Neutral Citation Number: [2023] EWHC 2969 (Admin)

CO/1995/2022; AC-2022-LON-000890 and CO/2007/2022; AC-2022-LON-000901

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2023

Before

MR JUSTICE SWIFT
MR JUSTICE BRIGHT

- -

Between

THE KING
on the application of
(1) ELLIOTT ASSOCIATES L.P
(2) ELLIOTT INTERNATIONAL L.P.

Claimants

- and -

THE KING
on the application of
JANE STREET GLOBAL TRADING, LLC

Claimant

- and -

(1) The London Metal Exchange
(2) LME Clear Limited

Defendants

- -
- -

Monica Carss-Frisk KC, Iain Steele and Eesvan Krishnan (instructed by **Akin Gump LLP**) for the CO/1995/2022 Claimants
James Segan KC, George Molyneaux and Hollie Higgins (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the CO/2007/2022 Claimant
Jonathan Crow KC, James McClelland KC, Rebecca Loveridge, Emily Mackenzie and Alastair Richardson (instructed by **Hogan Lovells International LLP**) for the Defendants

Hearing dates: 20, 21, 22 June 2023

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JUDGMENT

- -

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives.
The date and time for hand-down will be deemed to be at 10 am on 29/11/2023.

Mr Justice Swift and Mr Justice Bright:

A: INTRODUCTION

1. The First Defendant ("the LME") is the world's main centre for the trading of industrial metals. The Second Defendant ("LME Clear") is the clearing house for trading on the LME. Much of the trading activity conducted via the LME and LME Clear concerns futures contracts and other derivatives.

2. The metals traded via the LME include nickel – in particular, nickel due for delivery in three months' time ("3M nickel"). In early March 2022, nickel prices rose very dramatically. There was a particularly pronounced spike early in the morning of 8 March 2022. At 08:15 on that day, the LME suspended nickel trading ("the Suspension"). At 12:05, the LME published a notice cancelling all nickel trades entered into on that day before the Suspension ("the Cancellation").

3. The aggregate value of the cancelled trades was around US$12 billion. The parties affected included the Claimants in both the actions before us (respectively, "the Elliott Claimants" and "Jane Street"). The Elliott Claimants say that the Cancellation caused them to lose net profits totalling about US$456 million, which would otherwise have been made on the nickel trades agreed by them between 00:00 on 8 March 2022 and the Suspension at 08:15. Jane Street says that it has been caused to lose net profits totalling about US$15 million.

4. The Elliott Claimants and Jane Street say that the decisions of the LME and/or LME Clear in relation to the Cancellation were unlawful. They seek declarations to this effect. They also seek damages to compensate them for their lost profits, on the basis that there has been a breach of their Convention rights under the Human Rights Act 1998 ("HRA 1998") – specifically, their rights under Article 1 of the First Protocol ("A1P1").

5. It is common ground that the LME and LME Clear undertake regulatory functions, that their decisions are amenable to judicial review and that they are "public authorities" for the purposes of the HRA 1998. However, it is also common ground that the LME and LME Clear are commercial entities. So too are the Elliott Claimants and Jane Street, as reflected by their claims for substantial damages – which (we apprehend) are what really drives this litigation.

6. After a case management hearing on 28 February 2023, directions were given for a split trial. Judicial review issues, including the A1P1 points, were to be heard first. There was then to be a separate hearing of remedies issues, notably the assessment of damages, as required. This judgment follows the judicial review hearing and is not concerned with the claims for damages. Nevertheless, the financial context, which permeates the case as a whole, is highly relevant to many of the judicial review issues. The public law issues are entwined with private law rights.

7. Each party fielded an impressive array of legal talent, headed by Ms Monica Carss-Frisk KC for the Elliott Claimants, Mr James Segan KC for Jane Street and Mr Jonathan Crow KC for the Defendants. We are grateful to each of them, and to the other members of each team who contributed to the extremely thorough but succinct skeleton arguments, for all the assistance we have received.

B: BACKGROUND

(1) The Claimants

8. Each of the Elliott Claimants is an investment fund. They are experienced commodity traders, with substantial expertise in derivative contracts including nickel futures.

9. Jane Street is an international trader, trading predominantly in financial products. Some of its business activities concern financial products associated with commodities such as nickel.

(2) The LME

10. The LME is a "recognised investment exchange" or "RIE" for the purposes of Part XVIII of the Financial Services and Markets Act 2000 ("FSMA 2000"). As an RIE, the LME 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"). The LME Rules include the Trading Regulations ("TRs") set out in Part 3 of the LME Rules. As discussed later, 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.

(3) LME Clear

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 Retained EU Law 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 therefore is the effective guarantor of every contract concluded on the LME. In the event of a default, LME Clear will step in and manage the defaulting party's outstanding risk positions.

(4) Governance and key individuals

14. Each of the Defendants is ultimately owned by Hong Kong Exchanges and Clearing Limited, via subsidiaries. They are 'for profit' entities. As well as having public law obligations as regulators, they (or, strictly, their respective boards) owe private law obligations to their shareholders.

15. The CEO of the LME in March 2022 was Mr Matthew Chamberlain. The Chair of the LME was Ms Gay Huey Evans. The CEO of LME Clear was Mr Adrian Farnham. The COO of both the LME and LME Clear was Mr James Cressy (who was at the time of the hearing the acting CEO of LME Clear). The Chief Risk Officer of both the LME and LME Clear was Mr Christopher Jones. LME Clear's Head of Market Risk was Mr

Paul Kirkwood. LME's Chief Regulatory and Compliance Officer was Ms Kirstina Combe. All of these individuals had a role in the events of 8 March 2022 and they all feature in this judgment.

16. The LME and LME Clear have separate Boards of Directors, although a number of individuals (including, at the time of the hearing, Mr Chamberlain) are on both boards. Each Board has delegated its responsibility for overseeing all day-to-day business to the respective CEO.

17. The LME and LME Clear each has an Executive Committee ("ExCom"). The role of each ExCom is to assist the CEO in decision-making.

18. The LME and LME Clear each has a Default Management Committee ("DMC"). The responsibilities of each DMC include managing and resolving any default by a Clearing Member, including considering situations where a default may be likely to occur, for its respective entity. The Chair of the LME Default Management Committee was Mr Cressy. The Chair of the LME Clear Default Management Committee was Mr Farnham.

19. The LME has a Special Committee, a sub-committee of the LME Board to which the Board has delegated specific powers which are set out in TR 17. As set out below, this applies in the event of the Special Committee having cause to suspect or anticipate a corner or undesirable situation or undesirable or improper trading practice likely to affect the market. In such event, the Special Committee is given the power to contain or rectify the situation by giving directions to Members, including directions to trade out positions or reduce their net positions or by the suspension or curtailment of trading.

20. LME Clear has a Board Risk Committee. Its role is to consider matters relating to LME Clear's risk-management arrangements and in relation to developments impacting its risk management in emergency situations.

(5) Members and Clearing Members

21. 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.

22. There are several categories of Members. Of particular significance for this case are Clearing Members, who are members of both the LME and of LME Clear and are entitled to contract as principals and deal with LME Clear. Clearing Members submit to be bound not only by the LME Rules but also by the LME Clear Rules, and thus submit to having their clearing activities regulated by LME Clear.

23. Traders that 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).

24. Neither of the Elliott Claimants nor Jane Street is either a Member or a Clearing Member. To participate in transactions on the LME, they had to agree the commercial terms of a trade either (a) with a Clearing Member or (b) with a Member, i.e., as a

Client. If a Client deals with someone other than its designated Clearing Member, that party does not contract as a principal but will "give up" the trade to a Clearing Member. Either way, therefore, it will be a Clearing Member that enters into the necessary contracts.

25. All Members and Clearing Members are obliged under the LME Rules (specifically, TR 2.6) to ensure that all their contracts with non-Member clients such as the Claimants incorporate and are subject to the LME Rules. Thus, the Elliott Claimants and Jane Street could only do business via the LME by accepting the LME Rules. We understand that this was the case for all the transactions that we have to consider.

26. In effect, the Elliott Claimants and Jane Street thereby agreed 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.

(6) Contractual structure

27. The transactions that have given rise to these proceedings were predominantly sales. However, they could not be made by means of a contract of sale directly between buyer and seller. 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:

    i) There would have to be a sale by the relevant Clearing Member to LME Clear.

    ii) This would be mirrored by a matching purchase from LME Clear by a Clearing Member (usually the same Clearing Member).

    iii) Behind these matching transactions, there would be a sale by the Client to the Clearing Member.

    iv) If the underlying commercial arrangement had been concluded not with that Clearing Member but with another Clearing Member which did not have an arrangement to clear trades for the Client, there would also be a purchase by the latter Clearing Member (with whom the Client had no arrangement for clearing) from the former Clearing Member (with whom the Client did have clearing arrangements).

28. The relevance of this is that the damages claims advanced by the Elliott Claimants and by Jane Street assert that they have been deprived of property consisting of their contractual rights in respect of the cancelled trades. Fundamentally, this means the right to make a profit by selling at high price. In effect, their claims are for the alleged lost profits.

29. In each case, however, the contract that would have achieved such profit was not concluded merely by each Claimant agreeing commercial terms with its ultimate buyer. That agreement no doubt constituted a contract between those involved, but it was not a contract of sale. It was, rather, a contract imposing mutual obligations to take the steps necessary to ensure that contracts per the structure explained above would be put in place, via LME Clear.

30. The contracts that would have generated profits for the Claimants would have been, rather, the contracts that the structure outlined above posits between each Claimant, as a Client, and the Clearing Member.

(7) Contract nomenclature and contractual formation

31. The LME Rules and the LME Clear Rules differentiate between an "Agreed Trade", a "Cleared Contract" and a "Client Contract".

32. When commercial terms have been agreed between Client and Member and/or Clearing Member (as the case may be), there is an "Agreed Trade" – but this does not amount to a binding contractual agreement to trade under the LME Rules but (at most) a "Contingent Agreement to Trade". The relevant trade details are then entered into the LME system. When the LME and LME Clear have completed the relevant administrative processes and checks (notably, by confirming that the buy and sell orders match), the matching contracts between the Clearing Member and LME Clear become "Cleared Contracts". Following this – but not beforehand – the corresponding sale from the Client to Clearing Member becomes a "Client Contract".

33. Thus:

    i) The commercial agreements between the Claimants and their ultimate buyers were not profit-generating contracts of sale. They were mere Contingent Agreements to Trade.

    ii) The profit-generating contracts for the Claimants would have been Client Contracts, between the Claimants and a Clearing Member.

    iii) These Client Contracts could only come into existence slightly later – after the conclusion of commercial terms for each trade (i.e., the Contingent Agreement to Trade), after the relevant trade details had been entered into the LME system, after the relevant administrative checks had been completed and after the contracts between the Clearing Members and LME Clear had become Cleared Contracts.

34. Precisely how these processes take place, and how rapidly, depends on which LME venue has been used. Some trades are concluded by open outcry on a physical trading floor; some on the LME electronic trading system, LMESelect; some occur in the inter-office market. These all have different features, and, no doubt, their own advantages and disadvantages. Our impression is that the time required to enter, check and clear all the relevant contracts is not great in any of them, but the process is likely to be quickest on the LMESelect electronic trading system.

(8) LME Clear margin deposits

35. LME Clear's role as 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. "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.

36. 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.

37. These margin assessments are not performed only on nickel trades. Each Member, and certainly each Clearing Member, trades on a regular basis in respect of many other metals. LME Clear must be collateralised on all such trades, and the assessment of margin therefore takes account of all the trading that has been done, by all Clearing Members, on all metals.

(9) The LME Trading Operations Team and price bands

38. The LME operates various pre-trade controls and volatility controls, including "price bands" which are monitored and adjusted by the LME's Trading Operations Team ("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. Our understanding is that 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.

C: THE RELEVANT PROVISIONS

(1) LME Rules, TR 22

39. The key provision from the LME Rules that the LME relied on as giving it the power to cancel trades was Trading Rule 22:

> "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."

40. The legal status of this is slightly unusual in the context of judicial review. As an RIE, the legislative regime that governs the LME imposes statutory obligations to ensure that the market that it manages complies with various requirements. This means, in turn, that the LME is obliged to ensure that the LME Rules give it the powers and obligations mandated by the overarching legislative regime.

41. However, the LME Rules are not, themselves, pieces of legislation. In and of themselves, they have no legal effect over anyone. They have power over those who trade in the market only because those persons agree to be bound by the LME Rules, in contract. LME Members give that contractual agreement when they apply for and obtain membership. Their Clients (including the Elliott Claimants and Jane Street) give that agreement in contract, when they trade with any LME Member.

42. It follows that the legal effect of the LME Rules, including TR 22.1, operates in the field of private law (specifically, the law of contract), not that of public law. However, the regulatory context makes it necessary to interpret the LME Rules – and, in so far as relevant, the LME Clear Rules – by reference to the overarching legislation. This regulatory context also informs the judicial review of the decisions made by the LME and LME Clear, pursuant to their respective Rules.

(2) MiFID II

43. The relevant legislation begins with Directive 2014/65/EU on markets in financial instruments ("MiFID II"). The submissions before us focussed primarily on Article 48(5), but we were also taken to Article 47(1)(d) and (f), and to Article 48(12).

44. Article 47(1)(d) and (f) of MiFID II provide as follows:

> "**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."

Article 48(5) and (12) of MiFID II provide as follows:

> "**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.
> …
>
> 12. ESMA shall develop draft regulatory technical standards further specifying:
>
> (a) the requirements to ensure trading systems of regulated markets are resilient and have adequate capacity;
>
> (b) the ratio referred to in paragraph 6, taking into account factors such as the value of unexecuted orders in relation to the value of executed transactions;
>
> (c) the controls concerning direct electronic access in such a way as to ensure that the controls applied to sponsored access are at least equivalent to those applied to direct market access;
>
> (d) the requirements to ensure that co-location services and fee structures are fair and non-discriminatory and that fee structures do not create incentives for disorderly trading conditions or market abuse;
>
> (e) the determination of where a regulated market is material in terms of liquidity in that financial instrument;
>
> (f) the requirements to ensure that market making schemes are fair and non-discriminatory and to establish minimum market making obligations that regulated markets must provide for when designing a market making scheme and the conditions under which the requirement to have in place a market making scheme is not appropriate, taking into account the nature and scale of the trading on that regulated market, including whether the regulated market allows for or enables algorithmic trading to take place through its systems;
>
> (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."

45. The specific source for TR 22.1 is in Article 48(5), but the submissions before us naturally explored the interplay between that provision and the others.

(3) Recognition Requirements Regulations

46. MiFID II was implemented in the UK by Recognition Requirements Regulations. Paragraph 3A of Schedule 1 (headed "Market making agreements") in effect requires the existence of the LME Rules and that all Members should conduct business on the LME subject to the LME Rules.

47. Paragraph 3B(1) and (2) of Schedule 1 to the Recognition Requirements Regulations provide as follows:

> "**3B.— Halting trading**
> (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."

Most of the submissions before us in relation to the Recognition Requirements Regulations focussed on paragraph 3B, because of its clear relationship with Article 48(5) of MiFID II and with TR 22.

48. We were also referred to paragraph 4(1) and paragraph 9ZB(1). Paragraph 4(1) provides as follows:

> "**4.—Safeguards for investors**
> (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."

Paragraph 9ZB(1) provides as follows:

> "**9ZB.— Specific requirements for regulated markets: admission of financial instruments to trading**
>
> (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."

(4) RTS 7

49. Also relevant in implementing MiFID II are the Regulatory Technical Standards in Commission Delegated Regulation (EU) 2017/584 ("RTS 7"). RTS 7 is part of retained EU law, and to this end it was modified by the Technical Standards (Markets in Financial instruments Directive)(EU Exit)(No 1) Instrument 2019. RTS 7 is one of the ESMA standards anticipated by MiFID II Article 48(12) (see above, at paragraph 44).

50. Article 18 of RTS 7 provides as follows:

"**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:

(a) request information from any member or user of sponsored access on their organisational requirements and trading controls;

(b) suspend a member's or a trader's access to the trading system at the initiative of the trading venue or at the request of that member, a clearing member, the CCP, where provided for in the CCP's governing rules, or the competent authority;

(c) operate a kill functionality to cancel unexecuted orders submitted by a member, or by a sponsored access client under the following circumstances:
(i) upon request of the member, or of the sponsored access client where the member, or client is technically unable to delete its own orders;
(ii) where the order book contains erroneous duplicated orders;
(iii) following a suspension initiated either by the market operator or the competent authority;

(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;

(e) balance entrance of orders among their different gateways, where the trading venue uses more than one gateway in order to avoid collapses.

3. Trading venues shall set out policies and arrangements in respect of:

(a) mechanisms to manage volatility in accordance with Article 19;

(b) pre-trade and post-trade controls used by the venue and pre-trade and post-trade controls necessary for their members to access the market;

(c) members' obligation to operate their own kill functionality;

(d) information requirements for members;
(e) suspension of access;

(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;

(g) order throttling arrangements including:

(i) number of orders per second on pre-defined time intervals;
(ii) equal-treatment policy among members unless the throttle is directed to individual members;
(iii) measures to be adopted following a throttling event.

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.

5. Trading venues shall maintain full records of their policies and arrangements under paragraph 3 for a minimum period of five years."

(5) Other Rules of LME and LME Clear

51. As well as TR 22, reference was made to TR 13 and TR 17, and we have noted TR 3. TR3 is the General TR and provides at 1.3 and 1.5 as follows:

"1.3 The Exchange may, at its absolute discretion and acting reasonably suspend trading on one or more of the Execution Venues for such period it considers necessary in the interests of maintaining a fair and orderly market. Trading will be resumed as soon as reasonably practicable following any such suspension of an Execution Venue.

…

1.5 The Exchange may establish such arrangements as it considers appropriate to prevent disorderly trading and breaches of capacity limits including, without

limitation, procedures to establish the maximum price fluctuations on the market for each Metal Contract, which may as a consequence lead to the restriction or suspension of business."

TR 13 is concerned with trade invalidation and cancellation (and price adjustment) in certain circumstances. It provides as follows:

"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."

TR 17 deals with the LME Special Committee. TR 17.1 and 17.2 provide as follows:

"17. **EMERGENCIES**
17.1 In the event of the Special Committee or the Clearing House having cause to suspect the existence or to anticipate the development or likely development of a corner or undesirable situation or undesirable or improper trading practice which in their opinion has affected or is likely to affect the market, the Special Committee after consultation with the Clearing House may take such steps as in their absolute discretion they deem necessary to contain or rectify the situation and they may give directions to Members accordingly. Such directions to a Member may include, but are not limited to:-

(a) trading out Client Contract positions with one or more particular Clients;
(b) trading out Cleared Contract positions or positions otherwise related to Cleared Contracts; and
(c) reducing its net trading position.

17.2 Without prejudice to the generality of this Trading Regulation, such steps may include the suspension or curtailment of trading for such period or for such Prompt Dates in such metals or Contracts as may be specified or the direction that trading be limited to the liquidation of open Contracts and deferral of settlement of some or all Contracts with Prompt Dates in the current month or in the two succeeding months thereafter, subject to such compensation (if any) as the Special Committee may determine being paid to sellers or buyers."

52. In relation to the LME Clear Rules, there was reference to the following provisions in the Clearing Procedures section. Clearing Procedure A6 is a Clearing Procedure provision setting out what pricing data LME Clear is to use when calculating margin requirements. It refers, in particular, to LME closing prices, and it was common ground that the LME closing prices for the various metals were, in fact, the primary metric used by LME Clear. However, within this provision, Clearing Procedure A6.10 provides as follows:

> "6.10 LME Clear reserves the right to amend any prices that it considers do not accurately reflect the current market price."

D: EVIDENCE

(1) The Claimants' factual witnesses

53. On behalf of the Elliott Claimants, we were provided with witness statements made by Mr Christopher Leonard, an in-house lawyer with the Elliott group, and by Mr Thomas Houlbrook, a commodities trader who was involved in the Elliott Claimants' nickel trades. On behalf of Jane Street, we were provided with witness statements made by Mr Ariel Brown, a commodities trader and Global Co-Head of Commodities at Jane Street.

54. These witnesses all described the general structure of nickel trades placed by them on the LME, gave details of the specific trades relevant to this matter and noted that they were not consulted by the LME prior to either the Suspension or the Cancellation. These witnesses also all commented critically on the decisions made by the Defendants.

(2) The Defendants' factual witnesses

55. On behalf of the Defendants, we were provided with witness statements made by Mr Chamberlain, Mr Farnham, Mr Cressy, Mr Jones, and Ms Combe. The Claimants criticised the evidence of these witnesses, saying that their statements were made long after the event, with the assistance of lawyers, and we should not rely on them. We were referred to the unanimous judgment of the Court of Appeal in *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197 at [125], where emphasis was placed on the caution that must be exercised in relation to evidence that has come into existence after the decision under review was made; and to *R (Gardner) v Secretary of State for Health and Social Care* [2022] EWHC 967 (Admin) at [259]. These authorities highlight the significance of contemporaneous documents and suggest that the Court should generally prefer the contemporaneous record of the decision-making. Indeed, a witness statement that is directly in conflict with the contemporaneous documents will not generally be admitted*: R (United Trade Action Group) v Transport for London* at [125(3)], citing *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290. However, where the contemporaneous documents do not make matters clear, the decision-maker should explain them in evidence: *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 at [86]. If the claimant wishes to challenge such evidence, he should apply to cross-examine, failing which the evidence will be accepted unless it "cannot be correct": *R (Singh) v Secretary of State for the Home Department* [2018] EWCA Civ 2861 at [16].

56. Here, the relevant decisions were taken at relatively informal meetings, held remotely at short notice and reasonably early in the morning of 8 March 2022. No formal notes were taken. It was both sensible and necessary for Mr Chamberlain and the other main protagonists to state what they can recall of the discussions at the meetings, as well as the events leading up to them and their immediate aftermath. The Claimants did not apply to cross-examine them.

57. Although there was no direct contemporary record, these witnesses were sometimes able to refer to emails or other contemporaneous materials that helped to anchor their evidence and seems likely to have refreshed their recollection in an entirely appropriate manner. There were no contemporaneous materials that the Claimants were able to point to as casting doubt on the witnesses' reliability. There are some passages where, to some extent, the statements contain evidence that has the flavour of an attempt to reconstruct what the witness thinks his or her thought-process must have been. This was less helpful to us. However, we did not find it difficult to sift the wheat from the chaff.

(3) The Claimants' expert, Mr Dodsworth

58. The Claimants adduced expert evidence in the form of a report from Mr Andrew Dodsworth, who was the Head of Market Operations at the LME from April 2015 to March 2018. Mr Dodsworth's report covered the following areas:

    i) Margining, i.e., how LME Clear could and should have calculated and set margin calls on 8 March 2022.

    ii) What could and should have happened in relation to the TOT price bands.

    iii) Whether the market was disorderly on 8 March 2022 and what investigations LME could and should have carried out in this regard.

    iv) How the LME and LME Clear could and should have dealt with the risk of default by Members.

59. Mr Dodsworth's evidence was useful, in that it was a helpful way of explaining the Claimants' case. In some respects, their position emerged more clearly when set out by Mr Dodsworth, adopting the approach of someone with his industry background and in his own language, rather than as set out in the manner required by lawyers' pleadings. Furthermore, the result of this was that the Defendants' witnesses responded to Mr Dodsworth's evidence in a manner that we suspect would not otherwise have come about. All this was positively helpful, in that it meant that both sides had material in evidence that would not otherwise have been available, some of it very significant.

60. However, while the end-result was to make us better informed, much of Mr Dodsworth's evidence really boiled down to criticising the merits of the decisions that were made, rather than shedding light on the lawfulness of those decisions.

E: THE EVENTS ON 7-8 MARCH 2022

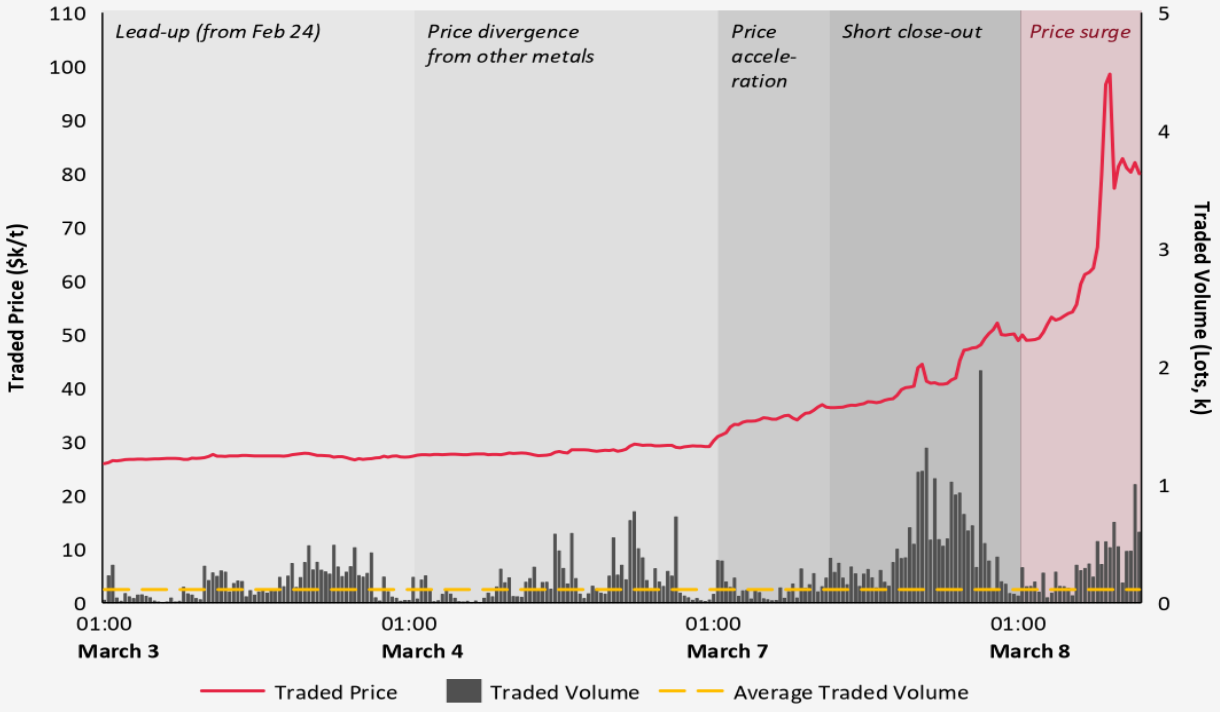
(1) The movement in the 3M nickel price

61. While it is inevitable that this judgment must contain a narrative section, the heart of the story is apparent from the diagrams below.

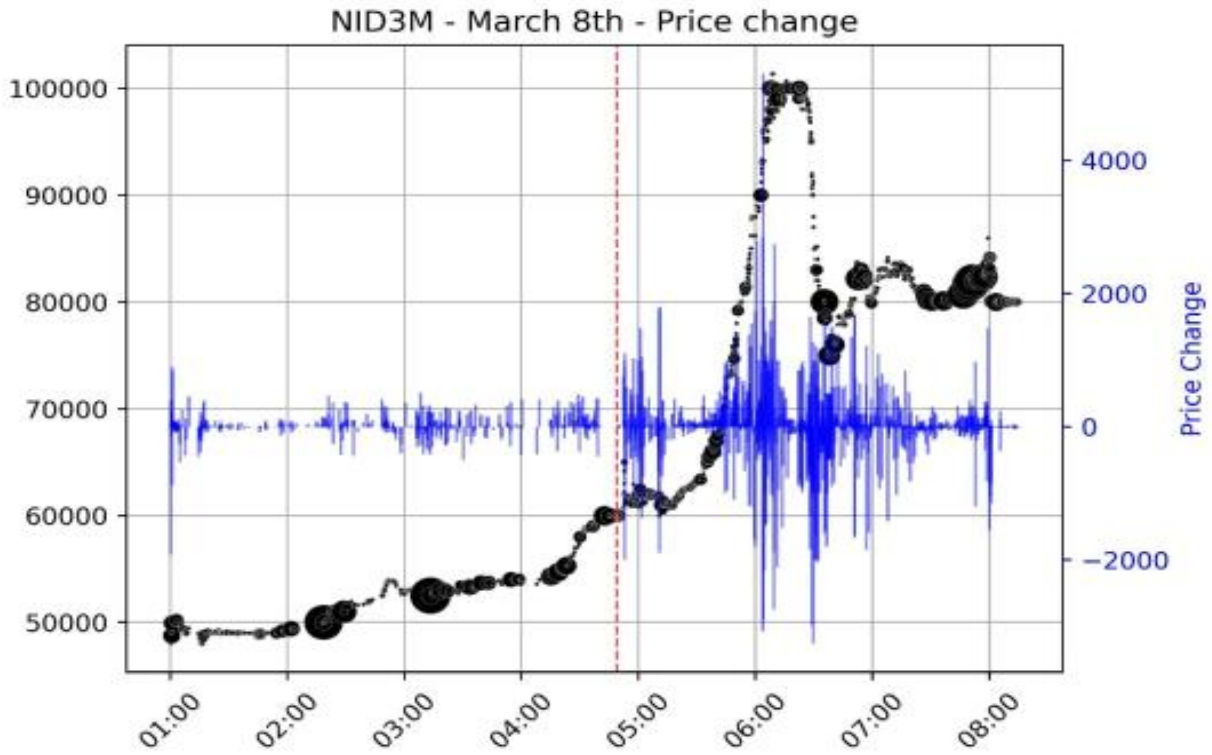
i) The first shows the movement in the 3M nickel price from 3 March until the Suspension on 8 March 2022. It has been taken from a report of 10 January 2023, 'Independent Review of Events in the Nickel Market in March 2022', which the LME commissioned from an independent consultancy, the Oliver Wyman Group ("the OW Report"):

ii) The second shows, in greater detail, the movement in the 3M nickel price in the morning of 8 March 2022. It was exhibited to the report of Mr Dodsworth.

Exhibit 3: LME 3month nickel traded price and volume
01:00 March 3 – 08:15 March 8



Note: 15 minute windows are shown on the graph above and the price is the volume weighted average LME 3month nickel trade price in this 15 minute period. The 15 minute window also applies to the traded volume and average traded volume
Source: LME data



62. To put this in context, the OW Report says that the price rise on 7 March 2022, 69%, was "nearly five times greater than the next biggest move in nickel in the last twenty years." The spike that followed within the first few hours of 8 March 2022, until the Suspension, was considerably greater still: at the close of trading on 7 March 2022 the price was slightly below US$50,000; the peak of the spike was $101,365 (at 06:08), i.e., a rise of over 100% in about 5 hours. These prices are all in US$/tonne.

(2) LME's view of the nickel market on 4 March 2022

63. The Russian invasion of Ukraine and the imposition of sanctions caused nickel prices to rise – including 3M nickel. The first significant price rise in a single day was on 4 March 2022 (a Friday), when the market opened at US$27,080 and closed at US$28,919, an intra-day increase of 6.8%. Mr Chamberlain and the LME viewed this as explicable given the circumstances. However, it resulted in an unprecedented intra-day margin call imposed by LME Clear on the LME's market of approximately US$2.6 billion. This was 40% higher than the previous record.

(3) LME's view of the nickel market on 7 March 2022

64. At 07:26 the price rise, even by that time, was considered remarkable, and Mr Chamberlain received an email from Mr Kirkwood drawing attention to it. This was a recurring topic throughout the day. By 09:24 a meeting of the Special Committee had been organized for later that day. It took place at 16:00. There was a discussion about whether the price increase reflected an underlying physical reality. The collective view was that the price rise was due to rational factors associated with the situation in Ukraine and reflected the market's fear of supply constraints arising from sanctions. On this basis, Mr Chamberlain considered the market was still orderly.

65. The market peaked at about US$55,000 and fell back to slightly below US$50,000 at the close.

(4) LME Clear Margin calls on 7 March 2022

66. As the day progressed, LME Clear imposed several margin calls, totalling approximately US$7.05 billion. The first margin call was due to be paid at 09:00. Three Clearing Members failed to pay on time. One remained in default until the end of the day and was sent a Notice of Default Event letter. The position of this Clearing Member was discussed by the Default Management Committees (which met jointly). Two Clearing Members said they were out of cash.

(5) 3M Nickel prices on 8 March 2022

67. The market opened below US$50,000. At around 04:49 – approximately when the price had risen to US$60,000 – the LME's TOT suspended the price bands.

68. By 06:00 the price had risen above US$100,000. It peaked at 06:08, at US$101,365. It then fell back, but the price was consistently above US$80,000 from 07:00 until the Suspension.

(6) The Claimants' trades

69. Jane Street agreed various nickel trades between 01:37 and 08:14. They were executed on the LME electronic trading system, LMESelect. They were fully cleared and resulted in fully constituted Client Contracts between Jane Street and the relevant Clearing Member.

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

(7) Mr Chamberlain's view of the nickel market early on 8 March 2022

71. Mr Chamberlain woke up at about 05:30. He immediately 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 8 March 2022, 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.

72. He made an approximate calculation of the likely increase in the intra-day margin requirement, his estimate being 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.

73. 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 or the commonly understood reality in the global physical market supply chain for nickel. He thought

that the price movements could not be explained by rational market forces, in that there was no connection with the value of the underlying commodity.

(8) The First Default Risk Spreadsheet

74. At 07:24, Mr Kirkwood circulated a spreadsheet showing the margin call calculation based on a price as at 07:00 (i.e., approximately US$80,000), Members' current open positions and LME Clear's assessment of Members' creditworthiness ("First Risk Default Spreadsheet"). This showed that the additional margin required would total US$19.75 billion, which Members would be due to be paid by 09:00. This was considerably greater than the figure Mr Chamberlain had estimated.

75. At least five Members were expected to default. Mr Chamberlain considered that four other Members would be at risk of default – possibly more.

(9) The 07:30 meeting and the decision to suspend

76. Having concluded that the market was disorderly, Mr Chamberlain considered that trading should be suspended, and had a draft Notice prepared.

77. At 07:30 Mr Chamberlain and other executives from the LME and LME Clear attended a remote meeting, held to discuss Mr Chamberlain's view that the market was disorderly, and the draft Notice. The meeting lasted for about 25 minutes. The decision to suspend nickel trading was confirmed.

(10) Notice 22/052

78. 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.
>
> **Defined Terms**
> 3. Defined terms used in this Notice shall have the meaning ascribed to them in the LME Rulebook or the Rules and Procedures of LME Clear, as applicable, unless otherwise defined in this Notice.
>
> **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

Matthew Chamberlain
CEO"

(11) The 09:00 meeting

79. At 09:00 there was another remote meeting, held to discuss what to do about the trades agreed prior to the Suspension, as outlined at point 9 of Notice 22/052 – in particular, whether they should be subject to reversal or adjustment. The meeting was attended by Mr Chamberlain and at least 24 other executives from the LME and LME Clear, including Mr Farnham. It effectively superseded a meeting previously arranged for the joint ExComs of the LME and of LME Clear. The meeting lasted for about 52 minutes.

80. A number of options were discussed:

i) Option 1A: Allow the trades to stand; calculate margin requirements by reference to the pricing of those trades.

ii) Option 1B: Allow the trades to stand; calculate margin requirements by reference to the 7 March 2022 closing price.

iii) Option 2: Allow the trades to stand but adjust their prices.

iv) Option 3: Cancel the trades.

81. Any decision as to whether trades should stand or be cancelled was for the LME to make – in the person of Mr Chamberlain as CEO. Any decision as to how margin requirements should be calculated was for LME Clear to make – in the person of Mr

Farnham. However, these issues were so interlinked that it would be impracticable to take a decision on one without a decision simultaneously being made on the other.

82. Option 1A and Option 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 that Option 1A entailed the risk of multiple defaults by Members, in light of the First Risk Default Spreadsheet. Option 1A would not make the market orderly – if anything, it risked causing a systemic disturbance to the nickel market.

83. 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 7 March 2022 closing price. He was concerned that this would leave LME Clear potentially 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.

84. Option 2 was rejected because it would not be fair to adjust prices, because the parties might well not have traded at the adjusted prices.

85. 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 8 March 2022 when trading changed from being orderly to disorderly. Mr Chamberlain concluded that the last known good state had been the close of trading on 7 March 2022. On this basis he decided that trades up to that point should stand, and all trades on 8 March 2022 should be cancelled.

(12) The Second Default Risk Spreadsheet

86. At 09:47 (i.e., shortly before the 09:00 meeting ended), Mr Kirkwood circulated a further spreadsheet ("Second Default Risk Spreadsheet"). This was similar to the First Default Risk Spreadsheet, but it was prepared on the basis that the 8 March 2022 trades stood, but LME Clear calculated margin requirements on the basis of the 7 March 2022 closing price. It showed that the additional margin required would total US$750 million.

87. Mr Farnham considered that the Second Default Risk Spreadsheet still indicated a risk that Members would default.

(13) Notice 22/053

88. Following the meeting, a draft Notice was prepared. It was circulated by email to the Special Committee, because some elements (delivery deferral) required the Special Committee's approval, which was duly obtained.

89. At 12:05 on 8 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.

Delivery deferral

7. All open delivery positions for physically deliverable Nickel Contracts with a Prompt Date of 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, will be rolled at level Carry using a Basis price of the previous day's Cash Official Price.

8. LME Clear Operations will assess long positions and short positions in affected Nickel Contracts and pair up holdings. Through LME Post-Trade

> Operations and the LME Relationship Management team, files containing relevant position details will be emailed to Members. Members will be required to book relevant trades in LMEsmart.
> 9. If a Nickel Contract is not subject to deferral under this Notice, it may still be deferred (at the Member's election) under the deferral mechanism set out in Notice 22/051, and the provisions of that Notice remain in full force and effect.
>
> **Pricing**
> 10. For the avoidance of doubt, the LME will continue to publish Official Prices and Closing Prices during this period in line with the LME's existing pricing methodology and waterfall.
>
> **Counterparty confidentiality**
> 11. In relation to all matters covered by this Notice, Members are reminded of the importance of ensuring the confidentiality of counterparty details including, but not limited to, counterparty names and other identifiers. Confidentiality shall apply to all adjustments and trade bookings and cancellations so that, without limitation, any information that relates to the identity of a counterparty must only be disclosed to those personnel who, from an operational perspective, require such information in order to action the price adjustment.
>
> **Compliance with measures**
> 12. All Members must comply with the measures set out in this Notice. Any failure to comply may be considered a breach of LME and/or LME Clear Rules as applicable.
>
> **Next steps**
> 13. We will issue a further Notice later today dealing with market re-opening and any measures that are deemed appropriate to ensure continued operation of orderly market.
>
> **Questions**
> 14. Members should direct any questions relating to this Notice to the LME Relationship Management team at [email address].
> James Cressy
> Chief Operating Officer – LME Group"

90. This Notice was sent out in the name of Mr Cressy because he was the COO of both the LME and LME Clear. However, the decision to cancel the trades was taken by Mr Chamberlain.

(14) How the state of the nickel market on 8 March 2022 came about

91. The OW Report is the most authoritative guide to how the state of the nickel market on 8 March 2022 came about. Large short positions had been built up by a number of market participants. The Russian invasion of Ukraine caused a rise in prices across all metals. A price divergence between nickel and other metals began to develop from 4 March 2022, as traders began to cover their short positions, causing a short squeeze. The price accelerated, resulting in record margin calls on 4 and 7 March 2022. This

took liquidity out of the market and placed further pressure on those holding exposed short positions. They were forced to buy rapidly, to close out their positions, exacerbating the price spiral.

92. The OW Report also states that there was some awareness among market participants that there was pressure on large short positions. Not enough participants were willing to take opposite positions, i.e., to profit-take as the price rose. Eventually, the perception developed that some Members might not be sufficiently robust to withstand the events.

93. The Claimants suggested to us that the major factor was the short positions built up by entities within the Tsingshan Holding Group Co. Ltd. ("Tsingshan"), a Chinese industrial user of nickel. Tsingshan's short activity was acquired not on the LME but on the over-the-counter ("OTC") market, making it less visible to the LME. However, a number of reports in the financial press in the days leading up to 8 March 2022 covered Tsingshan's short position.

94. The OW Report indicates that the position was more complex than this.

    i) Tsingshan is the only short identified by name in the OW Report. However, while the OW Report confirms that most of the buying activity over the relevant days was driven by participants exposed to large short positions, it makes it clear that there were several such participants.

    ii) It states that the largest short positions were held by a range of different company types, including diversified producers and traders and more specialised players.

    iii) It also states that several held positions with multiple Members: one held positions with twelve Members; on average, the ten largest short positions were held across five Members. Of these ten largest short positions, two were exclusively on the LME, five had both OTC and LME components and three were exclusively OTC.

    iv) The OW Report notes that this fragmentation of positions reduced the visibility of the risks.

F: THE CLAIMANTS' CASE THAT THE DECISIONS WERE UNLAWFUL

95. The Elliott Claimants and Jane Street each produced separate skeleton arguments, but the oral presentation of their case was in effect conducted jointly, the points being divided between Ms Carss-Frisk KC and Mr Segan KC. We are grateful for the efficiency with which they managed this.

(1) The Claimants' case on unlawfulness

96. The Claimants did not criticise the Suspension but said that the LME and/or LME Clear acted unlawfully in relation to the Cancellation.

97. First, they said that the Cancellation was ultra vires. The arguments here focussed on the interpretation of TR 22.1 in the light of other rules (notably TR 13) and the legislative materials (specifically, MiFID II, the Recognition Requirements Regulations

and RTS 7). The Claimants also contended the decision was taken for an improper purpose. The Claimants also said that, in so far as the Cancellation was implemented to protect Members from the risk of default, this was not the purpose for the power under which TR 22.1 was conferred.

98. Second, they said that the LME and/or LME Clear acted in a way that was procedurally unfair, because they failed to give the Claimants an opportunity to make representations, and/or engaged in a "one-sided consultation". The LME and LME Clear received information from Members facing the risk of default, but not from those who would be disadvantaged by cancelling. The Claimants said that they should have been consulted.

99. Third, the Claimants said that the LME and/or LME Clear had an unlawful approach to disorderliness, in that Mr Chamberlain was wrong to focus on his view that the LME price had ceased to be rationally connected with the physical market, and he was wrong to have regard to the possible adverse consequences for some Members in terms of margin calls. The Claimants also complained that the LME and/or LME Clear had failed to take reasonable steps to inform themselves, failed to consider relevant factors and/or took irrelevant factors into account (i.e., a submission made by reference to the principles considered in *Secretary of State for Education v Tameside MBC* [1977] AC 1014). The Claimants said that Mr Chamberlain should have investigated the price movements leading up to the Cancellation, in which case he would have appreciated that they were explained by the short positions taken by traders such as Tsingshan, and made worse by the TOT's suspension of price bands.

100. Fourth, they said that the LME and/or LME Clear acted irrationally in their approach to Option 1B (and/or, Option 2). They also said that it was irrational to cancel all trades from 00:00 on 8 March 2022 – at most, the cancellation should have been confined to those trades after the time when the market became disorderly, but Mr Chamberlain failed to ask himself that question or identify that time.

101. Finally, the Claimants said that the Special Committee and/or the Board Risk Committee should have been consulted.

(2) The Defendants' case

102. The Defendants took issue with all these arguments. They also said that, even if the LME and/or LME Clear acted unlawfully, they would have made the same decision absent such unlawfulness, and relief should be denied pursuant to s. 31(2A) of the Senior Courts Act 1981.

(3) The decisions challenged by the Claimants

103. Both the Elliott Claimants and Jane Street proceeded from the outset on the basis that the decision that should be judicially reviewed was the decision to cancel the 8 March 2022 trades ("the Cancellation Decision"). They were not certain whether the party responsible for making this decision was the LME or LME Clear or a combination of both, hence there being two Defendants, but there was no uncertainty about the decision being challenged.

104. As the case developed, the evidence (including the evidence of their expert, Mr Dodsworth) must have made it clear that the Cancellation Decision was taken by the LME, in the person of Mr Chamberlain.

105. As set out above, a significant part of the Claimants' case on unlawful decision-making relates to Option 1B – which would have involved allowing the 8 March 2022 trades to stand, but calculating margin requirements by reference to the 7 March 2022 closing price. However, any decision as to how margin requirements should be calculated was for LME Clear to make; and in the course of the 09:00 remote meeting, 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 7 March 2022 closing price. This effectively excluded Option 1B.

106. Thus, while the Cancellation Decision was made by the LME, the rejection of Option 1B was not (or, at least, not primarily) the result of a decision made by LME. It was the inevitable consequence of a separate and anterior decision, made by LME Clear in relation to how to conduct the margin assessment on 8 March 2022 ("the 8 March Margin Decision").

107. We raised this with Mr Segan KC (who dealt with this part of the case for the Claimants in oral submissions). He confirmed that the Claimants wished also to challenge the 8 March Margin Decision. Mr Crow KC opposed the Claimants' being allowed to advance this un-pleaded case, but sensibly acknowledged that all the relevant materials were before the Court and it could be dealt with fairly. We decided that the Claimants should be allowed this latitude.

G: CONTEXTUAL FEATURES

108. Before we address the individual issues raised by the Claimants' case, it is convenient to address some of the features of the case that provide important context. Each of these matters affects all the issues, albeit in different ways and to varying degrees.

(1) There is no fixed or established meaning of "orderly" or "orderliness"

109. The words "orderly" and "orderliness" appear in MiFID II, the Recognition Requirements Regulations and TR7. Although these words are not used in TR 22.1, they appear elsewhere in the LME Rules, and it was common ground that the concept of an orderly market was important to the proper exercise of the powers given to the LME under TR 22.1.

110. None of these provisions defines what is meant by "orderly" or "orderly market" or "orderliness". While the significant and rapid price rise seen on 8 March 2022 was central to what happened, no-one suggested that price volatility was, in itself, enough to amount to disorderliness; and, certainly, no-one proposed a bright-line test such that a daily rise of x% was consistent with an orderly market but a rise of y% was not.

111. In his evidence, Mr Chamberlain did not advance a specific definition of "orderly". His approach relied on the ordinary meaning of the word in the specific context. He did, however, make clear what led him to conclude that the market was not orderly: he did so in light of the unprecedented price levels reached, the speed of the price increase and the absence of any relevant macroeconomic, geopolitical or other factors relevant to the

market for the underlying commodity which could explain those developments; i.e., a disconnect between the 3M nickel price and the value of physical nickel.

112. The Defendants referred to guidance from the International Organization of Security Commissions ("IOSCO"):

> "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."
>
> (IOSCO Report on Principles for the Regulation and Supervision of Commodity Derivatives Markets)

113. They also noted that NASDAQ has produced a definition of "disorderly market", as follows:

> "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."

114. The Claimants relied on the following evidence from Mr Dodsworth:

> "*Criteria for assessment of an orderly/disorderly market*
> 8.4 In my experience, the key factors which underpin an orderly market are:
> (a) **Access** – are market participants able to access the market and submit/revise/cancel orders in the market?
> (b) **Price Discovery** – are orders that have been submitted to the market able to be matched according to the applicable processes?
> (c) **Publication** – are all orders and trades being disseminated in a timely manner to market participants via the relevant market data feed; and are order and trade acknowledgements being sent to the correct Clearing and/or Trading Members as appropriate?
> (d) Is there any evidence of erroneous or abusive trading (e.g. market manipulation or insider trading)?
>
> 8.5 If the criteria at paragraph 8.4(a)–(c) are met, and there is no evidence of criterion (d) being present, then the price of a contract may fluctuate considerably throughout the trading day without the market being considered to be disorderly. Volatility is not the same as disorder – it is a feature which may be present during the process of price discovery, and which may be managed through mechanisms such as backwardation levels and price bands.

> *Conducting market disorder assessments*
> 8.6 In this context I note that the existence of large open positions – either on or off the exchange – does not mean that a market is disorderly. If the position-holder seeks to liquidate the position gradually over time, then it can actually have a beneficial impact upon the market as there would be increased liquidity. Alternatively, even where the liquidation of an open position is uncontrolled and results in significant volatility, that does not mean disorderliness (and exchanges may seek to manage that volatility through mechanisms such as delivery limits, accountability levels, and backwardation levels).
>
> 8.7 Similarly, short covering is not an indicator of a disorderly market – it is a routine trading activity (albeit, as mentioned above, exchanges may seek to apply controls and procedures, primarily dynamic price limits, to moderate the effects of short covering). If a market participant holds a short position, the position will be subject to margin calls for as long as the position is maintained. If the market moves against them then they must either close-out the position or maintain it at the new level (and pay the required margin) if they wish. The same is true on the long side of the market, where the price is falling."

115. We have set this passage out in full because of its significance to the Claimants' case. Their position (supported by Mr Dodsworth) was that the price rise on 8 March 2022 was explained by the short positions of some traders, notably Tsingshan. The Claimants said that the LME did not take this into account, because Mr Chamberlain did not consider or investigate this possibility; and they said that it was not indicative of disorderliness. All this was important both for their points on ultra vires and for their case that the Cancellation Decision was irrational.

116. We do not accept Mr Dodsworth's evidence on this. The passage we have set out above begins with the words "In my experience …", but it was not apparent to us that Mr Dodsworth in fact has any experience of assessing whether a market is or is not orderly. He was the Head of Market Operations at the LME from April 2015 to March 2018, but he did not state in his report whether the orderliness of the market was questioned at any point during that period. His work since then has continued to focus on commodity markets as a consultant, but this has consisted of providing strategic and tactical advice, which we apprehend would not ordinarily involve assessing (on behalf of the RIE or otherwise) whether the relevant market was orderly. He gave no source for his averment that the four criteria that he identified in his paragraph 8.4 should be used to assess whether the market is orderly or disorderly, and that the process for doing so is as set out in his paragraphs 8.5 to 8.7. That is, he did not say (i) that this is how he has in fact gone about assessing orderliness on some specific occasion(s), (ii) that he knows that it is how someone else has in fact gone about assessing orderliness on some specific occasion(s) or (iii) that there is some published guidance to this effect. This leaves us with the impression that the criteria and methodology he proposes are of his own devising and have been produced, for the first time, in his report. This report was produced some months after the evidence of Mr Chamberlain, which was where the guidance from IOSCO and the NASDAQ definition were first highlighted. Those texts are public utterances by influential public bodies, which we would expect to be regarded as significant. Furthermore, they are flatly inconsistent with Mr Dodsworth's definition.

However, he has not referred to them and has not given any reason for disagreeing with them. His failure to explain his taking a different view from IOSCO is particularly striking. Elsewhere in his report, when setting out his background experience, he highlighted the fact that he has worked as a consultant for IOSCO. Furthermore, his report relies on IOSCO guidance in a different context (the calculation of margin requirements).

117. While the Claimants relied on Mr Dodsworth's definition, the Defendants (while citing IOSCO and NASDAQ) did not proffer or formulate a definition, instead submitting:

> "There is no definition of what is meant by 'disorderly': it is a matter of expert judgement based on an understanding of the particular market in question and the observation of specific market behaviour at the relevant time."

118. This savours slightly of "you know it when you see it" – often referred to as the "elephant test". This is an approach that sometimes makes lawyers uncomfortable: see *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, per Lord Walker and Lord Collins at [47] (with whom the other members of the Supreme Court all agreed on this point), expressing the view that judges ought to do better than this:

> "… we are not enthusiastic about the "elephant test" in para [77] of the Court of Appeal's judgment ("knowing one when you see it"). Any zoologist has no difficulty in recognising an elephant on sight, and most could no doubt also give a clear and accurate description of its essential identifying features. By contrast a judge, even one very experienced in intellectual property matters, does not have some special power of divination which leads instantly to an infallible conclusion, and no judge would claim to have such a power. The judge reads and hears the evidence (often including expert evidence), reads and listens to the advocates' submissions, and takes what the Court of Appeal rightly called a multi-factorial approach. Moreover, the judge has to give reasons to explain his or her conclusions."

119. We have this warning in mind. However, an RIE such as the LME, and an individual such as Mr Chamberlain who makes decisions on its behalf, is more akin to a zoologist than a judge. It/he is, or should be, capable of distinguishing between an orderly market and a disorderly one without needing evidence from others, let alone the assistance of an expert.

120. The Claimants criticised Mr Chamberlain's qualifications as CEO of the LME, suggesting that he did not have expertise in the assessment of disorderliness. We found this surprising; given that by March 2022 he had been in senior roles at the LME for 10 years (including as CEO since 2017), any suggestion that Mr Chamberlain did not have sufficient expertise would apply twofold as against Mr Dodsworth. However, the main difference between them is that, in Mr Dodsworth's case, his expertise in making this kind of assessment has to be demonstrated to us; whereas, in Mr Chamberlain's case, his appointment as CEO means that he has been selected by the LME as the right person

to make this assessment. The relevant RIE considered him to have the necessary expertise, and it would be difficult for us to gainsay this.

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.

(2) The Defendants are specialist decision-makers, in a complex, technical area

123. Most of the authorities relevant to this occur in the context of rational decision-making and the margin of discretion to be allowed to the decision-maker. However, the general context in which the LME performs its role as RIE is also relevant to the ultra vires arguments, because it informs our approach to the interpretation of the legislation and the construction of the LME Rules. It is also the basis of our view that, unlike a judge, Mr Chamberlain can be counted on to know when he is looking at a metaphorical elephant.

124. We were taken to *R(ABS Financial Planning Ltd) v Financial Services Compensation Scheme Ltd* [2011] EWHC 18 (Admin), per Beatson J at [61] to [62]:

> "[61] In approaching the submission that the defendant erred in law in its approach to the classification of the activity by Keydata which gave rise to the claims, I bear in mind that, as was recognised by the claimants, the analysis and determination involved, in AIFA's words, 'a complex company managing a range of products and instruments employing on and offshore entities and using a variety of tax wrappers'. Although, in the exercise of their private law jurisdiction, courts are used to determining whether a person acts as an agent or a principal, here the legislature and the statutory regulator have entrusted the primary decision as to the characterisation of the activity in question to an independent and specialised body, subject only to the judicial review jurisdiction. The test here is (see [65]) not whether the claims arise 'for' the activity of acting as an agent but the broader regulatory concept of whether they arose 'in respect of' the activity of acting as an agent.
>
> [62] The question entrusted to the defendant in this case involves a number of complex financial and transactional issues that depend on the application and interrelationship of a number of criteria of a technical and regulatory nature. The caution of a judicial review court when dealing with complex economic issues is well known. It is because such issues are often both

> technical and open-textured and because the primary decision-maker is likely to have developed an expertise on those issues. In such cases, even where the question at issue is a jurisdictional question, 'if the criteria are so imprecise that different decision-makers, each acting rationally, might reach different conclusions when applying it to the facts of a given case', it has been said that the court 'is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational': see *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport* [1993] 1 All ER 289 at 298, [1993] 1 WLR 23 at 32, per Lord Mustill, with whom the other members of the Appellate Committee agreed. The case involved an unsuccessful challenge to the Commission's conclusion that the South Yorkshire area, some 1.65% of the total area of the United Kingdom was 'a substantial part of the United Kingdom'."

125. We were also taken to *R(The Get Real Marketing Co. Ltd) v Culture Recovery Board* [2022] EWHC 1137 (Admin), at 30(iii):

> "(iii) The decision was taken by two committees comprised of individuals selected for their experience and expertise. Although many members of the public would have been aware of the general adverse impact of the pandemic on all sectors of the economy, not least the cultural sector, this broad knowledge should not be equated with the far more detailed expertise required to be applied by the First Defendant when considering an application for a loan. The assessment, amongst other things, of whether a business had exhausted alternative sources of funding required the application of knowledge and expertise of matters such as relevant financial markets, capital availability and the realities facing a company like the Claimant in the cultural sector. These are matters of expertise that fall out with general knowledge and which Courts should be slow to second guess, see for example *R(Mott) v Environment Agency* [2016] 1 WLR 4338."

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.

(3) Urgency

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.

128. Mr Crow KC submitted that the question whether the situation is or is not urgent (and, if so, how urgent) is, itself, a question for the decision-maker, which the Court should be slow to second-guess, especially when it arises in a complex, technical area. He cited no authority specific to this point, but it seems to us right that Mr Chamberlain and Mr Farnham were better equipped to assess the urgency of the situation in March 2022 than we are, even with the benefit of hindsight (which, naturally, we must eschew).

129. That said, the situation does seem to us to have been urgent. The main point made by the Claimants in this regard was that, following the Suspension, there was no further trading in nickel, and the LME and LME Clear had an opportunity to reflect, investigate and consult, before making either the Cancellation Decision or the 8 March Margin Decision. However, this ignores the fact that, while trading in nickel had been suspended, trading in other metals continued.

130. This meant that margin requirements still had to be assessed, and calls made, reflecting all the trades done by all Members and the potential exposure of LME Clear on those trades. It therefore was not possible to postpone LME Clear's margin requirements beyond the morning of 8 March 2022.

131. Furthermore, if the relevant decisions had been postponed, this might have resulted in an outcome along the lines of Option 1A or Option 1B, but with this not being clear until sometime after 8 March 2022. This would not have eliminated the risk that Members would be pushed into default. It would simply have meant that this risk would not have eventuated until a later date. However, putting off the evil day in this manner would have created a fresh peril: that, in the meantime, those vulnerable Members would still have been free to trade in other metal markets. If the LME and LME Clear had allowed market participants to do business with Members who were at risk of being pushed into default by pending decisions on margin calls, this could have had very serious consequences.

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.

(4) The contractual context

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.

134. Most judicial review cases involve decisions made under powers that have been granted by the legislature, without any direct involvement on the part of the persons affected. Those persons generally come to be affected by those powers by mere happenstance.

135. This case is very different. Here, each of the Elliott Claimants and Jane Street made a conscious decision to enter each trade, and to do so under the LME Rules. They did

not have to do this. They could have conducted their nickel trades elsewhere (including the OTC market) or they could simply have abstained. They became subject to TR 22 through their deliberate free choice and consent.

136. It is a general presumption that those who conclude contracts do so with a full understanding of the true meaning and effect of the contractual terms. Sometimes, this is a legal fiction that is at some remove from the practical reality. However, these Claimants are well-resourced entities with both internal and external lawyers at their disposal. They are also experienced and knowledgeable traders, who are familiar with the operation of RIEs and CCPs.

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.

138. All this is important, not only as context for some of the issues on lawfulness, but also for the A1P1 points.

H: ULTRA VIRES AND PROPER PURPOSE

(1) Vires

139. The Claimants contend that the LME lacked the power to cancel the trades. The LME relied (and relies) on TR 22 (see above at paragraph 39) and in particular the final sentence of TR 22:

> "Where the Exchange considers it appropriate, the Exchange may cancel, vary or correct any Agreed Trade or Contract."

140. The Trading Rules pursue the objectives identified in Schedule 1 to the Recognition Requirements Regulations. TR 22 specifically reflects the requirement in paragraph 3B of Schedule 1 (see above, at paragraph 47). The Recognition Requirements Regulations are themselves an implementation of MiFID II. For present purposes, the material provision in MiFID II is article 48(5) (see above, at paragraph 44).

141. The Claimants contend that, properly construed, the broadly-framed power in TR 22 is limited in a number of ways. The first submission is that the power given by TR 22 can be no wider than envisaged by paragraph 3B of Schedule 1 to the Recognition Requirements Regulations, so that the power to cancel "… where [the LME] considers it appropriate" must be understood as a power to cancel transactions only "in exceptional circumstances". We accept this submission and did not understand the LME to dispute this point.

142. The Claimants' second submission is that TR 22 must be read subject to TR 13 (see above, at paragraph 51) such that the TR 22 power can only be used to the extent permitted by "relevant procedures." The Claimants submit that since there were no such procedures pertinent to the circumstances prevailing on 8 March 2022, the TR 22 power was not available to the LME at that time. We do not accept this submission. First,

there is no sufficient reason to read TR 22 as in some way subject to TR 13. The opening sentence of TR 22 makes clear the circumstances in which that power to cancel a trade arises. This sets TR 22 apart from TR 13. While the power at TR 13 does envisage the existence of "relevant procedures" which would, we assume, identify the "certain circumstances" in which the power to invalidate a transaction under that rule would arise, none of that says anything material to the power at TR 22 which is available on its own terms. Second, as formulated, TR 22 is consistent with the position anticipated by paragraph 3B of Schedule 1 to the Recognition Requirements Regulations. This is a further reason why TR 22 should not be read down by reference to TR 13.

143. The Claimants' submission to the contrary relied on Article 47(1)(d) of MiFID II (above at paragraph 44). We do not think that provision takes the submission anywhere. Article 47 is a general provision that sets the context for the measures Member States are required to put in place for the operation of relevant regulated markets. The general provision in Article 47(1)(d) should not be read as a limitation on TR 22, not least because that would, for no sufficient reason, derogate from Article 48(5) which, as we have said, is the specific source for TR 22.

144. The Claimants' third submission is that the TR 22 power is to be read as constrained by technical standards issued by the Commission pursuant to Article 48(12), specifically Article 18 of RTS 7 (see above, at paragraph 50). This submission links to the submission based on TR 13 since Article 18(2)(d) of RTS 7 provides that trading venues should be able to "… cancel or revoke transactions in case of malfunction of … mechanisms to manage volatility …" and at Article 18(3)(f) requires trading venues to set out "policies and arrangements in respect of … cancellation policy in relation to orders and transactions …".

145. We do not consider that Article 18 has any bearing on the exercise of the TR 22 power in circumstances such as those existing on 8 March 2022. While the scope for regulatory technical standards under Article 48(12) of MiFID II is widely cast, we consider it to be clear that the premise for RTS 7 was Article 48(12)(g) – i.e., "the requirements to ensure appropriate testing of algorithms so as to ensure that algorithmic trading systems … cannot create or contribute to disorderly trading conditions on the market." Delegated Regulation (EU) 2017/584 is, therefore, directed to algorithmic trading. The first recital to the Regulation provides:

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

146. By Article 1, "algorithmic trading" has the definition at regulation 2 of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017:

> *"algorithmic trading* means 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"

This makes it clear that the power at TR 22 is not to be read-down on account of Article 18 of RTS 7. The submission based on Article 18 of RTS 7 therefore fails.

147. The final matter relied on for the purposes of the vires submission was Clearing Procedure A6.10 within the LME Clear Rules (see above, at paragraph 52). The Claimants submitted that LME Clear's ability under this provision to "amend any prices that it considers do not accurately reflect the current market price" was the power directly applicable in the factual situation that arose on 7 and 8 March 2022, such that resort to any other power (including TR 22) was unlawful.

148. If this point is seen in this way (which is, we think, the substance of the point), it collapses into the Claimants' later submission on Option 1B. We consider that submission below at Section L, and do not need to add to those reasons here: we do not consider the failure to follow Option 1B (the course that would have rested on resort to Clearing Procedure A6.10) was unlawful.

149. The vires-related point is that the possibility that resort could have been had to Clearing Procedure A6.10 means that any option to use the power at TR 22 either disappeared or did not arise. We do not consider it is appropriate either to construe these two provisions as being mutually exclusive, or to read the existence of the power at TR 22 as in some way contingent, whether that be contingent on the unavailability of the power at Clearing Procedure A6.10 or on a lawful decision by LME Clear not to exercise its power under Clearing Procedure A6.10. In circumstances such as those on 7 and 8 March 2022, that is not a helpful approach. The better approach is to consider the two powers as existing independently of each other and providing different options.

(2) Proper purpose

150. Both Claimants' submissions on ultra vires also contended that the LME had exercised its power to cancel for an improper purpose. They said that the LME's permitted functions do not extend to protecting market participants from the consequences of bad trading decisions or to averting perceived systemic risk; particularly where the effect would be to protect some market participants at the expense of others.

151. On the facts of this case, however, the 'proper purpose' argument comprises no more than a different way of putting the submissions (a) that irrelevant matters were considered when the decision was taken; and (b) that no proper regard was had to other options available to the LME on 8 March 2022. We consider those matters below, in Sections K and L, respectively. For the reasons set out there, in particular at paragraphs 181 – 183 and 197 – 210, the submission that the LME acted for an improper purpose also fails.

I: PROCEDURAL UNFAIRNESS

(1) Authorities on procedural fairness

152. The case law on procedural fairness is legion. We mention below only the cases that received particular attention in submissions.

153. First, our attention was drawn to *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, per Lord Mustill at p. 560:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

154. Next, we were taken to *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 and referred to two passages. The first was per Lord Sumption at [31]. Having cited the passage set out above from Lord Mustill's speech in *R v Secretary of State for the Home Department, ex parte Doody*, Lord Sumption said:

> "31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each directive is made."

Lord Sumption then referred to two possible respects in which, on the facts of that case, there was an issue as to whether prior consultation would have raised practical difficulties. The second passage we were referred to in *Bank Mellat* was per Lord Neuberger at [179]:

> "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."

155. The Claimants preferred the passage per Lord Neuberger at [179], while the Defendants preferred the passage per Lord Sumption at [31]. We are not convinced that either passage differs from the other; not, at any rate, in a respect that could affect the outcome in this case. Both acknowledge the significance of the context of the particular case, which had been emphasised by Lord Mustill in *ex parte Doody*.

156. We were then taken to a number of further authorities, which shed light on how context may shape the requirements of procedural fairness and provide practical examples:

    i) *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 at [35]: Lord Reed said that there is no general common law duty to consult persons who may be affected, although the duty may exist where there is a legitimate expectation of consultation.

    ii) *R (Kebbell Developments) v Leeds City Council* [2018] EWCA Civ 450, at [68] to [69]: Having cited a passage slightly later in Lord Reed's speech in *Moseley*, Singh LJ then said that there was 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 the decision-making process.

    iii) *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin): at [98], the Divisional Court set out a series of propositions, including at [98(6)] the proposition that the Court will not generally impose a duty to consult where a democratically elected body decided not to impose such a duty.

    iv) *R v Life Assurance Unit Trust Regulatory Organisation Ltd, ex p. Ross* [1993] QB 17: Mann LJ said in the Divisional Court (at p. 32F) that procedural fairness will not require a decision-maker to obtain representations where this would be incompatible with the urgency of the situation. He cited the decision of the Court of Appeal in *R v Birmingham City Council ex p Ferrero* (1991) LGR 977. This aspect of the Divisional Court's judgment was expressly approved by the Court of Appeal (albeit with a qualification that is not material here): see at p. 52D.

(2) The parties' submissions on procedural fairness

157. The Claimants emphasised their position as persons who would be directly affected, highlighting their case as to their A1P1 property rights. They said this put them into the first category noted in *Kebbell*, i.e., persons whose legally protected interests might be adversely affected. They also noted that Mr Chamberlain's evidence was that no consideration was given to the possibility of consulting with market participants.

158. The Defendants emphasised that no duty of consultation is imposed either under MiFID II or the other legislative instruments; above all, there is no such duty under the LME Rules or the LME Clear Rules. They referred (in particular) to *Plantagenet Alliance* at [98(6)].

159. In *Plantagenet Alliance*, the Divisional Court expressed the relevant point in terms of a democratically elected body. Judicial deference to a decision by a rule-maker not to

impose a duty of consultation must, no doubt, be at its highest where the rule-maker has been democratically elected. However, as noted in Section G above, it seems to us significant that in this case the Claimants consented to TR 22.1, and they must be taken to have appreciated that its terms do not require prior consultation.

160. The Defendants also said that the urgency of the situation precluded consultation with the Claimants or (more broadly) the general class of persons who had agreed trades on 8 March 2022, relying in this regard on evidence from Mr Chamberlain (as well as various other witnesses) to this effect.

(3) Analysis and application

161. For the reasons we have already given, we accept that the situation was urgent. Above all, we accept that the situation was regarded as urgent by Mr Chamberlain and Mr Farnham (along with others) and we consider that they were entitled to come to that view.

162. Furthermore, it strikes us as important that neither the Elliott Claimants nor Jane Street is a Member of the LME, let alone a Clearing Member, and they accordingly had no direct relationship to the LME or to LME Clear, still less a contractual nexus in respect of the trades in question. This not only impacts on the legal proximity of the relationship between the Claimants and the Defendants, it also would have affected the practicality of either the LME or LME Clear first identifying the market participants potentially affected by the relevant decisions, then contacting them, then carrying out any consultation.

163. Finally, Mr Chamberlain stated in his evidence that his view was, and is, that any consultation would not have provided any useful information because the views expressed would simply have reflected the respective interests of the consultees. It was already obvious to him (and others) that there would be winner and losers. This is a part of Mr Chamberlain's evidence where we are slightly sceptical that he was setting out a thought-process that he actually carried out at the time, rather than stating what he thinks he would have thought if he had asked himself the question on 8 March 2022. Nevertheless, we accept the basic logic of Mr Chamberlain's evidence here: namely, that consultation would not have told him or Mr Farnham anything that was not already obvious to them. Based on the various accounts given about the two remote meetings, it seems obvious to us that everyone involved was aware both that the Suspension and Cancellation decisions were momentous, and of the likely effects on all market participants – including those in the position of the Claimants.

164. Mr Chamberlain did in fact hear from some Clearing Members who were concerned about the consequences for them, in terms of margin calls, if the 8 March 2022 trades were to stand. We do not accept that this made the decisions unfairly one-sided. Those parties, too, were not saying anything that was not already obvious to Mr Chamberlain and Mr Farnham: namely, that a margin call of US$19.75 billion would cause some Members to default.

165. Accordingly, we reject the Claimants' case in relation to procedural fairness and the failure to consult. Consultation was not expressly required under the LME Rules or the LME Clear Rules. 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. In these

circumstances, especially the urgent context, there was no duty to consult the Claimants.

166. In any event, even if a consultation had taken place, we consider it very unlikely that it would have made any difference, so this is a part of the case where section 31(2A) of the Senior Courts Act 1981 would have been relevant had we found either the Cancellation Decision or the 8 March Margin Decision to have been unlawful on this ground, which we have not.

J: RELEVANT CONSIDERATIONS AND LEVEL OF SCRUTINY

(1) The applicable legal principles

167. The Claimants had several criticisms of the LME's approach to disorderliness, raising various aspects of the general duty summarised in *Tameside* (above), per Lord Diplock at p. 1065 that decision-makers must ask the right questions and must take reasonable steps to acquaint themselves with the relevant information to enable them to answer those questions correctly.

168. The general legal principles in this area are apparent from two relatively recent cases which refer to and summarise some of the other well-known authorities. The first is *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52. The Supreme Court gave guidance on how a court should review and identify the considerations that the decision-maker should have in mind – and, therefore, the considerations in respect of which it should inform itself – at [116] to [121]:

> "116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset CC, ex p Fewings* [1995] 3 All ER 20 at 32, [1995] 1 WLR 1037 at 1049, in which he identified three categories of consideration, as follows:
>
> > '[T]he judge speaks of "a decision-maker who fails to take account of all and only those considerations material to his task". It is important to bear in mind, however … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.'
>
> 117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172 at 183:
>
> > 'What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a

> consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.'

Cooke J further explained at 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, 'there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act'.

118. These passages were approved as a correct statement of principle by the House of Lords in *Findlay v Secretary of State for the Home Dept* [1984] 3 All ER 801 at 826–827, [1985] AC 318 at 333–334. See also *R* (*on the application of Hurst*) *v London Northern District Coroner* [2007] UKHL 13, [2007] 2 All ER 1025, [2007] 2 AC 189 (at [55]–[59]) (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R* (*on the application of Corner House Research*) *v Director of Serious Fraud Office* (*BAE Systems plc, interested party*) [2008] UKHL 60, [2008] 4 All ER 927, [2009] AC 756 (at [40]) (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R* (*on the application of Samuel Smith Old Brewery* (*Tadcaster*)) *v North Yorkshire CC* [2020] UKSC 3, [2020] 3 All ER 527, [2020] PTSR 221 (at [29]–[32]) (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para [55]), but that it is not unlawful to omit to do so (para [56]).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, [2018] PTSR 2063, [2018] All ER (D) 01 (Jul) (at [20]–[26]), in line with these other authorities, the test whether a consideration falling within the third category is 'so obviously material' that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1947] 2 All ER 680, [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950–951, [1985] AC 374 at 410–411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para [40]. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the

> present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para [59]). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995]
> 2 All ER 636 at 657, [1995] 1 WLR 759 at 780 (Lord Hoffmann)."

169. The second case was *R (Pantellerisco) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1454. Underhill LJ (with whom the other members of the Court of Appeal agreed) summarised the irrationality test, as well as the law as to the degree of intensity with which the Court will review a public law decision, and the importance of context, at [54] to [57]:

> "54. In *Johnson* [2020] PTSR 1872 Rose LJ noted that the court had not received detailed submissions on the test of irrationality: see para 48 of her judgment. The claimant had relied squarely on "the *Wednesbury* unreasonableness that has been a ground for a public law challenge since the early days of the modern jurisprudence on judicial review". Rose LJ referred to para 98 of the judgment of Leggatt LJ and Carr J, sitting as a Divisional Court, in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649. This reads (so far as relevant):
>
> > "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e g *Boddington v British Transport Police* [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached."
>
> Rose LJ observes that the challenge in *Johnson* was essentially of the first kind, and the same is true in this case.
>
> 55. No doubt taking their lead from *Johnson*, counsel before us did not feel the need to advance any detailed submissions on the test of irrationality. That being so, this is not the case in which to attempt any wide-ranging analysis. I am broadly content to adopt the very general formulation derived from *Boddington v British Transport Police* [1999] 2 AC 143 which appears in the *Law Society* case: it is clearly not intended to be essentially different from the time-honoured *Wednesbury* language, but, as the Divisional Court there says,

the *Boddington* formulation is simpler and less tautologous.

> 56. It is now well-recognised that the degree of intensity with which the court will review the reasonableness of a public law or act or decision (including a provision of secondary legislation) varies according to the nature of the decision in question. There are many authoritative statements to this effect, but I need only quote from para 51 of the judgment of Lord Mance JSC in *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2015] AC 455, where he says: "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle … The nature of judicial review in every case depends upon the context."
>
> 57. It is also well-recognised that in the context of governmental decisions in the field of social and economic policy, which covers social security benefits, "the administrative law test of unreasonableness is generally applied … with considerable care and caution" and the approach of the courts should "in general … [accord] a high level of respect to the judgment of public authorities" in that field. I take those words from para 146 of the judgment of Lord Reed PSC (with which the other members of the court agreed) in *R (SC) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2021] 3 WLR 428: see para 146. In that case the Supreme Court was concerned, as here, with a challenge to the legislation relating to welfare benefits (sections 13 and 14 of the Welfare Reform and Work Act 2016). The claimants' case was that the impugned provisions contravened article 14 of the Convention, but in the part of the judgment from which I quote Lord Reed PSC is making the point that the Strasbourg jurisprudence is in line with the approach taken by the common law, and it is the latter which he is describing. He explains the reasons for adopting a less intensive standard of review in this area, including the need for the courts "to respect the separation of powers between the judiciary and the elected branches of government" (see para 144)."

170. So far as concerns the decision-maker's duty to obtain information, we were taken to the following extract from the judgment of the Court of Appeal in *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, at [58] to [59]:

> "58. Fourthly, a specific application of the doctrine of irrationality which is invoked by CAAT in the present case is the duty recognised by the courts ever since the well-known speech of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065. This is the duty which falls upon a decision-maker to take reasonable steps to acquaint himself with the relevant information in order to enable him to answer the question which he has to answer. Here that question is to be found in the assessment of risk required by Criterion 2c.
>
> 59. The general principles on the Tameside duty were summarised, as we have said earlier, by the Divisional Court. They have recently been approved by the

Court of Appeal (Underhill, Hickinbottom and Singh LJJ) in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, para 70 in the following way:

> "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.""

(2) The application of these principles in this case

171. One common thread running through these authorities is the importance of context. It affects both the intensity and the scope of review – notably, what considerations should the decision-maker have regard to, what should he not have regard to, and what steps should he take to obtain information in relation to them. We have outlined our assessment of the salient contextual features in Section G above. They inform our application of the principles set out above in several significant respects.

172. *First*, the fact that the LME and LME Clear are specialist decision-makers, operating in a complex, technical area, is highly relevant to the intensity of our review of their decisions, for the reasons given by Lord Mance JSC in *Kennedy* and summarised in *Pantellerisco* at [56] to [57].

173. *Second*, we note that the passage from Underhill LJ's judgment at [57] cites *R (SC) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* to highlight, in this context, the separation of powers between the judiciary and elected branches of government. As we have already said in the context of procedural unfairness, the LME and LME Clear are not elected bodies, but it seems to

us significant that the Claimants consented to subject themselves to their decision-making, by contracting on terms providing for the LME Rules.

174. *Third*, TR 22.1 does not specify what considerations the LME must have in mind when exercising the powers granted under that Rule; nor does it specify any matters to be excluded from consideration. However, the regulatory and legislative context in which TR 22.1 sits makes it apparent that the orderliness or disorderliness of the market, and the LME's overarching obligation to ensure orderly trading, are certainly considerations that the LME must have regard to.

175. *Fourth*, the LME is to be allowed a margin of discretion in respect of its approach to the matters to be considered when assessing orderliness: *Friends of the Earth* at [117] to [119]; and in respect of its approach to the weight they should be given: *Friends of the Earth* at [121].

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.

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.

178. *Seventh*, it was for the LME to decide what investigations were appropriate, subject to a Wednesbury challenge: *Campaign Against Arms Trade* at [58], and the second and third points in the passage from *Balajigari*, cited at [59].

179. *Eighth*, the urgency of the situation is also relevant when considering what investigations should have been made and the margin of discretion to be afforded to the LME and LME Clear.

K. CRITICISMS OF THE APPROACH TO "DISORDERLY MARKET"

(1) Criticism of the focus on the "disconnect" from the physical market

180. This relates to the Claimants' criticisms of Mr Chamberlain's understanding of and approach to orderliness, and their preference for Mr Dodsworth's definition. These criticisms were central to many of their other points. However, we have already explained our conclusion that Mr Chamberlain's understanding and approach was reasonable.

(2) Criticism about taking account of the adverse consequences of margin calls

181. The Claimants also criticised Mr Chamberlain for taking account of the possible adverse consequences for some Members in terms of margin calls. They said that this was an irrelevant consideration, which amounted to favouring some Members above others.

182. This criticism mischaracterises Mr Chamberlain's concerns. The fear that he had, along with Mr Farnham and most if not all those present at the remote meetings, was not merely that some Members might lose money. It was that some Members, including Clearing Members, might default. This would mean that they could not trade on the LME until the default was cleared – whether in nickel or any other metal. Ultimately, it might mean that they would go out of business. This would not merely be a problem for the Members in question. It would also cause a general loss of confidence among LME Members and their Clients. It is difficult to think of anything more likely to make the nickel market disorderly. Further, it would not only have affected the nickel market; the failure of an LME Member, let alone a Clearing Member, would have had a serious impact on the global commodities market more broadly.

183. Mr Chamberlain was very clear in his evidence that such thoughts were actively in his mind when he made the Suspension Decision and when he made the Cancellation Decision. So too was Mr Farnham. They both considered that allowing the 8 March 2022 trades to stand entailed the risk of multiple defaults by Members, causing a systemic disturbance to the market. We do not see how an RIE charged with ensuring an orderly market could not properly be entitled to take these considerations into account.

(3) Criticism of a "failure to investigate" the causes of the price movements

184. The Claimants criticised Mr Chamberlain for failing to investigate the causes of the price movements leading up to and on 8 March 2022.

185. Mr Chamberlain reached the conclusion that the nickel market was disorderly fairly rapidly – within about 20 minutes from waking up in the morning of 8 March 2022. He did so without speaking to or consulting anyone, on the basis of some internet research on his mobile phone and his own familiarity with the market, including the events of the previous few days. His conclusion was then tested and confirmed in the course of the two remote meetings that followed at 07:30 and 09:00. However, his conclusion was not based on any real investigation. He was not aware of the fact that there were several market participants with significant short positions – despite the fact that there had been some press reports in relation to Tsingshan. He therefore did not appreciate that the immediate cause of the sharp rise in prices was the short squeeze which Tsingshan and the other relevant short traders were experiencing.

186. The Claimants said there was, therefore, an economically rational explanation for the price rise, which Mr Chamberlain was not aware of, but could and should have made himself aware of, by investigating the causes of the price movements.

187. We cannot accept this criticism for several reasons. *First* and foremost, it was fundamentally dependent on Mr Dodsworth's preferred definition of orderliness. Once it is accepted that Mr Chamberlain was entitled to understand and assess orderliness in the way that he did, it follows that all he needed to know was whether the disconnect between the 3M nickel price and the value of physical nickel could be explained by any relevant macroeconomic, geopolitical or other factor relevant to the market for the underlying commodity. The short squeeze explained in the OW Report was not such a factor. In short, Mr Chamberlain did not need to establish why prices had moved as they did, in order to conclude that the market was disorderly. He was entitled to identify

the relevant question as one related to the value of physical nickel, and to satisfy himself that he knew the answer to that question.

188. *Second*, the situation was urgent. It would not have been possible for Mr Chamberlain to find out why the price had moved as it did, within the timescale that he and Mr Farnham considered necessary for the decisions they had to make. It is worth noting that the OW Report took several months to be produced.

189. *Third*, it is fair to say that, in the limited time available, it would have been possible for Mr Chamberlain to find out at least something about the involvement of a short squeeze affecting some market participants, notably Tsingshan. This is because of the press reports shortly before and on 8 March 2022, referring to Tsingshan's exposed short position.

190. However, if (contrary to our view) the decisions facing the LME and/or LME Clear could only properly be made having established the causes of the price movements, we do not consider that these press reports would have provided a very satisfactory basis. It is apparent from the OW Report that the true position was much more complex than the contemporary press reports suggested, and that the scale of the short squeeze was much more significant (and not confined to Tsingshan). It would not have been useful for Mr Chamberlain to spend time and energy seeking information that would inevitably have been incomplete and unreliable.

(4) Criticism of a "failure to appreciate" the TOT's suspension of price bands

191. It is apparent from his evidence that Mr Chamberlain did not know that the TOT had suspended the price bands for nickel at around 04:49 on 8 March 2022. By this time the price had risen from US$49,208 when the market opened to about US$60,000. As is apparent from the diagrams in Section E above, it then rose particularly steeply in the period up to about 06:00.

192. The Claimants said that Mr Chamberlain should have known that the price bands had been suspended. They also said that this development was significant to the way the price rose after 04:49.

193. We agree that it seems odd that Mr Chamberlain does not appear to have learnt that the TOT had suspended the price bands, at any time before the Cancellation Decision. We would have thought this would be the kind of information the CEO would like to have, if only as an indicator of the way the market was behaving. However, on the evidence we have received, we do not accept that the suspension of price bands was in any way causative of the price rises that followed. On the contrary, our understanding is that the suspension was caused by the fact that the price was rising, not the other way around.

194. As we have already stated, and as was explained in more detail in the evidence of Mr Cressy, the effect of price bands is that, if a Member seeks to book a trade outside the bands, it will not be entered onto the relevant LME trading platform, but will be rejected automatically. This is one of the control systems that the LME has in place, in order to constrain erroneous trades as required by RTS 7: see Article 18.3(f)(v). This means, essentially, errors resulting from algorithmic trading (runaway trading systems) and human errors (fat-finger syndrome). However, price bands are not intended to prevent market participants from trading outside the bands if that is their genuine intention, i.e.,

if the trade is not erroneous. Accordingly, if a genuine trade is agreed at a price outside the bands, and is rejected, those involved simply have to contact the TOT and confirm that the trade reflects their actual intention. It will then be processed as normal, and the bands will be adjusted.

195. We received no evidence as to why the TOT suspended the price bands, but our inference is that the rising prices meant that genuine trades were getting rejected, and those involved repeatedly had to contact the TOT, to the point where it became apparent that the bands were not working as intended, i.e., they were not affecting erroneous trades but genuine trades. Whether that is right or not, the evidence of Mr Cressy (in particular) was that, had the price bands not been suspended, that would have made no real difference. Some of the trades would have taken slightly longer to conclude, because of the need to contact the TOT, but they would still have been accepted and executed in the normal way, subject to the Suspension Decision and then the Cancellation Decision.

196. Accordingly, this criticism goes nowhere. The suspension of the price bands had no real causative effect. We are conscious that, in reaching this conclusion, we are reaching a different view of the significance of price bands from that of the authors of the OW Report. We do not know what evidence they considered in relation to price bands, but our conclusion is based on the evidence provided to us, notably that of Mr Cressy.

L: CRITICISMS RESTING ON OPTION 1B, AND/OR OTHER OPTIONS

(1) LME Clear's 8 March Margin Decision

197. As explained above, Option 1B was excluded by LME Clear's 8 March Margin Decision: Mr Farnham decided that, if the 8 March 2022 trades were to stand, LME Clear was not willing to calculate margin requirements on the basis of the LME Closing Price at the end of the previous day – which was what Option 1B would have required. The witnesses said that Mr Farnham stated in the course of the 09:00 remote meeting, and he repeated in his written evidence to us, that he was concerned that Option 1B would leave LME Clear under-collateralised.

198. The Claimants criticised LME Clear's 8 March Margin Decision, on the basis that, while it was normal practice for margin requirements to be calculated using the day's closing price, it was possible under Clearing Procedure A6.10 for LME Clear to adjust this price. The Claimants said that LME Clear could and should have used this power so as to permit the adoption of Option 1B.

199. The Claimants were not able to say that LME Clear failed to consider this possibility: the question whether LME Clear should adjust its usual practice, and adopt a different metric from normal, was precisely the discussion that took place in relation to Option 1B. Their case was, rather, that it was irrational for LME Clear to insist on following its normal practice and the standard metric (i.e., the LME closing price for the relevant day). They said that Mr Farnham's concern that LME Clear would be under-collateralised was, itself, irrational.

200. Irrationality is a significant hurdle in any judicial review case. It is a particularly difficult hurdle for any claimant to surpass in a judicial review with the contextual

features we have already highlighted, with all the consequences those features bring in terms of the margin of discretion to be allowed and the caution with which the Court should proceed.

201. The Claimants relied on the evidence of Mr Dodsworth. He expressed the view that Option 1B would not have left LME Clear under-collateralised, because (i) adequate collateralisation requires margin assessed at the market price, (ii) it followed from the Suspension Decision and the Cancellation Decision that LME did not consider that the trading prices agreed on 8 March 2022 were the market price, (iii) therefore it could not be right to calculate margin on the basis of those prices, or the closing price derived from them, (iv) what the LME and LME Clear ultimately did indicates their view that the 7 March 2022 closing price was reflective of the market price, therefore (v) it would have been safe to use that price even if the 8 March 2022 trades had stood.

202. There are a number of difficulties with this reasoning. The chief problem, highlighted by Mr Farnham, was that, while LME Clear was content that the closing price on 7 March 2022 was representative of the market price at the end of 7 March 2022, this did not mean that it could be used as a proxy for the market price on 8 March 2022. In all the circumstances (above all, the *ex hypothesi* disorderly market on that day) it was impossible to know what the market price was on 8 March 2022. Mr Farnham said in his Third Witness Statement (responding to Mr Dodsworth) that for LME Clear to have calculated margin requirements for the 8 March 2022 trades on the basis of the 7 March 2022 closing price would have been "unacceptably risky (indeed wholly irresponsible)".

203. Bearing in mind the obligation under MiFID II Article 47(1)(f) that the regulated market must have "… sufficient resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the degree of the risks to which it is exposed", we consider that Mr Farnham was right to take a conservative approach. We do not see how it can reasonably be said that LME Clear's 8 March Margin Decision was irrational.

204. Finally, Mr Dodsworth has worked in the past for the LME (as outlined above), but never worked for LME Clear or had any direct involvement in assessing margin requirements. The Defendants suggested that he had no expertise in relation to the assessment of margin requirements and the correct approach to be taken. There was some force in this criticism. It confirms that we should prefer the evidence of Mr Farnham (as we have).

(2) The concern that even Option 1B risked Members defaulting

205. The other reason for rejecting Option 1B was the concern that, while it would have entailed much smaller margin calls than Option 1A, there would still have been a risk those margin calls would lead to defaults by Members. This risk appears to have been discussed during the 09:00 remote meeting. It was made more concrete by the Second Default Risk Spreadsheet, circulated shortly before the meeting ended.

206. Before us, the Claimants had some criticisms of the accuracy of the Second Default Risk Spreadsheet, but they did not ultimately suggest that it had been wrong to indicate a risk of default. In any event, this was the best information that could be produced in the urgent context. We therefore consider that Mr Farnham (who was the witness who

principally gave evidence about this) was entitled to consider that, even if Option 1B had been acceptable from the point of view of LME Clear's margin requirements, it would still have entailed the risk that Members would default.

(3) The rejection of Option 2

207. The Claimants suggested that the LME and LME Clear could and should have allowed the 8 March 2022 trades to stand by adjusting the prices, in light of the power under TR 22.1 to "vary or correct" trades.

208. However, this too was something that was considered at the 09:00 remote meeting, and rejected because it would not be fair to the parties. We would add that the Claimants did not say what adjustments should have been made, in terms of price or any other contractual parameters. Presumably each trade would have had to be considered on its merits and adjusted individually. We do not see how this could have been done, in the urgent circumstances. We certainly do not see how it could have been done without risking further complaints of irrationality or (at least) unfairness.

(4) Only some trades should have been cancelled

209. The Claimants' final suggestion within this group of criticisms was that, rather than cancelling all the trades on 8 March 2022, the LME should only have cancelled those trades after the time when the market became disorderly. They criticised Mr Chamberlain for not having considered this possibility or asked himself when the market became disorderly. The Claimants did not have a clear case as to the time when the market became disorderly, although Mr Segan KC suggested in oral submissions (i) the time when the price rose above a point 20% higher than the previous day's close (i.e., about US$60,300) or (ii) the time when the TOT suspended the price bands.

210. There was no compelling case for either of these. In any event, Mr Chamberlain's evidence was that the consensus during the 09:00 remote meeting was that the last time when the market could be considered to have been orderly was at the close of trading on 7 March 2022. This was why all trades after that point were cancelled. It seems to us rational to have made this assessment, and then to have proceeded on the basis that all trades agreed when the market could not be considered to have been orderly should be cancelled. It was certainly within the margin of discretion that the LME must be allowed. It is possible that other approaches might also have been rational, but the approach actually followed was not irrational.

M: FAILURE TO CONSULT COMMITTEES

(1) Failure to consult LME Special Committee

211. The Claimants said that the Cancellation Decision should not have been taken without consulting the LME's Special Committee.

212. There is no basis for this suggestion. The power to cancel trades under TR 22.1 was not reserved to the Special Committee. Under the LME Rules, it was a power of the LME itself. That means it was a power of the Board of Directors, which was subject to the general delegation to the CEO, i.e., Mr Chamberlain. There was simply no requirement for the Special Committee to be involved in relation to a decision under

TR 22.1. The Special Committee is given specific powers under TR 17, in the event of an emergency. However, these powers are separate from TR 22.1, which operates independently of TR 17.

213. In any event, the Special Committee was consulted, as correctly stated in Notice 22/053, which had been circulated in draft to the Special Committee for its approval before being circulated.

214. There had not been a meeting of the Special Committee, but it is not obvious how this could have made any difference, given the number of senior executives who attended the meeting of 09:00. This is another point where section 31(2A) of the Senior Courts Act 1981 would have been relevant, had we otherwise found the Cancellation Decision to have been unlawful on this basis.

(2) Failure to consult LME Clear Board Risk Committee

215. The Claimants also suggested that LME Clear should have consulted its Board Risk Committee. They referred to the Board Risk Committee's terms of reference, which refer to its duties as including the duty to "advise the Board in relation to developments impacting the risk management of the Company in emergency situations." However, we read this as relating not to advice to be given while an emergency is ongoing, but advice to be given from time to time about developments that impact how LME Clear would manage risk in the event of a future emergency.

216. Furthermore, the Board Risk Committee's membership includes representatives of Clearing Members and their Clients. It would not have been possible to convene a meeting in the kind of urgent situation that prevailed in the morning of 8 March 2022.

N: CONCLUSION ON THE TWO DECISIONS

217. For all the reasons given above, we reject the Claimants' case that either the Cancellation Decision or the 8 March Margin Decision was unlawful.

O: THE ARTICLE 1, PROTOCOL 1 CLAIMS

(1) The elements of a successful claim

218. Article 1, Protocol 1 ("A1P1") provides:

> "ARTICLE 1
> *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."

219. Claims of this type generally raise some or all of the following questions. (a) Does the claim relate to a "possession" within the meaning of A1P1? (b) If so, has the claimant's peaceful enjoyment of the possession been interfered with, within the first sentence of A1P1? (c) Alternatively, has the claimant been deprived of the possession, in a manner that was not lawful and in the public interest, within the second sentence of A1P1? (d) Was the interference or deprivation in accordance with the general interest and proportionate, within the third sentence of A1P1?

220. In this case, the Claimants raised one further matter: if the decision to cancel the trades was taken in exercise of the power at TR 22, was it a decision made in a manner "provided for by law" – i.e. does TR 22 meet the requirement for legal certainty? The standard required is long-established: norms must be formulated with "sufficient precision" as to enable those potentially affected to foresee "to a degree that is reasonable in the circumstances" how the norm may be applied (see *Sunday Times v United Kingdom* (1997) 2 EHRR 245 at [49]). This standard is applied sensitive to context. In this case it is significant that TR 22 applies to a class comprising highly sophisticated and well-resourced commercial actors who chose to contract on LME Rules, including TR 22. We have set out these matters in more detail above: see Section G at paragraphs 133 – 138. We have no doubt at all that the requirement for legal certainty was met. TR 22 is formulated widely, but not unduly so. The first sentence of the rule is a sufficient indication of the circumstances in which the power to cancel transactions will arise. While the second sentence permits the LME to cancel a transaction where it considers it "appropriate", that does not offend the requirement for legal certainty given the LME's position as regulator and the requirement that any exercise of the power be in accordance with ordinary public law requirements.

(2) "Possessions" – the distinction between the Elliott Claimants and Jane Street

221. It was common ground that the trades agreed by Jane Street on 8 March 2022 gave rise to concluded contracts that constituted "possessions" within the meaning of this provision.

222. The position was different as regards the Elliott Claimants, because their trades were not fully cleared. Adopting the terminology of the LME Rules, they were Contingent Agreements to Trade. They did not result in Client Contracts by which the Elliott Claimants agreed to sell, and the counterparty Clearing Member agreed to buy, nickel.

(3) Were the Elliott Claimants' trades "possessions"?

223. There is no doubt that a concluded commercial contract, which is assignable and has present economic value, will constitute a "possession" within A1P1. We were taken to the judgment of Coulson J at first instance in *Breyer Group plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB), at [51], and this would have been our view, in any event. A contract for the future sale of nickel in three months is not merely something that the law regards as property (a chose in action), it is the kind of thing that is treated by commercial people as having realisable monetary value. Traders might well wish to trade it. Accountants would require it to be accounted for in audited financial statements. It would be distinctly odd if something that can be bought and sold for money could not be protected by A1P1.

224. In *Breyer Group*, Coulson J took a different view in relation to what he referred to as "imminent contracts" – i.e., things that were not concluded contracts, but where the claimant had a reasonable prospect of acquiring a contract: see at [57] and [60A] to [60C]:

> "There is a substantial difference between a completed contract—with its combination of rights and obligations binding on both parties—and a contract that might or might not be agreed in the future."

225. Coulson J said at [61] that there might be a "possible exception" for contracts that were substantially agreed, but where some details remained to be finalised – the dotting of i's or the crossing of t's. However, he explained this possible exception with a reference to *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 611 and *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27. These are cases showing that, in such circumstances, the Court will conclude that, even though there are details outstanding and nothing has been signed, the agreement on the substantial commercial terms means that the contract is treated in law as having been concluded and (therefore) fully legally effective (*Pagnan*); especially if the contract is substantially performed (*G Percy Trentham*). If, despite being ostensibly incomplete, it is still concluded and legally effective, this means that it is legal property (a chose in action). It therefore is assignable and has real economic value. In short, the "possible exception" in Coulson J's judgment at [61] is not really an exception at all.

226. This point was not the subject of appeal when that case went to the Court of Appeal, although the judgment as a whole was upheld: [2015] EWCA Civ 408. There was a cross-appeal in relation to Coulson J's approach to the extent to which goodwill can be regarded as a "possession", but the arguments on that point did not relate to the distinction between a concluded contract and one that is not concluded.

227. In our view it is clear that a prospective contract in relation to which there has not yet been sufficient agreement on the terms for the parties to consider themselves bound is not a "possession" for the purposes of A1P1. This was the situation being addressed by Coulson J, hence the passage we have set out above positing a dichotomy between (i) a completed contract and (ii) "a contract that might or might not be agreed in the future".

228. The Elliott Claimants' position was more nicely poised than this; they contended that there was nothing further to be agreed in the future; and what was outstanding was the completion of administrative checks and processing by the LME. We understood Mr Crow KC not to dispute that the checks and processing would have been completed as expected, had it not been for the Suspension Decision and then the Cancellation Decision.

229. Nevertheless, there is a clear distinction between a contract of sale that exists, and one that does not yet exist. One comprises a bundle of contractual rights. The other does not. This distinction is not a mere lawyer's construct. It is integral to the LME Rules, which were fundamental to the putative contractual rights that the Elliott Claimants' claim is all about. We apprehend it to be a distinction that would seem natural, not artificial, to participants in the LME market.

230. In her submissions, Ms Carss-Frisk KC noted the use of the term "Affected Contracts" in Notice 22/053, and drew attention to evidence from Mr Cressy and Mr Farnham that they understood this to relate not only to Cleared Contracts (as defined in the LME Rules) but also to Agreed Trades. (By contrast, Mr Chamberlain had a different and more restricted view of "Affected Contracts"). This does not seem to us to assist the Elliott Claimants. It shows that those involved consciously had the LME Rules in mind.

231. As it happens, we think that Mr Cressy and Mr Farnham were right. Notice 22/053 gives a definition of "Affected Contracts" that goes beyond the term "Contract" as defined in the LME Rules and (in our view) would extend to a Contingent Agreement to Trade. Having said that, we see that another view is possible, as Mr Chamberlain explained in his statements. However, this is not the right question. The issue here is not whether the Elliott Claimants' commercial agreements with their intended end-buyers were affected by the Cancellation Decision: they obviously were, because it became impossible for those arrangements to give rise to the sale of nickel. What matters is, rather, which contracts are the subject-matter of the Elliott Claimants' claim.

232. In paragraph 90 of their Re-Amended Statement of Facts and Grounds, the Elliott Claimants' A1P1 claim was said to be in respect of "the Elliott Trades". Earlier in the Re-Amended Statement of Facts and Grounds, this term was defined as "the sale of a number of Nickel future contracts with an aggregate multi-hundred-million-dollar nominal value."

233. As we have explained in Section B, the Elliott Claimants' commercial agreements with the intended end-buyers were Contingent Agreements to Trade. We have characterised these not as contracts of sale, but as contracts imposing mutual obligations to take the steps necessary to ensure that the trades would be cleared and that all the necessary Contracts would come into place, per the LME contractual structure. Furthermore, our understanding from Ms Carss-Frisk KC was that the Elliott Claimants' counterparties to those Contingent Agreements to Trade in fact took all the relevant steps that they were obliged to take: they entered the details of each trade into the LME system, so that the LME could then perform the matching and clearing, etc. (as, ordinarily, it would have). However, none of this was sufficient to generate contractual rights to sell nickel and be paid the price. So far as the Elliott Claimants are concerned, their contracts of sale, under which the price for the nickel would become due and payable to them, would be different contracts: Client Contracts with a Clearing Member.

234. In submissions, we asked Ms Carss-Frisk KC whether it followed that the Elliott Claimants' claim was really about the putative Client Contracts, because that is where the Elliott Claimants' contractual right to payment of the price would have been found: non-payment would have given rise to a cause of action against the Clearing Member, under those Client Contracts. We understood her to accept this. In any event, and even if that was not the answer she intended to give, it is our answer. The problem for the Elliott Claimants is that these Client Contracts were things that did not yet exist when the Cancellation Decision was taken. This made it difficult for Ms Carss-Frisk KC to say that they were, as such, in the Elliott Claimants' possession.

235. Ultimately, we understood her argument to be that the Elliott Claimants had a legitimate expectation that they would enter into Client Contracts, and they were deprived of that legitimate expectation. In that regard, she referred us to the decisions of the ECHR in

Depalle v France (2012) 54 EHHR 17 and in *Ceni v Italy* (App 25376/07, 4 February 2014).

236. The claim in *Depalle* concerned a house on maritime public property, which the claimant had lived in for 30 years before his authorisation to occupy the house was not renewed. The Court held at [68] that the lapse of time had vested in the claimant a proprietary interest in peaceful enjoyment of the house that was sufficiently established and weighty to amount to a "possession". In the course of reaching that holding, the Court said at [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"."

237. In *Ceni* the claimant concluded a preliminary contract for the purchase of an apartment, which constituted a commitment on both sides to enter into and perform a final contract. She also paid the full price. The final contract did not come into existence because the vendor refused to perform, then entered liquidation, and the official liquidator terminated the preliminary sales contract pursuant to Italian bankruptcy law. The Court held at [43] and [44] that the preliminary contract, her payment under it and her occupation of the apartment gave rise to a legitimate expectation sufficient to constitute property for the purposes of A1P1.

238. While the ECHR used the phrase "legitimate expectation" in these cases, we do not understand the phrase to have been used as it is by English public lawyers. We understand it to have been used to indicate an expectation with a basis in law sufficient to constitute a legal right. In *Depalle*, this is indicated by the final sentence of [63] (i.e., "A legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a "sufficient basis in national law"."). Furthermore, the words that form the quotation in that final sentence come from *Kopecky v Slovakia* (2005) 41 EHHR 944, which Coulson J considered in *Breyer Group* at [99] ff, holding at [102] that no legitimate expectation could come into play without an asset; a legitimate expectation is not itself a proprietary interest.

239. This means that the Elliott Claimants face two problems, in relation to this argument based on legitimate interest. *First*, "legitimate interest" in this context means some sort of proprietary interest recognised in law. In *Depalle*, there was the proprietary interest that the ECHR found had vested in the claimant. In *Ceni*, there was the right under the preliminary contract to have the vendor enter into and complete the final contract. In this case, (i) some of the Contingent Agreements to Trade were not contracts with the relevant Clearing Member, from whom the price would have been payable (unlike *Ceni*, where the preliminary contract was with the vendor); and (ii) the counterparties to the Contingent Agreements to Trade were not promising that the Elliott Claimants would enter into concluded Client Contracts; only that they would take the steps that were incumbent on them, which they duly did (again, unlike *Ceni*, where the preliminary contract was a commitment that each party would enter into and perform the final contract – a commitment that the vendor did not fulfil). Here, therefore, the Elliott

Claimants did not yet have a proprietary interest recognised in law, or any relevant legal interest.

240. *Second*, the legitimate interest must relate to an asset. In *Depalle*, there was the house and the right to occupy it. In *Ceni*, there was the apartment. Here, the Elliott Claimants' case of legitimate interest is said to relate to the Client Contracts; but these did not exist and in the event never came into existence.

241. We therefore reject the Elliott Claimants' case that they had a "possession" within the meaning of A1P1.

(4) Jane Street's A1P1 claim

242. It was common ground that Jane Street had concluded Client Contracts for the sale of nickel and that these constituted possessions for the purposes of A1P1. Under A1P1 they accordingly were guaranteed the peaceful enjoyment of those Client Contracts, and could not be deprived of them, except as permitted under the second and third sentences of A1P1.

243. We have noted above that such cases typically raise questions as to whether the claimant's peaceful enjoyment has been interfered with, or whether the claimant has been deprived of the possession, and whether (if so) this was lawful, in the general interest and proportionate (etc.). The Claimants (echoing Lord Hope in *Wilson v First Country Trust Ltd (No. 2)* [2003] UKHL 40 at [106]) suggested that an important touchstone in this area is the distinction between cases where the effect of the relevant decision is to deprive the claimant of a right he already possessed and cases where his right has from the outset been subject to the reservation or qualification which is now being enforced against him.

244. One of the examples frequently given in this context is a property affected by a compulsory purchase order. The power of the relevant authority to issue the compulsory purchase order may well have predated the property or the claimant's interest in it, but the exercise of that power will still trigger A1P1.

245. We were also taken to the facts of *Wilson v First Country Trust Ltd (No. 2)*, where the automatic effect of a failure to comply with certain statutory provisions was that a valid contract never came into existence, i.e., there was no interference with an existing possession; and to *Sims v Dacorum Borough Council* [2014] UKSC 63, where a tenancy had been terminated by service of notice to quit pursuant to the terms of the tenancy agreement, i.e., in circumstances specifically provided for in the agreement which created the property interest. We were also reminded of Lord Sumption's explanation of the A1P1 proportionality requirement, in *Bank Mellat* at [20]. While interesting, we did not consider the analogies and guidance provided by these cases was sufficiently close to the facts of this case to be of direct assistance.

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.

248. The authority that this case most resembles is *Sims v Dacorum Borough Council* – also a contractual case, where the analysis of the Supreme Court effectively began and ended at [15], as follows:

> "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."

249. That passage has an obvious resonance in this case. However, it is important not to lose sight of the fact that *Sims* involved an individual concluding a rental agreement for a domestic property with a local authority. Mr Sims's bargaining position was relatively weak and one might reasonably doubt how carefully he read or how well he understood the contract terms, before he entered into the tenancy agreement. Nevertheless, even in those circumstances, the fact that Mr Sims had agreed to the terms he now complained of was effectively the end of the case. In short, that case lacked all the other contextual features that we have highlighted. They make this case considerably more difficult for Jane Street than matters were for Mr Sims. This would also have been the case for the Elliott Claimants, if their A1P1 claim had not failed at an earlier stage.

(5) Conclusion on A1P1 claims

250. It follows that, having rejected the Claimants' case that the Cancellation Decision and the 8 March Margin Decision were unlawful, and also because we have concluded that the Elliott Claimants do not satisfy the "possession" test, we dismiss the A1P1 claims.

P: DISPOSAL

251. It follows that both Claimants' claims for judicial review fail on all grounds and their challenges are dismissed.