Millimetres 0 10 100

LINK ROAD BETWEEN M25 JUNCTION 29 ROUNDABOUT AND CODHAM HALL ROUNDABOUT

TO M25 JUNCTION 29

70

70

8

PROPOSED ROUNDABOUT

EXISTING BRIDLEWAY

A127 - SOUTHEND ARTERIAL ROAD

EXISTING BRIDGE TO BE RETAINED FOR NON-MOTORISED USERS.

PROPOSED BRIDGE

ACCESS LINK FOR FARM TRAFFIC

ROAD THROUGH CODHAM HALL ROUNDABOUT AND INTO BRENTWOOD ENTERPRISE PARK

Unit 2 (12.5m)

Unit 3 (15m)

Unit 4 (15m)

Scale 1:1000

10m 0m 10m 20m 30m 40m 50m 60m 70m

NOTES:

1. THIS DRAWING SHALL ONLY BE USED FOR THE DESIGN ELEMENT STATED IN THE DRAWING TITLE.
2. ALL MEASUREMENTS ARE IN METRES UNLESS STATED OTHERWISE
3. VISIBILITY ENVELOPE GENERATED TO PROVIDE 70M FORWARD VISIBILITY ON THE M25/J19 TO CODHAM HALL ROUNDABOUT AS PER DMRB FOR 50KPH DESIGN SPEED.
4. VISIBILITY ENVELOPE GENERATED TO PROVIDE 70M FORWARD VISIBILITY ON THE CODHAM HALL TO BEP ROAD AS PER TABLE 1, OF APPENDIX A ESSEX COUNTY COUNCIL DEVELOPMENT CONSTRUCTION MANUAL SEPTEMBER 2019.

KEY:

- OS MAPPING
- TOPOGRAPHICAL SURVEY
- PROPOSED SHARED FOOTWAY / CYCLEWAY
- INDICATIVE VERGE
- NATIONAL HIGHWAYS BOUNDARY
- ESSEX COUNTY COUNCIL BOUNDARY
- BRENTWOOD ENTERPRISE PARK BOUNDARY
- PLANNING RED LINE BOUNDARY

SAFETY, HEALTH AND ENVIRONMENTAL INFORMATION

In addition to the hazards/risks normally associated with the types of work detailed on this drawing, note the following significant residual risks (Reference shall also be made to the design hazard log).

Construction
None

Maintenance / Cleaning
None

Use
None

Decommissioning / Demolition
None

Description	Status	Revision	Drawn	Checked	Reviewed	Authorised	Issue Date
FOR PLANNING	A1	C01	RM	DT	EM	AM	09/12/21
FOR REVIEW / COMMENT	A1	C02	PB	EM	EM	AM	03/02/22
FOR INFORMATION	A1	C03	GO	MF	MS	MS	31/05/23

Drawing Suitability: APPROVED - PUBLISHED — Status: A1

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Client: ST.MODWEN

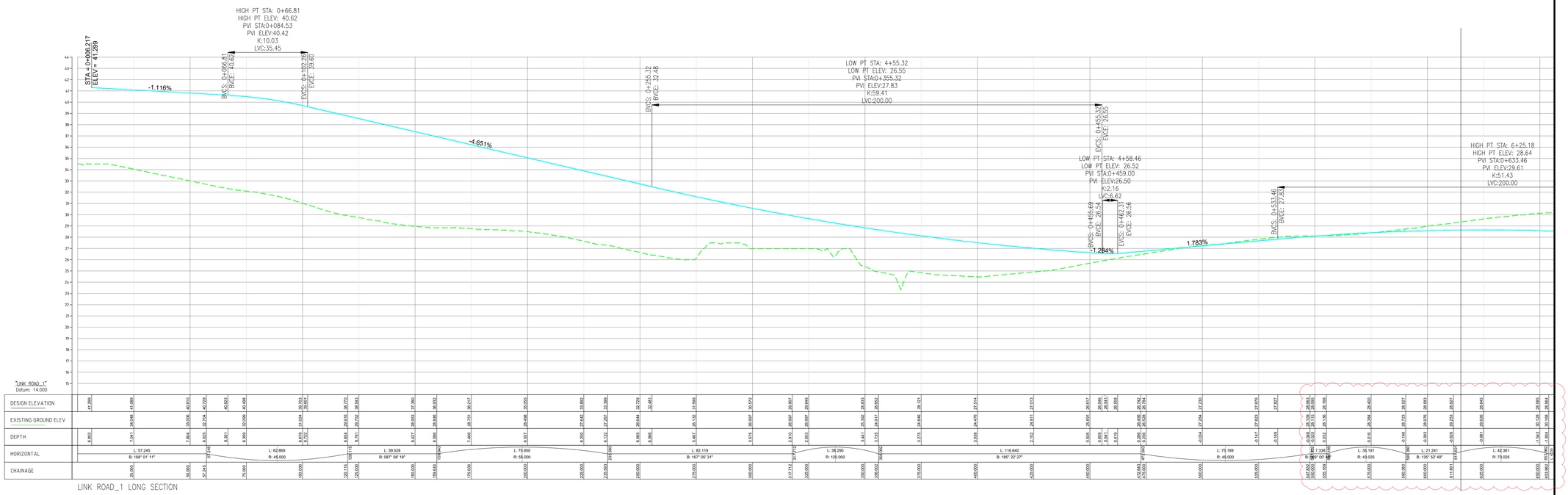
Project Title: BRENTWOOD ENTERPRISE PARK

Drawing Title: VISIBILITY ENVELOPES

Drawing Number: Project BEP | Originator ATK | Volume HML | Location _ZZ | Type DR | Role CH | Number 000007

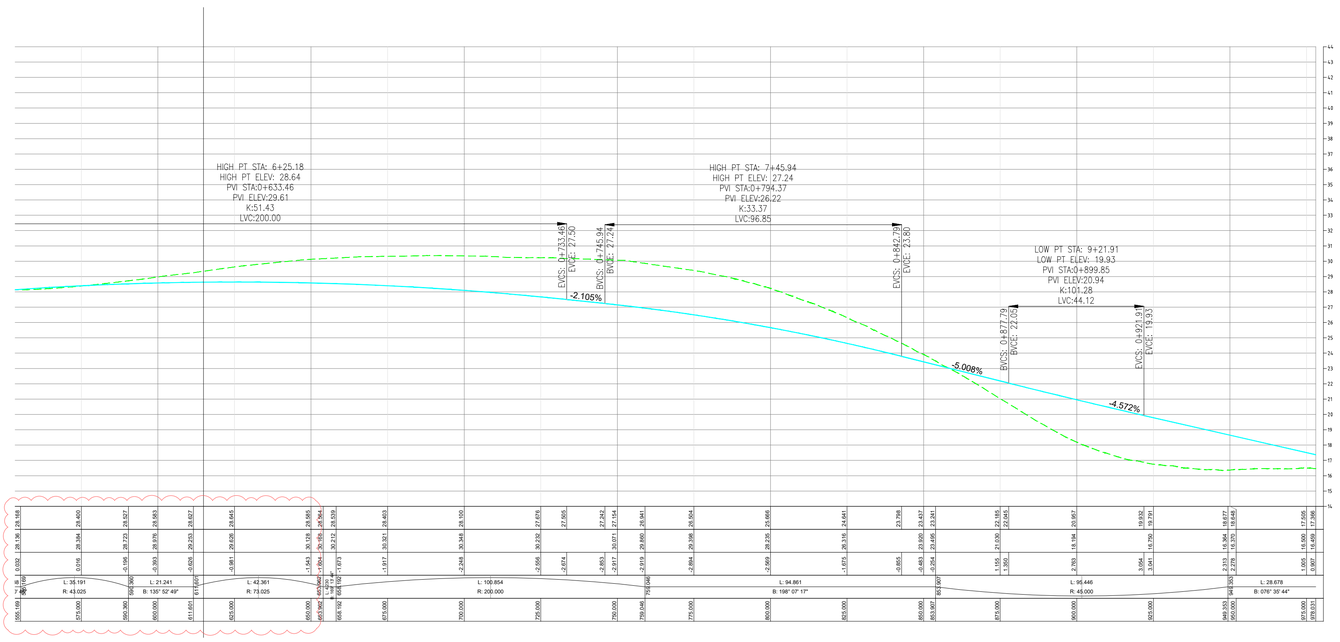
Original Size: A1 | Scale: AS SHOWN | Project Ref. No: 5183535 | Sheet: 1 of 1 | Rev: C03

This Drawing is saved on ProjectWise. Plotted: 31/05/2023 15:02:48 By: OLDH8071



LINK ROAD_1 LONG SECTION

LINK ROAD-1 (STA. 0+000 TO 0+575)
(Scale 1:1000 Horizontal / 1:50 vertical)



LINK ROAD-1 (STA. 0+575 TO 0+971)
(Scale 1:1000 Horizontal / 1:50 vertical)

1. ALL DIMENSIONS IN THIS DRAWING ARE IN MILLIMETERS UNLESS SPECIFIED
2. DRAWING BASED ON TOPOGRAPHICAL SURVEY: SURVEY SOLUTIONS, DWG NO: 34443BWLS-01 TO 34443BWLS-12 DATED: OCTOBER 2021
3. THE PROPOSED DEVELOPMENT PLAN IS BASED ON ARCHITECTURAL SITE PLAN BY UMC ARCHITECTS
4. DO NOT SCALE FROM THIS DRAWING, WORK TO DIMENSIONS OR CO-ORDINATES PROVIDED.
5. FOR GENERAL ARRANGEMENT REFER TO DRAWING No. 20-081D_421 TO 20-081D_424
6. FOR TYPICAL ROAD CROSS SECTIONS REFER TO DRAWING No. 20-081D_470
7. FOR DRAINAGE LAYOUT REFER DRAWING 20-081D_480 TO 20-081D_483
8. FOR VEHICLE TRACKING PLANS REFER DRAWING 20-081D_500 TO 20-081D_502
9. FOR VISIBILITY CHECK PLANS REFER DRAWING 20-081D_503 TO 20-081D_505

KEY:

EXISTING GROUND

PROPOSED ROAD PROFILE

Rev.	Tech	Date	Description
P4	BS	23.03.23	UPDATED VERTICAL ALIGNMENT
P3	BG	19.08.22	UPDATED VERTICAL ALIGNMENT
P2	HA	03.02.22	ISSUED FOR PLANNING
P1	HA	19.01.22	ISSUED FOR PLANNING

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Client

Project Title

BRENTWOOD ENTERPRISE PARK
BRENTWOOD

Drawing Title

ONSITE HIGHWAY WORKS
PROPOSED VERTICAL ALIGNMENT LINK ROAD-1

Purpose of Issue

Information ○ Preliminary ● Approval ○ Tender ○ Construction ○ Record Copy ○

First Issue Date	Drawn By	Scale	Checked
JAN '22	HA	AS SHOWN	SM

Drawing Number	Rev.
20-081 / 440	P4

Dated 21st November **2023**

JOYCE WINIFRED PADFIELD

STATUTORY DECLARATION

relating to

Entrance, Private Roadways and Adjoining Land at

Codham Hall, Great Warley, Brentwood, Essex CM13 3JT

Gepp Solicitors
5 Springfield Lyons Approach
Springfield
Chelmsford
CM2 5LB

Reference: EMW/416546.1

I, JOYCE WINIFRED PADFIELD, of Codham Hall, Great Warley, Brentwood, Essex CM13 3JT do solemnly and sincerely declare that:

1 I am 89 years old, having been born on the 10th February 1934.

2 I make this statutory declaration in preparation for an application to HM Land Registry in relation to certain areas of land situated on the east of the M25 and South of the A127.

3 There is now produced and shown to me marked 'Exhibit JWP 1' a plan showing unregistered land which is not tinted pink (**the Land**) situated on the east of the M25 and South of the A127, which forms one of the said areas of land.

4 I have been in continuous occupation of Codham Hall, Great Warley, Brentwood, Essex CM13 3JT (**Codham Hall Farm**) since 1972, initially pursuant to an agricultural tenancy (**the Tenancy**) with Essex County Council. A copy of the Tenancy is now produced and shown to me marked 'Exhibit JWP 2'.

5 In 1972 I was a partner, together with my late husband, Herbert Charles Scott Padfield (**Scott**), in a dairy and arable farming partnership ('S & J Padfield') which traded on the land comprised in the Tenancy (**Partnership**). My principal duties were sterilising the milking equipment and tractor driving, particularly during the harvest period.

6 The land comprised in the Tenancy included land on the East and the West sides of what is now the M25 (and land that the M25 is now built upon) and land on the North and the South of what is now the A127. The land on the North side of what is now the A127 included the farmhouse in which I still live. It was necessary for me and my late husband, Scott to be permanently present at Codham Hall Farm to look after the dairy herd.

7 There is now produced and shown to me a plan marked 'Exhibit JWP 3', which shows the land comprised in the Tenancy edged red. I note that the land comprised in the Tenancy included the Land and the site of an entrance and private roadways, more particularly described later in this declaration.

8 The Tenancy merged with the freehold of Codham Hall Farm, or was otherwise extinguished when the land to the North East, South East and South West of Junction 29 of the M25 was purchased freehold in 2000, by:

8.1 a transfer dated 21 March 2000 made between (1) Essex County Council and (2) Scott, myself and Christopher Scott Padfield (my son) relating to the land North of the A127 (and such land is still registered at HM Land Registry in the names of my late husband, Scott, myself and my son, Christopher Scott Padfield (**Christopher**) with freehold title absolute under title number EX653588); and

8.2 a transfer dated 30 March 2000 made between (1) Essex County Council and (2) Winterthur Pension Trustees UK Limited (a family pension fund) and relating to the land South of the A127 and on the East and West sides of the M25 (and such land is now registered at HM Land Registry in the name of my son, Christopher with freehold title absolute under title number EX653586). This transfer contains land which is adjacent to and grants limited rights

over the areas of land which this declaration relates to and a copy of the said transfer is now produced and shown to me marked 'Exhibit JWP 4 '.

9 There is now produced and shown to me marked 'Exhibit JWP 5', two aerial photographs showing the Entrance (as such term is defined in paragraph 15 below) and the private roadways leading to the South and to the East, all enclosing the Land as it looked circa 2000.

10 Whilst the Land is immediately outside the freehold registered title boundary of Codham Hall Farm, following the purchase of the freehold of Codham Hall Farm in 2000, Scott, myself and Christopher have occupied the Land and treated the Land as owned with Codham Hall Farm without payment to any third party or permission or any lease, licence or tenancy. I understand that my son, Christopher has prepared his own statutory declaration which covers the use of the Land from 2000 onwards. I have confined this declaration to the period prior to this.

11 In the latter half of the 1970s (prior to the construction of the M25) the Partnership tried to negotiate with the highway authority in relation to the construction of an accommodation bridge across the A127 in order to maintain access to Codham Hall Farm, but each request was rejected. Whilst it was Scott who was directly engaged in discussions with the highway authority, I do recall that the reason for the rejection was because the M11 had not long been built and there were too many flyovers put in at that time. I also recall that the highway authority did, however, propose to create an access to the four parts of Codham Hall Farm severed by the A127 and due to be severed by the M25. The proposal was that the three gated entrances could be used to gain access directly from the Junction 29 M25/A127 interchange roundabout, to and from the three different quadrants that Codham Hall Farm would be divided into (the woods in the North West quadrant were left open).

12 Whilst those three entrances were constructed in or around 1980, in view of the scale of the proposed road development, this suggestion was not practical for the movement of our dairy herd from that part of Codham Hall Farm that is South of the A127 (where the herd grazed) to and from where they were milked in the part of Codham Hall Farm that is North of the A127. Indeed, prior to the M25 development, moving the dairy herd across the A127 twice a day and stopping the traffic in order that they could make safe passage had become hazardous enough. There is now produced and shown to me marked 'Exhibit JWP 6', a photograph looking west along the A127 from the Accommodation Bridge (as defined in paragraph 14 below) as it was being widened ready for the M25. The A127 was already a fast dual carriageway road to drive the dairy herd across before the construction of the M25. Exhibit 'JWP 6' contains a photograph of the cows in or around 1980 grazing on the land South of the A127 once the Accommodation Bridge (as defined in paragraph 14 below) had been installed (but before it was operational) and a photograph of the cows in their shed situated North of the M25 taken at around the same time.

13 There is now produced and shown to me marked 'Exhibit JWP 7' a copy of a letter from the Partnership's land agents, Savills dated 7th June 1976, where Scott was pressing the relevant authority not to sterilise Codham Hall Farm with the motorway works.

14 In 1978 it transpired that the highway authority had to construct a flyover so that they themselves could gain access to and from each side of the A127 in relation their works. The

highway authority were not able to pursue a compulsory purchase order in relation to parts of Codham Hall Farm required for the site of the M25 before the final line of the M25 was approved. I recall that Scott, on behalf of the Partnership threatened to raise objection to the M25 if the local highway authority did not allow an A127 crossing to be built. Furthermore, I recall that Scott, on behalf of the Partnership refused to give consent to move the electricity lines or gas main until a new A127 crossing was agreed. I further recall that within three days of this discussion, the highway authority agreed to build a new crossing over the A127 (**the Accommodation Bridge**) marked 'Accommodation Bridge' on the plan now produced and shown to me marked 'Exhibit JWP 8', and on that basis the Partnership gave its consent to move the electricity lines and gas main.

15 By the time the M25 works were completed in 1980 and the Accommodation Bridge and new entrances were in place, the Partnership's farming activities were fully arable (the disruption to Codham Hall Farm caused by the motorway development was too great to continue with dairy farming). The Partnership gained access to what had become the South Eastern section of Codham Hall Farm via one of the three farm accesses referred to in paragraph 11 above marked 'Entrance' on 'Exhibit JWP 8' (**the Entrance**) and the Accommodation Bridge. The Entrance (together with the Accommodation Bridge) were used all year round to gain access to the South Eastern section of Codham Hall Farm with essential plant and equipment. There is now produced and shown to me marked 'Exhibit JWP 9', a photograph from the early 1980s showing an example of the type of equipment that used the Entrance.

16 The Entrance led to the private roadways running East and South from the Entrance, each at the same level as the M25 interchange, with the Land forming an embankment leading down to field level. The Entrance and fencing leading from it enclosed the said the private roadways and the Land with Codham Hall Farm. There is now produced and shown to me marked 'Exhibit JWP 10' a series of photographs taken in or around 2009 with a key, which show the said areas as they had existed since the M25 works were completed in 1980, save that the private roadway running East from the Entrance to connect with the Accommodation Bridge was not hardened until the early 1990s. The Entrance is shown in 'Photograph 12' in 'Exhibit JWP 10'.

17 The private roadway running South from the Entrance was hardened in or around 1982. There is now produced and shown to me marked 'Exhibit JWP 11' a letter from the Partnership land agents, Savills dated 21st June 1982, granting permission to Edward Thompson Limited for the hardening of the private roadway running South. From 1982 to the present day, the private roadway running South has provided a route from the Entrance via an underpass running beneath the M25, to the South Western section of Codham Hall Farm.

18 Following 2000 and the family's freehold purchase of Codham Hall Farm (as described at paragraph 8 above) the Entrance has continued to be used by the freeholders and the Partnership. This period of use is dealt with in more detail in a statutory declaration being made by my son, Christopher.

19 Over the years, the Entrance and the private roadways leading South and East from it, (which enclose the Land with Codham Hall Farm) have, with the Partnership's consent, been used by a number of people and organisations.

19.1 The Partnership and subsequently the freeholder owners of Codham Hall Farm controlled the Entrance and the private roadways leading South and East from it, (all of which enclose the Land with Codham Hall Farm). Until in or around 2009, when the Entrance was redeveloped, the gate at the Entrance was secured by a padlock which the Partnership and later the freeholders of Codham Hall Farm had the only key to. The key was called 'No.6 Key' and the padlock can be seen on the photograph of the gate which appears at Exhibit JWP 10 (photograph 12).

19.2 Prior to 1980 (before the M25 was constructed), some of the pylons situated at Codham Hall Farm needed to be moved as they were in the way of the intended route for the new road. After the construction of the M25, with the Partnership's consent, the electricity board and their employees, equipment and vehicles have regularly used the Entrance and the private roadway leading South from it (all of which enclose the Land with Codham Hall Farm), as an access from the Junction 29 M25/A127 interchange roundabout for pylon maintenance purposes.

19.3 I recall that railway operators, with the Partnership's consent, would use the Entrance and the private roadway leading South from it (which both enclose the Land with Codham Hall Farm), to come on to the South Eastern section of Codham Hall Farm and down to the railway that runs along the Southern boundary of Codham Hall Farm.

19.4 By way of further example of the Partnership's control of the Entrance and the private roadways leading South and East from it, (all of which enclose the Land with Codham Hall Farm) C A Blackwell (Contracts) Ltd (**C A Blackwell**) were commissioned by the highway authority to repair the east side and the west side of the M25 embankment as it runs South from the M25, Junction 29 at regular intervals over a period of five years from the early 1980s. During each period of works the Entrance and the private roadway leading South from it, were used by C A Blackwell's employees to gain access to the repair sites with their machinery and materials. C A Blackwell would obtain the Partnership's permission to use the Entrance for each period of works. There is now produced and shown to me marked 'Exhibit JWP 12' a copy of a letter from CA Blackwell dated 19th November 1986 setting out their agreement to pay the Partnership for the access described in this paragraph.

19.5 Again, in 1982 Edward Thompson Limited (**ETL**) on behalf of the highway authority negotiated with the Partnership's land agents, Savills for access via the Entrance and the private roadway leading South from it (which both enclose the Land with Codham Hall Farm). A copy of Savills' letter to ETL dated the 21st June 1982 is at 'Exhibit JWP 11'. The purpose of the access was to conduct works to a ditch in connection with the M25. The Partnership, represented by Scott was paid £50 for the access and ETL agreed to install the hardened track that runs South from the Entrance between point A on the plan to the said letter (which is the Entrance and is described by Savills as, '...the new access to Mr. Padfield's "pylon" field'...') and point C on the said plan, which is level with a underpass under the M25 through to that part of Codham Hall Farm of the West of the M25.

19.6 Throughout the 1990s, up until in or around 2001, the Partnership operated a concrete crushing plant in the area marked 'Concrete Crushing' on Exhibit JWP 10 (the aerial photograph which is used as a key). I remember that the heavy machinery for that plant had to be brought to and from the site of the plant via the Entrance and the private roadway leading East from it. There is now produced and shown to me marked 'Exhibit JWP 13' a photograph showing the concrete crusher in action. I was very pleased when the concrete crushing activities ceased. I always felt it was a very dangerous part of Codham Hall Farm.

19.7 I also recall that in or around the late 1980s/ early 1990s we had a clay pigeon shoot at Codham Hall Farm, who regularly used the Entrance, with the Partnership's permission.

19.8 In 2004, following the freehold purchase of Codham Hall Farm, the highway authority paid the freeholders £11,000 for access to Codham Hall Farm via the Entrance and the private roadway leading South from it (which both enclose the Land with Codham Hall Farm). A copy of the letter that was received from the freeholders' land agent at Strutt & Parker in connection with this arrangement dated the 27th of July 2004 is now produced and shown to me marked 'Exhibit JWP 14'.

19.9 As mentioned, in 2009 the Entrance was redeveloped to form a return access, which involved the removal of the gate (but not the fence on either side that it was attached to). Later on, in 2014 in connection with a planning permission obtained by one of the tenants at Codham Hall Farm the Highways Agency agreed that the traffic lights that were already installed could be used to access Codham Hall Farm via the Entrance. There is now produced and shown to me marked 'Exhibit JWP 15' a copy of a letter addressed to my son Christopher, dated 1st May 2014 from the Highways Agency inviting the freeholders to enter an agreement pursuant to section 278 of the Highways Act 1980 to permit the use of those traffic lights and to discharge the cost of the same being installed. In sending that letter the Highways Agency treated the freeholders as owners of the Entrance and the land within it, responsible as private landowners for the cost of maintaining the road safety controls for the Entrance.

20 Throughout the period of the Tenancy and since the family's freehold acquisition of Codham Hall Farm in 2000, the Partnership and since 2000 also the freehold owners of Codham Hall Farm have treated the Entrance and the private roadways leading South and East from it, (all of which enclose the Land with Codham Hall Farm) and the Land as being part of Codham Hall Farm. During the said periods, the said persons have intended to possess the Entrance and the private roadways leading South and East from it together with the Land at all times and have treated and used the said areas as their own land.

21 Since the early 1990's, Scott and I have gradually stepped back from the day-to-day operations of the Partnership and my son Christopher has taken over. Christopher has been heavily involved in Codham Hall Farm since the mid 1980's and will be able to provide an account of the use of the Entrance, the private roadways leading South and East from it, and the Land up to the present day.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1835.

Signed by JOYCE WINIFRED PA[redacted]

Declared a[redacted]

On this [redacted]

Before me[redacted]

Signed ....[redacted]

A commis[redacted]

This is "Exhibit JWP 1", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at

[redacted]

A commissioner for oaths or a solicitor empowered to administer oaths.

Exhibit JWP 1

Exhibit JWP 1 (With surrounding title numbers for identification purposes)

This is "Exhibit JWP 2", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at

[redacted]

A commissioner for oaths or a solicitor empowered to administer oaths.

Great Warley
Estate.....

Name of Holding.....Codham Hall Farm

Tenant....H.C.S. Padfield.....

Rent £....3,758.....

THIS AGREEMENT is made the THIRTY FIRST day of DECEMBER One thousand nine hundred and Seventy one between THE COUNTY COUNCIL OF ESSEX (hereinafter called "the Council") by GEORGE SEAGER SEELEY their Land Agent and Valuer of the one part and HERBERT CHARLES SCOTT PADFIELD of Stubbers Farm Blackmore Ingatestone in the County of Essex (hereinafter called "the Tenant" which expression shall where the context admits include his executors administrators and assigns) of the other part WHEREBY the Council agree to let and the Tenant agrees to hire THE HOLDING containing 464.024 acres or thereabouts known as Codham Hall Farm and situated in the Parish of Great Warley and Cranham in the County of Essex and more particularly described in the First Schedule hereunder written and delineated on the plan attached hereto and thereon verged with Pink EXCEPT FOR RESERVED BY AND SUBJECT TO the conditions in the Second Third and Fourth Schedules hereunder written and also subject to the rights of the Outgoing Tenant from the twenty-ninth day of September One thousand Nine hundred and Seventy one from year to year determinable as hereinafter mentioned PAYING therefore the yearly rent of Three thousand seven hundred and fifty eight pounds and a proportionate rent for any part of a year over which the tenancy may extend

THE tenancy is subject to the provisions endorsed on this agreement and to the following conditions:-

1. The rent shall be paid at Clarendon House Friars Place Chelmsford in two equal half-yearly instalments on the twenty-fifth day of March and the twenty-ninth day of September in each year the first of such instalments to be paid on the twenty-fifth day of March next succeeding the date of the commencement of the tenancy and the last instalment to be paid three months previous to the termination of the tenancy — Rent

2. The Tenant shall pay all rates taxes charges or assessments whatsoever which may be charged upon or in respect of the Holding or any part thereof during the continuance of the tenancy (Landlord's Property Tax Land Tax Tithe Redemption Annuities and Landlord's proportion of Drainage Rate only excepted) — Rates and Taxes

3. The Tenant shall not underlet assign or part with the possession of the Holding or any part thereof except the cottage or cottages upon the Holding not being the farmhouse to an agricultural worker or workers employed upon the Holding by the Tenant at a rent or rents not exceeding the weekly amount fixed by the Essex Agricultural Wages Committee as being the benefit of the occupation for the purpose of the minimum agricultural wage — Sub-Letting

4. The Tenant shall preserve all timber willows and other trees tellers pollards saplings and underwood from injury by cattle or otherwise and shall report any dangerous trees to the Council's Land Agent and Valuer and shall not cut lop top prune hang gates on or drive nails into destroy or injure any timber or timberlike trees — Preservation of Timber

5. The Tenant shall not without the previous consent in writing of the Council except as provided by Section 50 of the Agricultural Holdings Act 1948 erect any house or building or alter any existing dwellinghouse or building whatsoever on the holding and shall if requested in writing so do so forthwith remove any unsightly or dangerous erection whether erected by the Tenant or not and shall comply with the building regulations in force in the district — Erection of Buildings

6. The Tenant shall not install any electrical generating plant or fittings or affix any oil or petrol engines in any house or building on the Holding without previous consent in writing of the Council or do any act by which any policy of insurance of the Council shall be invalidated and shall indemnify the Council against any losses charges costs or expenses incurred by any breach of this Clause

Electrical Generating Plant and Oil and Plant Engines

7. The Tenant shall not use the Holding or any part thereof for trading other than with produce grown or produced on the Holding except with the written consent of the Council

Trading

8. The Tenant agrees except for the liabilities which are the responsibility of the Council under Clause (34) hereof:-

(i) To repair and to keep maintain and leave clean and in good repair and condition the whole of the buildings structures fixtures and fittings upon the holding together with water supply systems fences hedges gates walls posts stiles bridges culverts ponds water-courses ditches roads and yards in and upon the holding or which may be erected or provided thereon during the tenancy and to keep clear and in good working order all roof valleys eaves-guttering and downpipes drains sewers sewage disposal systems gulleys and greasetraps and also to use carefully so as to protect all such items from wilful reckless negligent or accidental damage and to make good all such damage directly it occurs

(ii) To properly paint with at least two coats of a suitable quality paint and apply gas-tar creosote or other suitable preservative to all outside wood ironwork and other material to which it is necessary so to do as often as necessary to prevent deterioration and in any case at intervals of not more than five years

(iii) As often as may be necessary and in any case at intervals of not more than seven years to properly clean colour whiten paper and paint with materials of suiteble quality the inside of the dwelling-house cottages (if any) and buildings which have been and should be so treated and in each year of the tenancy to limewash the inside of all buildings which have been or should have been previously limewashed

(iv) Notwithstanding the liability of the Council for repairs and replacements to the roof covering under clause (34) to be responsible for the first fifteen pounds of the cost in any one year of renewing or replacing all broken cracked or slipped tiles slates or other roof covering materials as the damage occurs

(v) If the last year of the tenancy is not a year in which such cleaning colouring whitening papering painting tarspraying creosoting as mentioned in paragraphs (ii) and (iii) is due to be carried out to pay to the Council at the end of such year one-fifth part of the estimated reasonable cost of such items in paragraph (ii) and one-seventh part of such items in paragraph (iii) in respect of each year that has elapsed since that work was last executed

(vi) To maintain in proper repair all hedges and to cut and trim a proper proportion of hedges in each year so as to maintain them in good and sound condition

(vii) To regularly dig out scour and cleanse all ponds watercourses ditches and gripe as may be necessary to maintain them at sufficient width and depth and to keep clear from obstruction all field drains and their outlets

(viii) To report at once to the Council any apparent defects rot or other structural deterioration

9. If the Tenant fails to execute repairs for which he is liable under the beforementioned clause 8 within one month of receiving from the Council a written request specifying the necessary repairs and calling on him to execute them the Council may enter on the Holding and execute such repairs and recover the cost from the Tenant forthwith

10. The Tenant shall directly it occurs and at his own expense make good all damage to the Council's property caused by his stock and all wilful damage or damage caused by negligence of the Tenant or any member of his household or his employees

Advertisement Hoardings

11. The Tenants shall not without the written consent of the Council erect any advertisement or other hoarding on the Holding (except for the purpose of advertising his own produce where the advertisement or hoarding shall be in a form previously approved by the Council) and the Council shall be entitled to attach such conditions as they deem fit to any consent given by them

Use of Holding

12. The Tenant shall himself reside in the house and cultivate the Holding and shall not use it for any purpose other than agriculture as defined in Section 109 of the Agriculture Act 1947

Management and Cultivation of Holding

13. The Tenant shall manage and cultivate the whole Holding in accordance with the rules of good husbandry set out in Section 11 of the Agriculture Act 1947 and in particular and without prejudice to the generality of these rules shall use the holding primarily as an arable and stock Holding and shall not allow any sugar beet quota or potato acreage allocation to reduce without the written consent of the Council's Land Agent and Valuer

14. The Tenant shall periodically or when required by the Council's Land Agent and Valuer cause samples of the soil from the arable and grassland on the Holding to be analysed and shall make suitable applications of chalk lime or fertilizers where there is shown to be a deficiency

Cultivations during last year

15. In the last year of the tenancy the Tenant shall unless agreed otherwise in writing by the Council's Land Agent cultivate and manage the arable land in accordance with the Third Schedule of this Agreement

16. The Tenant shall not plant any fruit trees fruit bushes or plants or any rhubarb asparagus seakale mint sage or herbs or market garden crop of a perennial or permanent nature but the Tenant shall at the expiration of the tenancy be paid for any annual vegetable crop which it has been agreed under clause 15 may be grown which has reached such an advanced stage of maturity that the yield can be fairly estimated at market value less the costs of harvesting and marketing or if such crops are not matured upon the same basis as that for which growing crops would be paid under Section 51 of the Agricultural Holdings Act 1948 provided that if the Council or Incoming Tenant within one calendar month before the termination of the tenancy give notice in

writing to the Tenant that they decline to purchase such crops then the Council will permit the Tenant to enter on the land upon which such crops are growing with free access thereto until the twenty-fifth day of March next after the expiration of the tenancy for the purpose of attending cultivating managing selling or removing the said crops the Tenant paying to the Council the pro rata apportionment of the rent under this Agreement for every acre or part of an acre of such land from the twenty-ninth day of September until the twenty-fifth day of March or the removal or notified abandonment of such crops whichever date may be the earlier but any crop grown contrary to the provisions of clause 15 shall be paid for only on the basis of Section 51 of the Agricultural Holdings Act 1948 and no hold-over shall be allowed

17. The Tenant shall properly maintain the orchard (if any) on the Holding keeping the trees duly pruned and sprayed in a husbandlike manner and shall keep and leave the gardens in good condition — Orchards and Gardens

18. The Tenant shall not sell or remove from the Holding any farmyard manure without written consent from the Council's Land Agent and Valuer — Prohibition as to sale or removal of manure

19. The Tenant shall not permit any rubbish spoil or other waste material to be shot or deposited on the land and shall destroy or otherwise dispose of all tins bottles and rubbish and not do or permit to be done on the Holding anything which might be become or cause a nuisance damage or annoyance to the Council or to the occupiers of the adjoining lands whether holdings let by the Council or not — Litter

20. The Tenant shall not allow any pigs to run loose in any of the fields comprising the Holding without being properly ringed and shall not allow any pigs to run loose in any occupation road or lane adjoining or forming part of the Holding — Pigs

21. Where poultry is kept by the Tenant in permanent pountry runs the land shall be dressed at the Tenant's expense with burnt quick lime at the rate of at least one ton per acre every second year of the tenancy — Poultry

22. The Tenant shall keep and produce at any time at the request of the Council's Land Agent and Valuer a true account of all croppings upon the Holding together with a record of the provision made for the return to the Holding of the full equivalent manurial value of all crops sold off or removed from the Holding — Records

23. The Tenant shall on entering the Holding pay to the Council on demand the amount of compensation that would be due to the Outgoing Tenant in respect of the Holding under the provisions of the Agricultural Holdings Act 1948 if the Outgoing Tenant had been holding under the terms of an agreement containing similar terms with due alteration of details as those herein contained but excluding compensation (if any) for improvements other than fruit bushes set out in Part I of the Second Schedule and Parts I and II of the Third Schedule of the Agricultural Holdings Act 1948 and excluding compensation for disturbance but without deducting therefrom any amount payable or to become payable by the Outgoing Tenant and shall pay the usual Valuer's fees for settling the amount of such compensation and where the Council is in occupation of the Holding prior to the commencement of the — Compensation to Landlord and Tenant

tenancy shall pay on demand for all fixtures specified by the Council and all sums properly payable by an Incoming Tenant for growing crops tillages dead stock and other matters to which the Council would be entitled if it were an Outgoing Tenant holding under the terms of this Agreement after deducting theerefrom all sums which the Council would be liable to pay if it were an Outgoing Tenant

24. The Tenant shall in the last year of the tenancy bale cart and stack in the usual stacking places all straw arising from the corn crop or such proportion thereof as is previously agreed in writing by the Council's Land Agent and Valuer whereupon the surplus straw after being suitably treated shall be ploughed in

Breaking up of Pasture

25. The Tenant shall not break up or convert into tillage any part of the permanent grassland (including land laid to grass for which the Landlord has provided seeds) whether so described in the First Schedule or not without the previous consent in writing of the Council's Land Agent or the order of an arbitrator under Section 10 of the Agricultural Holdings Act 1948

Prohibition against Agistment

26. The Tenant shall not without the written consent of the Council's Land Agent sell or let the right of grazing on the Holding or take in thereon stock belonging to any other person

Insurance by Tenant

27. The Tenant shall insure and keep insured against fire all growing and harvested crops for the time being on the Holding to the full market value thereof and in the event of the whole or any part of the produce required by this agreement to be consumed on the Holding being destroyed or damaged by fire shall expend forthwith the full value of such produce in the purchase of like produce which shall be consumed by stock in the proper manner or shall bring on and apply to the Holding the equivalent manurial value in artificial manures or feeding stuffs approved by the Council's Land Agent

28. The Tenant shall insure and keep insured to their full value against fire his household furniture and live and dead farming stock

29. The Tenant shall whenever required by the Council's Land Agent produce the policy or policies of such insurances as are required by Clauses (27) and (28) and the receipts for the current year's premiums

Right of Entry

30. The Tenant shall permit the Council and all persons authorised by them at all reasonable times to enter upon and inspect the Holding and examine the state of repair and cultivation thereof and execute repairs and improvements and to enter for all other reasonable purposes

Trespass

31. The Tenant shall forthwith bring to the notice of the Council and use his best endeavours to prevent trespass and the formation of any new footpaths or rights of way over the Holding

Bill of Sale, etc.

32. The Tenant shall not at any time during the tenancy enter into any arrangement involving a legal charge whether by Bill of Sale or otherwise on his live and dead farming stock or household effects without giving previous notice to the Council

33. The Council at its discretion shall expend upon the Holding any sum or sums received from the Outgoing Tenant in respect of those matters for which he is liable under the provisions of this agreement and shall pay to the Incoming Tenant any portion of such sum or sums as soon as dilapidations have been remedied by the Incoming Tenant

Dilapi

34. The Council shall execute all repairs and replacements to the structural parts of the buildings including external walls load bearing walls roofs and the covering thereof (except insofar as this is the liability of the Tenant under Clause 8 (iv)) trusses frames and structural timbers and the replacement where necessary of floors and provided the Tenant has complied with Clause 8 (viii) shall execute any repairs which would otherwise be the liability of the Tenant caused by structural defects or the making good thereof by the Council under this clause

Repair
by Coun

35. The Council shall keep the dwellinghouse cottages and buildings insured to their full value against loss or damage by fire and execute all works of repair or replacement to the dwellinghouse cottages and buildings necessary to make good damage by fire being damage not due to the wilful act or negligence of the Tenant or any members of his household or his employees

Insuranc
by Coun

36. The Council shall be under no liability to execute repairs or replacements to buildings or fixtures which are the property of the Tenant or to execute the repair of damage caused by the Tenant's stock or by the wilful act of negligence of the Tenant or any member of his household or his employees

Tenant
Buildi

37. The Council will on the Tenant quitting the holding provided he has observed and performed the stipulations on his part contained in this Agreement pay to the Tenant (subject to and after setting off any sums due to the Council for rent or otherwise under or by virtue of this agreement) for improvements and other matters specified in the Fourth Schedule of the Agricultural Holdings Act 1948 in accordance with the provisions of Section 51 of that Act except insofar as they may be varied by specific clauses in this agreement

Tenant
Right
Compens

38. The Tenant shall be allowed to hold over until the twenty-fifth day of March next succeeding the Michaelmas Day at which the tenancy is terminated the necessary storage accommodation for corn grown in the last year of the tenancy and the Tenant shall before the twenty-fifth day of December next succeeding the Michaelmas Day at which the tenancy is terminated remove from the Holding all crops of potatoes and sugar beet provided the sugar beet tops are left on the Holding free to the Council and all potato haulm is removed from the Holding or burnt thereon and in no circumstances shall seeds cultivations fertilizers or manures be paid for in respect of sugar beet or potatoes unless other arrangements have been agreed in writing with the Council's Land Agent and Valuer

Holdover

39. The Council will permit the Tenant on his punctually paying the rent and performing and observing the conditions of this agreement peaceably to occupy the Holding without any disturbance by the Council or any person lawfully claiming under the Council

Quiet
Enjoyme

40. Nothing herein contained shall be deemed to be a consent by the Council within the meaning of the Agricultural Holdings Act 1948 to any of the improvements set out in the Fifth Schedule of that Act nor shall the Holding or any part thereof be deemed to be let as a market garden

Market Gardening

41. (i) All those buildings listed under Schedule Four hereunder shall be considered redundant to the Holding and there shall be no liability on either the Council or the Tenant to repair or maintain such buildings but when they reach such a state of deterioration as to be dangerous or unsightly the Council shall undertake their demolition

Redundant Buildings

(ii) If at any time during the tenancy either party considers that any building on the Holding other than those included in the Fourth Schedule should be treated as redundant to the proper requirements of the Holding then in default of agreement with the other party the question after one calendar months notice in writing has been served by either party may be referred to the decision of a single Arbitrator to be appointed in accordance with the Agricultural Holdings Act 1948 and any building agreed or declared by the Arbitrator to be redundant shall be deemed to be included in the Fourth Schedule from the date of such agreement or Arbitrator's award and both parties shall be rrelieved of any liability for repair as set out in Para (i) of this clause

42. Upon any seizure by the Council under distress for rent the Council shall not be obliged to sell any hay straw or crops (except the crops which the Tenant may sell or remove from the Holding without contravention of this agreement) upon the terms that the same may be removed from the Holding but may exercise the power of sale of distrained goods conferred by statute by selling the same subject to the conditions that such produce shall be consumed on the Holding or subject to some other condition which shall secure that the manurial value of such hay straw or crops shall be returned to the Holding and upon any such seizure and sale it shall be lawful for the Council to grant to any purchaser of such hay straw or crops and for such period or periods as the Council may thing fit and also the use of such part or parts of the Holding as the Council may think necessary or proper for the purpose of storing consuming or otherwise dealing with such hay straw or crops and without making any compensation to the Tenant in respect thereof

Distress

43. All notices including notices to quit may be served in accordance with Section 92 of the Agricultural Holdings Act 1948

Service of Notices

44. The Council may at any time or times by giving three calendar months previous notice to quit expiring at any time enter upon and resume possession of and determine the tenancy of the whole of the Holding or of any part or parts of the Holding for purposes of building mining or industrial purposes or for use as an open space or for any recreational purposes or other local authority purpose not being the use of the land for agriculture

Resumption of Possession

45. In case the Tenant neglects to perform or observe any of the agreements on his part herein contained after one month's notice in writing from the Council of such neglect the Council shall be at liberty (without prejudice to the provisions of Clause (46) hereof) to do all such things as may be necessary for the performance or observance thereof and to recover the cost of doing so from the Tenant

Neglect to Perform and Observe Agreements

Re-Entry

46. If any part of the rent shall be in arrear for one month after the expiration of the half-year in respect of which it is payable or if there shall be a breach of any of the agreements by the Tenant herein contained or in case the Tenant shall be adjudged bankrupt or shall enter into any composition with his creditors or if the interest of the Tenant under his agreement be taken in execution or if any execution be levied on the Tenant's goods and chattels or possession thereof or if any stock or crops on the Holding be taken under a Bill of Sale it shall be lawful for the Council after giving to the Tenant not less than two months' notice of their intention so to do to re-enter upon the Holding or any part thereof in the name of the whole and thereupon the tenancy shall absolutely determine without prejudice to the rights and remedies of the Council in respect of any breach or non-observance of any of the covenants and conditions herein contained and on the part of the Tenant to be performed and observed

Deductions

47. The Council shall be entitled to set off against and deduct from any monies which may at any time be payable by the Council to the Tenant in respect of the Holding any monies which may be payable to the Council by the Tenant in respect of the Holding whether such sum so payable by or to the Council shall be of liquidated character or not

Record of Condition

48. The cost of making any Record of Condition required under Section 16 of the Agricultural Holdings Act 1948 shall be borne by the party requiring it

Stamp Duty on Agreement

49. The Tenant shall pay the stamp duty on this Agreement and on the duplicate or counterpart thereon

Determination of Tenancy

50. The tenancy may be determined by the Council or the Tenant at the expiration of any year of the tenancy by not less than twelve calendar months' previous notice in writing but such determination shall be without prejudice to the remedies of the Council against the Tenant in respect of any antecedent breach by the Tenant of the agreements on his part herein contained or of any condition or term of the tenancy

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO

Field areas and cultivations

Ordnance No. on Plan	DESCRIPTION AND CULTIVATION ON ENTRY	AREA
Great Warley		
216	Arable	10.954
217	Arable	12.586
218	Pasture	16.735
Pt.219	Wood	29.094
249	Wood	1.955
261	Wood	7.793
262	Pasture	14.879
263	Wood	1.030
277	Pasture	4.757
278	Pasture	6.981
278A	Two cottages	0.317
279	Two cottages	0.318
280	Wood	5.664
280A	Pond	0.110
281	Arable	12.553
281A	Arable	0.100
282	Arable	4.861
282A	Arable	2.987
287	Road	0.672
288	Pasture	2.217
288A	Shed and yard	0.647
289	Wood	1.846
291	Pasture and buildings	2.458
292	Yard and buildings	2.444
293	Codham Hall	1.052
294	Pasture	0.096
Pt.304	Pasture	11.493
Pt.304A	Pasture	0.631
304C	Pasture	2.641
305	Pasture	5.455
305A	Pasture	3.015
306	Pasture	10.944
320	Arable	12.797
321	Arable	14.587
Pt.323	Pasture	3.276
324	Pasture	0.019
325A	Pasture	0.780
Pt.325	Arable	16.992
326A	Pasture	3.024
326B	Arable	12.463
Pt.337	Arable	25.368
338	Wood	2.072
339	Wood	1.902
340 & 340A	Arable	26.072
341	Pasture	0.985
341A	Pasture	0.378
342	Arable	12.032
343	Pasture	20.774
352	Arable	12.269
353	Arable	9.488
354	Arable	12.133
354A	Pond	0.110
355	Arable	18.636
356	Arable	18.424
358	Arable	17.016
359	Arable	3.013
376	Arable	11.512
Cranham		
146	Arable	8.053
147	Wood	10.259
		464.024

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO

Exceptions and Reservations

All springs of water mines quarries minerals clay sand stone gravel and sub-strata and all trees timber willows and underwood in under or upon the Holding with power for the Council or any persons authorised by them with or without vehicles and equipment to enter cut and remove the timber and to get and carry away minerals stone or gravel making reasonable compensation to the Tenant for any damage caused thereby

All existing rights of way or easements over or under the land at the date of entry

Power for the Council upon service of one month's notice from any date to create or grant additional rights of way wayleaves licences or easements over or under the land subject to the payment of fair compensation to the Tenant

The right for the Council and all persons authorised by them to make and use such ways across the Holding as may in the Council's opinion be necessary or convenient for the proper working of their adjoining holdings or for access to cut and remove timber tellers saplings or underwood from any lands vested in the Council

Power for the Council to grant similar rights of hold-over to the Outgoing Tenant as are granted to the Tenant under Clauses (16) and (30) of this agreement

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO

Cultivations during last year

Corn - Three fifths of the arable land or thereabouts
Clover or Seeds Mixture - One fifth of the arable land or thereabouts
Pulse or roots - One fifth of the arable land or thereabouts

THE FOURTH SCHEDULE HEREINBEFORE REFERRED TO

Redundant Buildings

The range of Pig Housing on the north side of the Homestead.
The brick built range to the West of the covered yard together with the remaining buildings in O.S. Nos. 280A and 291

SIGNED by the said)
GEORGE SEAGER SEELEY)
in the presence of:-)

DATED 3rd January 19 71

COUNTY COUNCIL OF ESSEX

AGREEMENT
FOR LETTING

Estate... Great Warley .....

Name of Holding... Codham Hall Farm .....

.....

Tenant... H.C.S. Penfield .....

Acreage... 464.024 acres .....

Rent... £3756.00 .....

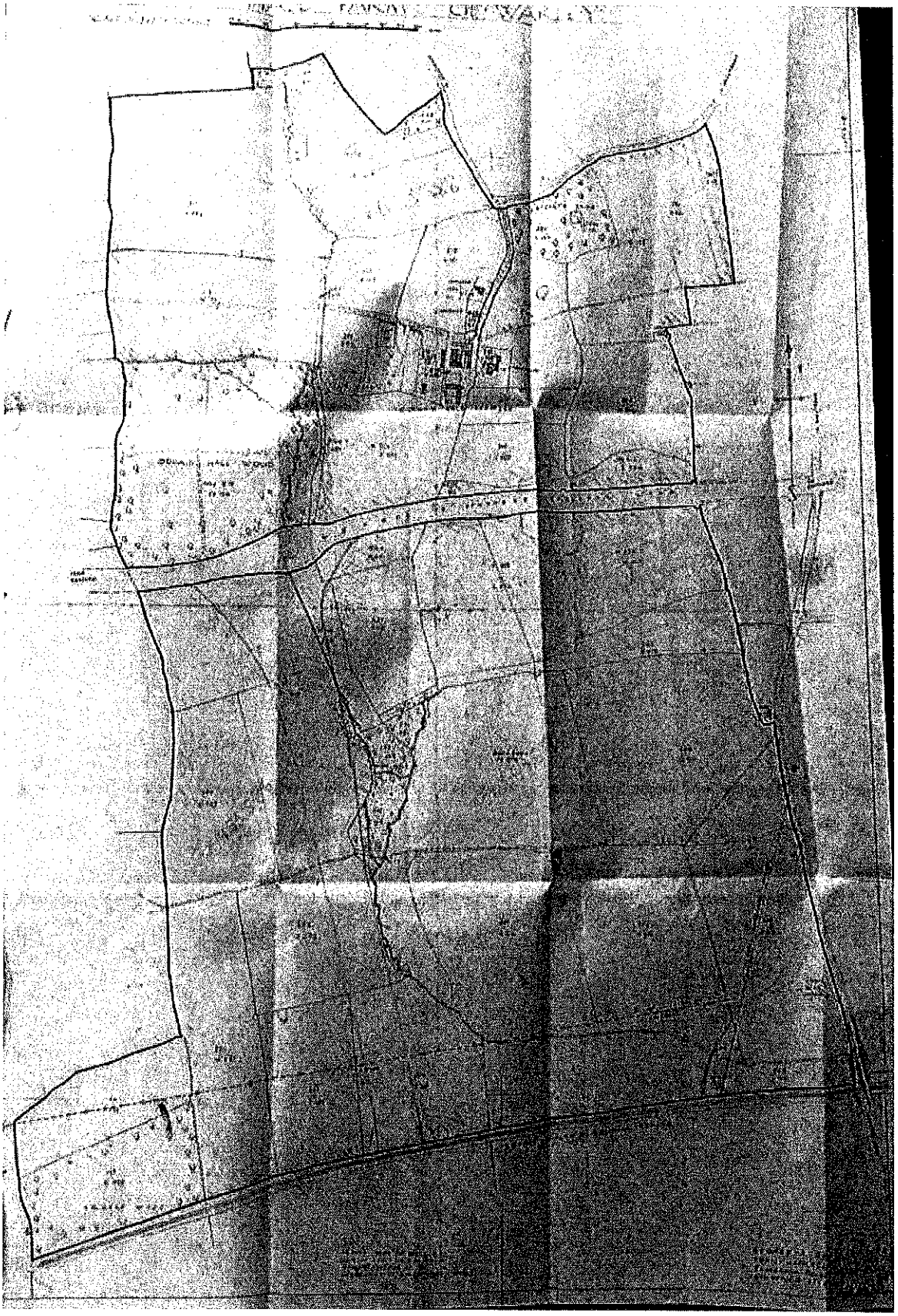
Date of Entry... 29th September 1971

Tenancy... Michaelmas .....

This is "Exhibit JWP 3", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at

[redacted]

A commissioner for oaths or a solicitor empowered to administer oaths.



This is "Exhibit JWP 4", referred to in the Statutory Declaration of Herbert Charles Scott Padfield

[redacted]

A commissioner for oaths or a solicitor empowered to administer oaths.

These are the notes referred to on the following official copy

Title Number EX653586

The electronic official copy of the document follows this message.

This copy may not be the same size as the original.

Please note that this is the only official copy we will issue. We will not issue a paper official copy.

Transfer of whole of registered tit [redacted] **HM Land Registry**

TR1

(if you need more room than

1. Stamp Duty

Place "X" in the box that applies and complete the box in the appropriate certificate

☐ I/We hereby certify that this instrument falls within category ☐ in the Schedule to the Stamp Duty (Exempt Instruments) Regulations 1987

☒ It is certified that the transaction effected does not form part of a larger transaction or series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of

£ 500,000.00

2. Title Number(s) of the Property *(leave blank if not yet registered)*

3. Property Codham Hall Farm (South) Great Warley Brentwood Essex shown for identification purposes only edged red on the plan annexed hereto ("the Plan")

If this transfer is made under section 37 of the Land Registration Act 1925 following a not-yet registered dealing with part only of the land in a title [illegible] under rule 72 of the Land Registration Rules 1925. Include a reference to the last preceding document of title containing a description of the property.

4. Date 30th March 2000

5. Transferor *(give full names and Company's Registered Number if any)*

ESSEX COUNTY COUNCIL

6. Transferee **for entry on the register** *(Give full names and Company's Registered Number if any. For Scottish Co. Reg. Nos., use an SC prefix. For foreign companies give territory in which [illegible])*

WINTERTHUR PENSION TRUSTEES UK LIMITE [redacted]

Unless otherwise arranged with the Land Registry headquarters, a certified copy of the transferee's [illegible] corporate but is not a company registered in England and Wales or Scotland under the Companies Acts

7. Transferee's intended **address(es) for service in the U.K.** *(including postcode)* **for entry on the register**

24-27 Barnack Business Centre Blakey Road Salisbury Wiltshire SP1 2LP

8. The Transferor transfers the property to the Transferee.

9. Consideration *(place "X" in the box that applies. State clearly the currency unit if other than sterling. If none of the boxes applies, insert an appropriate memorandum in the additional provisions panel.*

☒ The Transferor has received from the Transferee for the property the sum of *(in words and figures)* **FOUR HUNDRED AND THIRTY FIVE THOUSAND POUNDS (£435,000.00)**

☐ *(Insert other receipt as appropriate)*

☐ The Transfer is not for money or anything which has a monetary value

SEQ68

P QUALITY

10. The Transferor transfers with *(please "X" in the box which applies and add any modifications)*

[X] full title guarantee

[ ] limited title guarantee

11. Declaration of trust *Where there is more than one transferee, place "X" in the appropriate box*

[ ] The transferees are to hold the property on trust for themselves as joint tenants.

[ ] The transferees are to hold the property on trust for themselves as tenants in common in equal shares.

[X] The transferee is to hold the property as Trustee of the Winterthur Life Self Administered Personal Pension Scheme

12. Additional Provision(s) *Insert here any required or permitted statement, certificate or application and any agreed covenants, declarations etc*

See continuation sheet

13. ***The Transferors and all other necessary parties should execute this transfer as a deed using the space below.*** *Forms of execution are given in Schedule 3 to the Land Registration Rules 1925 If the transfer contains transferees' covenants or declarations or contains an application by them (e g. for a restriction), it must also be executed by the Transferees.*

The **COMMON SEAL of ESSEX COUNTY COUNCIL** was affixed hereto in the presence of:-

[redacted]

EXECUTED as
PENSION TRU
the presence of:-

[redacted]

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued".*

Panel 3 continued

Together with the right of way with or without vehicles and agricultural machinery over and along the bridge and roadway between the points marked F G and H on the Plan to the Highway together also with a right of way with or without vehicles not exceeding three metres in width through the tunnel under the M25 between the points marked B and C on the Plan and together with full and free rights of access with or without vehicles and agricultural machinery to and from the Highway known as junction 29 of the M25 at the points marked 2 and 3 on the Plan and TOGETHER with the like right of way through Hobbs Hole Wood (retained by the Transferor) via the crossing coloured yellow on the Plan

Yellow

Panel 12 continued

1. The property is transferred subject to and where appropriate with the benefit of the matters contained or referred to in the following documents:-

1.1 A conveyance dated 26th April 1939 made between Clayhall Park Estates Limited (1) and The County Council of the Administrative County of Essex (2) (hereinafter referred to as "the Conveyance")

1.2 A Deed dated 12th June 1941 made between the County Council of the Administrative County of Essex of the one part and the London County Council of the other part (hereinafter referred to as "the Green Belt Deed")

1.3 An undated Wayleave Consent made between Essex County Council of the one part and Eastern Electricity Board of the other part in respect of works north of Franks Farm Great Warley aforesaid

1.4 An undated Wayleave Consent made between the County Council of Essex of the one part and The Eastern Electricity Board of the other part in respect of the Cranham – Alma Park 11KV Line

1.5 A Wayleave Consent of 4th January 1952 made between The Essex County Council of the one part and British Electricity Authority of the other part

1.6 A Wayleave Consent of 10th November 1953 made between the County Council of Essex of the one part and Eastern Electricity Board of the other part

1.7 A Wayleave Consent dated 22nd May 1959 made between the County Council of Essex of the one part and The Eastern Electricity Board of the other part

1.8 A Wayleave Consent dated 12th January 1962 made between the County Council of Essex of the first part R H Goodchild of the second part and The Eastern Electricity Board of the third part

Continuation sheet [ ] **of** [ ]

(Insert sheet number and total number of continuation sheets e.g. "sheet 1 of 3")

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued".*

Panel 12 continued

1.9 A Deed of Grant dated 5th June 1964 made between The County Council of Essex of the first part Robert Hicks Goodchild of the second part and North Thames Gas Board of the third part

1.10 An Assignment of 7th June 1988 made between Herbert Charles Scott Padfield of the first part County Council of Essex of the second part and the Secretary of State for Transport of the third part

1.11 A Deed of Grant dated 23rd June 1980 made between the Essex County Council of the one part and British Gas Corporation of the other part

1.12 A Deed of Grant dated 28th August 1990 made between the Council of the first part Herbert Charles Scott Padfield of the second part and Essex Water Company of the third part

1.13 A Deed of Grant dated 26th August 1992 made between the Council of the one part and British Gas Plc of the other part

1.14 The public bridleway with a width of 3 metres the route of which is shown coloured green on the Plan GREEN

1.15 The M25 Motorway (A13-A12 section) (North of Ockendon to Naggs Head Lane) Compulsory Purchase Order (No. CE9) 1979 (hereinafter referred to as "the CPO")

2.1 The parties declare that Section 62 of the Law of Property Act 1925 shall not operate to pass to the Transferee nor shall the Transferee be otherwise entitled to any rights or privileges of whatsoever nature other than those expressly hereby granted

2.2 It is further agreed and declared that the compensation payable in respect of only those parts of the Property affected by the CPO shall be payable to the Transferee and the Transferee shall indemnify the Transferor in respect of any obligations imposed by the CPO in respect of the Property insofar as they remain to be observed and performed

3. There are excepted and reserved to the Transferor for the benefit of such land referred to in the Conveyance as is shown edged blue on the Plan ("the Retained Land") the following matters:- BLUE

Continuation sheet [ ] **of** [ ]

(Insert sheet number and total number of continuation sheets e.g. "sheet 1 of 3")

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued"*

Panel 12 continued

3.1 The right to pass and repass with or without motor vehicles equipment and agricultural vehicles over and along the strip of land six metres in width shown coloured brown on the Plan and a strip of land six metres in width including and following the route of the Bridleway for all purposes (including timber extraction) connected with any present horticultural or silvicultural use of the Retained Land AND IT IS HEREBY AGREED that no compensation shall be payable by the Council to the Purchaser in respect of such use of the said access

3.2 The right for the Council and persons authorised by the Council to enter the Bridleway (upon giving the Purchaser reasonable prior notice (except in case of emergency) with or without workmen vehicles equipment material and specialist services for the purposes of constructing repairing maintaining and renewing the Bridleway and the tunnel between points B and C on the Plan

3.3 All quasi-easements and other rights in the nature of easements as are now or have hitherto been used or enjoyed by the Retained Land over the Property and all such other rights as would have been enjoyed had the Property and the Retained Land been in separate ownership for more than forty years

3.4 The right to rebuild reconstruct build on or otherwise develop the Retained Land in such manner as the Council shall think fit notwithstanding any interference thereby occasioned to the access of light or air to the Property to the intent that the Purchasers and his successors in title shall be deemed to enjoy the access and use of light and air to the Property with the consent and by the leave and licence of the Council and shall not by the enjoyment thereof acquire any absolute or indefensible or other right thereto from and over the Retained Land nor acquire any right to restrain impede or control the erection of any building or the alterations of or reconstruction of any building upon the Retained Land as aforesaid or to damages in consequence of or arising from such operations or user physical damage to the buildings on the Property and the services thereto expected

Continuation sheet [ ] **of** [ ]

(Insert sheet number and total number of continuation sheets e.g. "sheet 1 of 3")

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued".*

Panel 12 continued

3.5 The right for the owners and occupiers for the time being of Codham Hall Farm (North) (being the land comprised in a Transfer of even date made between the Council (1) and Messrs H C S J W and C S Padfield (2)) to pass and repass with or without vehicles and agricultural machinery over and along the roadway or track between points E and F on the plan for the purpose of access to the highway and the point marked 2

4. The Transferor hereby covenants with the Transferee henceforth to maintain repair and renew whenever necessary the structure of the bridge and the embankment between points F and G on the Plan

5. The Transferee for the purpose of affording to the Transferor a full and sufficient indemnity b[redacted] not further or otherwise hereby covenants with the Transferor that they the Transferee and the persons deriving title under them will at all times hereafter observe and perform the covenants and stipulations contained or referred to in the Conveyance and the Green Belt Deed so far as the same relate to the Property and are still subsisting and capable of being enforced and will a[redacted] far as aforesaid indemnify and keep indemnified the Transferor and its estate and effects from and against all actions claims and demands in respect of any future non-observance or non-performance thereof

6. The Transferee hereby covenants with the Transferor and its successors in title pursuant to Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 as follows:-

6.1 The Transferee for itself and its successors in title hereby covenants with the Transferor that on any sale or transfer ("a disposition") including a sale by a mortgagee and including the grant of a Lease at a premium or other disposition of the Property or any part thereof (but excluding any disposition by way of gift to a husband wife child or children of the donor or the creation of a mortgage and excluding also the creation for full value of a Farm Business Agricultural or Residential tenancy or a Lease at full value relating to commercial premises) at any time arising within a period of twenty years from the date hereof the Transferee or his successors in title will pay to the Council 50% of the difference between the value of the Property or the relevant part thereof at the date of a disposition but only with the benefit of any planning consent or established planning use now existing and the value of the Property or such part thereof at the date of such disposition arising at any time within such twenty year period forthwith payable on the happening of any of the following events:-

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued"*

Panel 12 continued

6.1.1 A disposition with the benefit of a Planning Permission granted after the date hereof for the conversion of farm buildings to residential user

6.1.2 A disposition with the benefit of a Planning Permission granted after the date hereof for any residential or any commercial development other than a disposition with the benefit of a Planning Permission for the use of land as garden land or as a paddock

6.1.3. A disposition of any farm buildings with the benefit of a Planning Permission granted after the date hereof for a change of use to that of a commercial purpose

SAVE THAT the parties hereto agree that in calculating the said sum payable to the Transferor there shall be deducted sums equal to 50% of the professional fees and disbursements incurred by the Transferee in connection with a disposition and with the obtaining of such Planning Permission and 50% of the cost of obtaining any necessary release or consent under the terms of the Green Belt Deed

PROVIDED THAT any dispute arising out of the provisions of this clause 6.1 shall be referred on the application of either party to the determination of an Independent Chartered Surveyor to be forthwith agreed between the parties to act as an expert or in the case of the parties not being able to agree the appointment of such a Surveyor such dispute shall be determined by an Independent Chartered Surveyor to be appointed on the application of the Transferor or the Transferee or their successors in title by the President of The Royal Institution of Chartered Surveyors or any body into which the said body may be merged or reconstructed or by a person appointed on behalf of the said President and the person so appointed shall act as an expert alone for the purposes of the said determination and the fees of such an expert shall be borne by the Transferor and the Transferee or their successors in title as the said expert shall so decide. The expert shall afford the Transferor and the Transferee or their successors in title an opportunity to make written representations to him and he shall issue his decision to the Transferor and the Transferee or their successors in title within 30 days of being appointed If the person so appointed to act as an expert by the parties or by the President for the time being of the Royal Institution of Chartered Surveyors or the person acting on his behalf shall die delay or become unwilling or incapable of acting or if for any reason the said President or the person acting on his behalf in his absolute discretion think fit he may discharge such expert and appoint another in his place

Continuation sheet [ ] **of** [ ]

(Insert sheet number and total number of continuation sheets e.g. "sheet 1 of 3")

Continuation sheet for use with application and disposition forms

HM Land Registry

CS

1. Continued from Form TR1 Title number(s)

2. *Before each continuation, state panel to be continued, e.g. "Panel 12 continued".*

Panel 12 continued

6.2 The Transferee for himself and his successors in title FURTHER COVENANTS with the Transferor:-

6.2.1. In the event that the Transferee or his successors in title shall obtain a Planning Permission for any of the uses contained in the clauses 6.1.1 6.1.2 and 6.1.3 above then the Transferee or his successors in title shall notify the Transferor within 28 days of receipt of such Planning Permission

6.2.2. The Transferee shall not sell or transfer or otherwise dispose of the Property to any part thereof within twenty years from the date hereof without having prior to or contemporaneously with the sale or transfer or other disposition obtained a Deed of Covenant directly with the Transferor to observe and perform the covenants contained in this Schedule at the expense of the Transferee which Deed of Covenant will include a covenant from the incoming transferee that any future disposal will be subject to a like covenant being interest into by the person to whom such a disposal is made with the Transferor in respect of the future observance and performance of the covenants contained in this Schedule

6.2.3. The parties hereto apply to the Chief Land Registrar to enter a Restriction on the Register of the Title to the Property that except under an Order of the Land Registrar no dealing or disposition with the Property is to be registered unless a certificate is lodged by a Solicitor or Licensed Conveyancer confirming that the Deed of Covenant required by clause 6.2.2 of this Transfer has been entered into directly with the Transferor

7. It is agreed and declared that the liability of the Transferee in respect of any covenant or obligation in favour of the Transferor arising from the terms of this Transfer shall not exceed that which can be secured by that part of the Winterthur Life Self Administered Personal Pension Scheme which comprises the property to which this Transfer relates and any assets directly relating thereto

Continuation sheet [ ] **of** [ ]

(Insert sheet number and total number of continuation sheets e.g. "sheet 1 of 3")


Essex County Council
Property Services
GREAT WARLEY
FATHERS HALL FARM
SITE PLAN
1:2500
HY288
DP/0231

This is "Exhibit JWP 5" referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [redacted]

Exhibit 5.1

EXHIBIT 5.2

This is "Exhibit JWP 6", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [redacted]

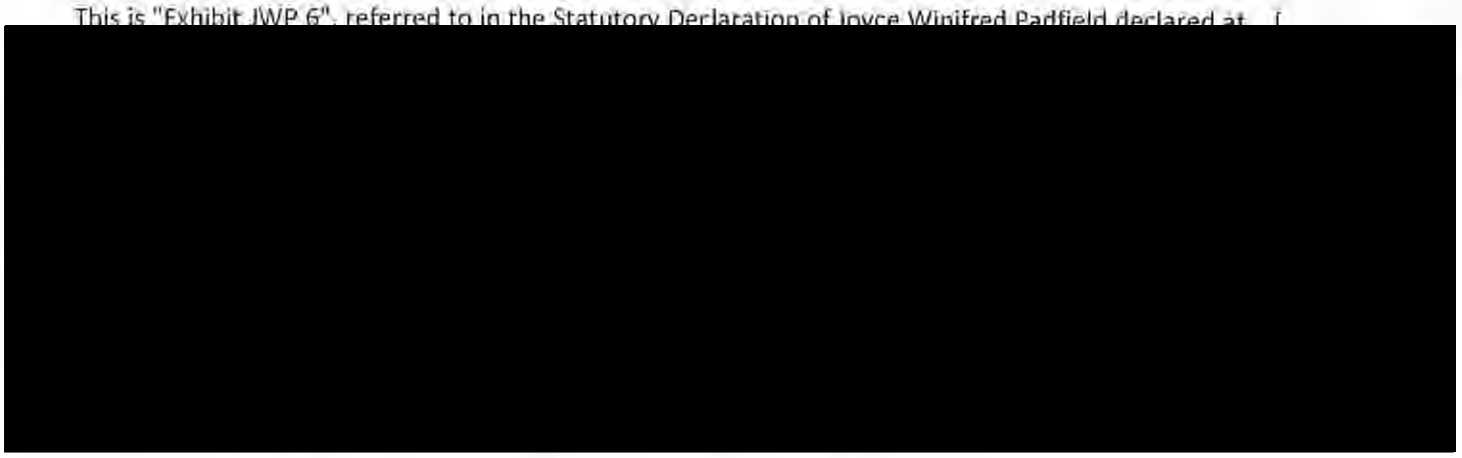
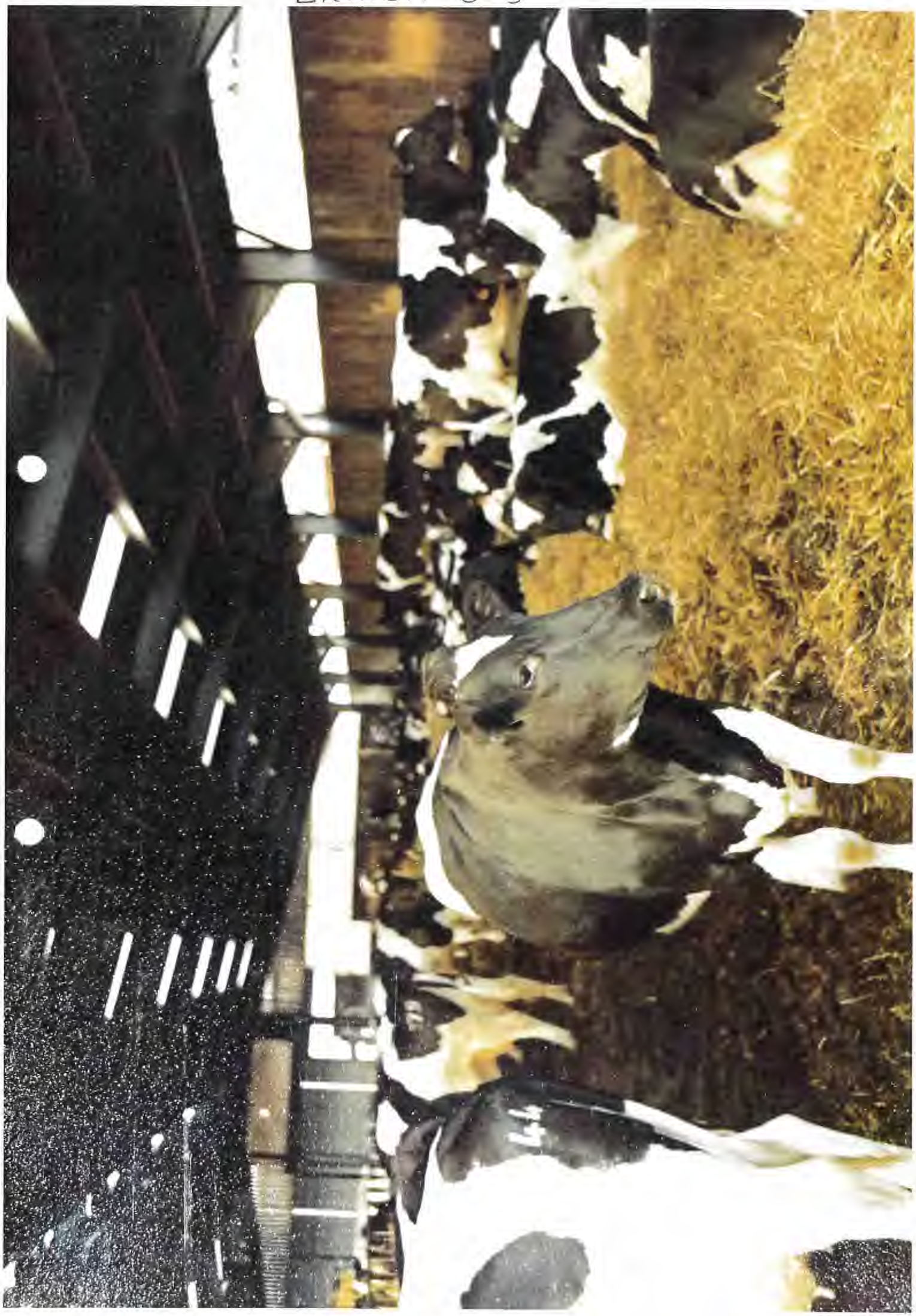


EXHIBIT 6 1

EXHIBIT 6.2

EXHIBIT 6-3



This is "Exhibit JWP 7" referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [redacted]

COPY

SAVILLS
136 London Road
Chelmsford Essex CM2 0RQ
Telephone Chelmsford (0245) 69311

CHARTERED SURVEYORS AGRICULTURAL RESIDENTIAL COMMERCIAL & RATING

Our Ref. DH

Your Ref.

7 June 1976

G. F. Heath Esq., F.R.T.P.I., M.B.I.M., J.P.
The Council Chamber
"Langtons"
Billet Lane
Hornchurch
Essex

Dear Sir

H. S. Padfield Esq., Codham Hall
The M.25 Motorway (A.13-A.12 Section) Compulsory Purchase Order (No. CE) 19

We are instructed to act on behalf of Mr. H. G. Scott Padfield of Codham Hall Farm, Brentwood, Essex. The Essex County Council are the owners of the Farm of which Mr. Padfield is the tenant.

On behalf of Mr. Padfield we submitted an objection on the 26th March 1976 to the proposals of the Department of the Environment on the basis that inadequate access was being provided to reach the severed portions of the Farm.

*** The Farm extends to approximately 464 acres as is shown edged pink on the plan attached to this letter, after deduction of woodlands this leaves a working area of about 400 acres. It will be seen that the Farm is already severed by the A.127 there being approximately 140 workable acres on the north side and about 260 workable acres on the south side.

It is apparent that the proposals will entail the acquisition of approximately 53 acres of the Farm, including 11 acres of woodlands and will cause severance particularly on the south side of the A.127 by isolating an area of approximately 70 acres to the west of the M25 and which includes 10 acres of woods.

Our Client's problems therefore are two-fold. Firstly the traffic on the A.127 will increase considerably and therefore make passage across the road more difficult or impossible and secondly there would be no access to the severed south west block of land.

Cont/..d

Our Client and his Landlords requested that an access bridge be provided over the A.127 and that an access tunnel be provided under the M.25. These have been persistently and positively refused by the Department.

Mr. Padfield's management is as a mixed farm with a dairy herd of 150 cows and with a planned increase up to 250. To attain this it is necessary for Mr. Padfield to increase the grass area which he already has on the south side of the A.127. At the present time to reach the south side Mr. Padfield has the co-operation of the police who hold up the traffic while the herd is driven across. While that area is being grazed this is a twice daily occurance, the cows being taken across in the morning and returning in the afternoon.

The present access across the A.127 will be destroyed by the proposed works and although the Department have promised to provide a new crossing it is of considerable concern to Mr. Padfield that this crossing will be mid-way between the Slip Roads to the M.25 on the new Interchange and the Slip Roads to the Warley Street Flyover at the east end of the Farm. It could well be that the traffic will be of such quantity and velocity that regular stoppage of that traffic for the passage of the cows will be a dangerous if not impossible proposition. The only alternative open to Mr. Padfield would be to transport the cattle by lorries. This would not be an economic proposition on a daily basis.

The Department have agreed to provide three accesses onto the roundabout at the Interchange between the A.127 and the M.25. These will be at the north-east corner from Codham Hall, at the south-east corner into the larger block of severed land to the south of the A.127 and on the south-west corner into the severed 70 acres to the west of the M.25. These are to be available for farm traffic working the arable land to the south of the A.127 and will be in considerable use throughout the year, particularly at harvest time by slow moving harvesting machinery and by tractors and trailers bringing corn back to the Farm.

While fully appreciating the Department's concession in providing these accesses, our Client is very concerned that the introduction of his slow moving farm traffic into the Interchange will create a safety hazard.

It is appreciated by Mr. Padfield that the cost of providing access over or under trunk roads or motorways is very high indeed and the compensation payable cannot normally be equated against such costs. Nevertheless we do feel that the question of safety should be of paramount importance and we would hope that the Department will feel able to reconsider its decisions.

Cont/...d

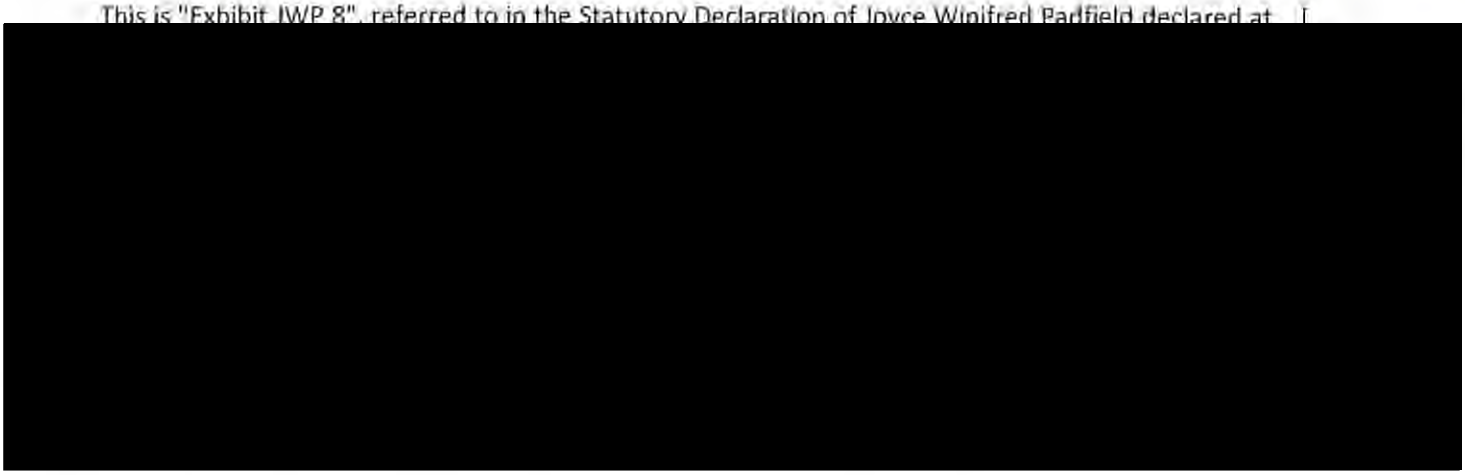
SAVILLS

We were originally informed that it was the Department's intention to release that part of the old A.127 hatched in blue on the plan to the Essex County Council for inclusion in the farm. This would have provided some hard standing for our Client even if it could not have been returned to agriculture. It would also have been under his control. We are now informed that, apparently to meet the requirements of the Post Office, this piece of road will remain part of the Public Highway. To have an area of this size with a hard standing with access to the Public Highway is, in our opinion, an invitation to squatters, gypsies and people desiring to dispose of rubbish. Neither our Client nor his Landlords will have control over this piece of land which must in consequence be a burden on the Highway Authority and will become an undesirable eye-sore.

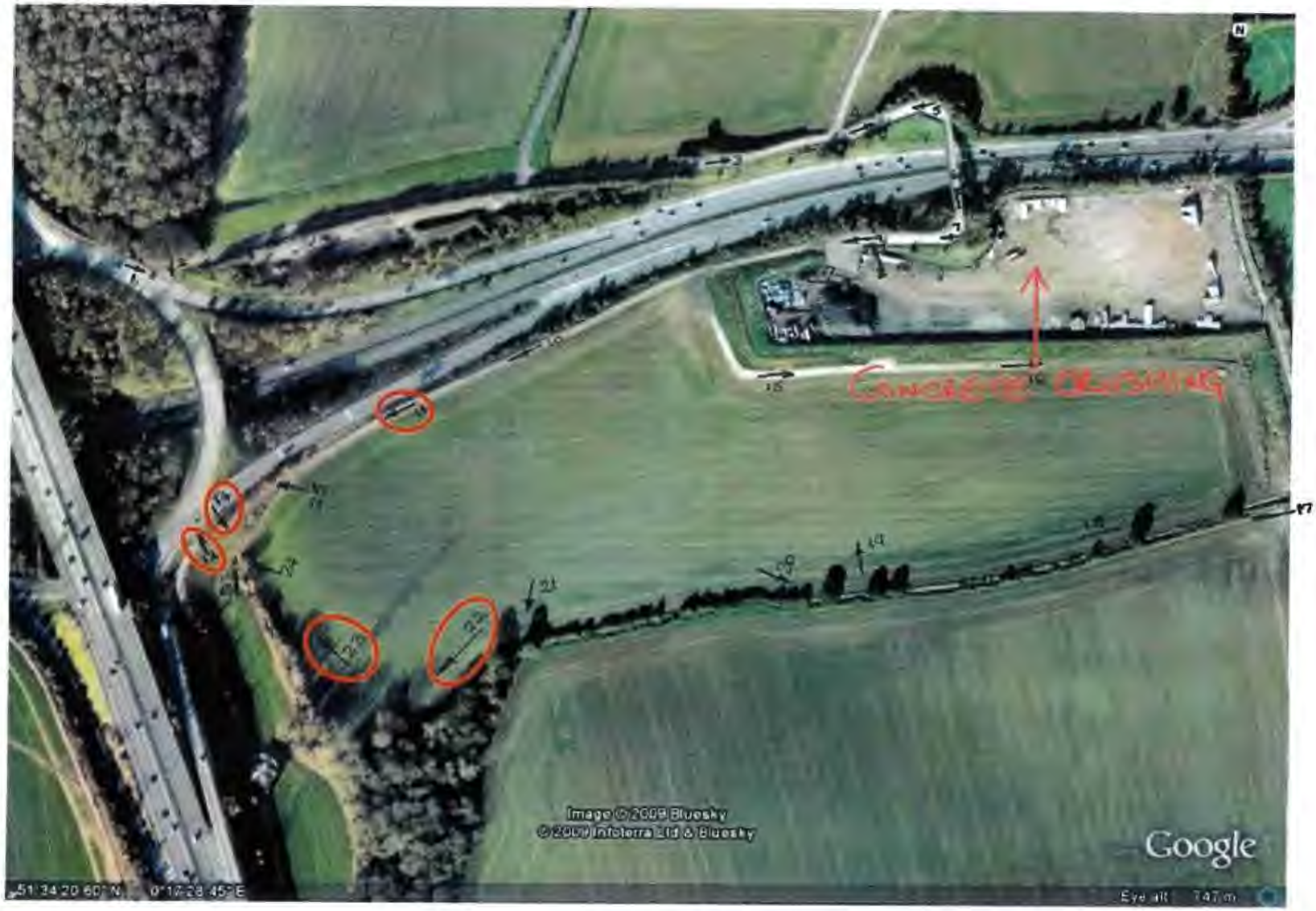
Our Client spent considerable sums of money in being represented and putting his views at the initial Enquiry which was held between June and September 1973, but cannot again indulge in such expense although he feels equally strongly in regard to the matters which are the subject of the present Enquiry. It is appreciated that the scheme has been considerably modified but the access problems remain and Mr. Padfield has instructed us to advise you of his concern.

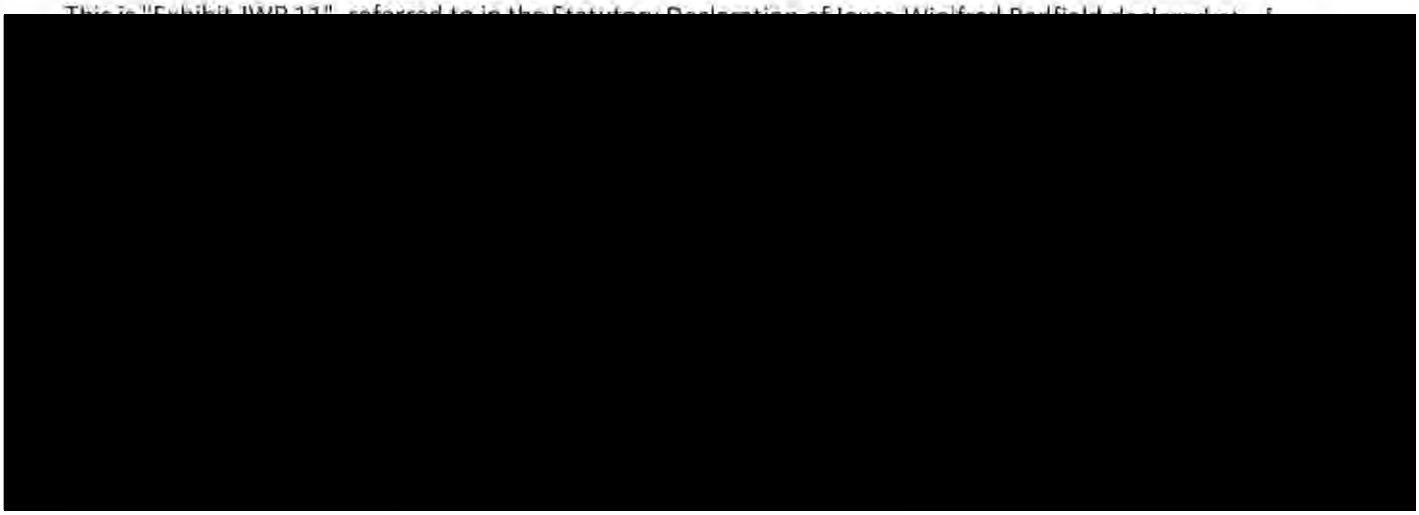
It would be much appreciated if you could arrange to inspect Mr. Padfield's Farm so far as it is affected by the proposals.

This is "Exhibit JWP 8", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [redacted]




ENTRANCE


N
CONCRETE CRUSHING
Image © 2009 Bluesky
© 2009 Infoterra Ltd & Bluesky
Google
51°34'20.60" N 0°17'28.45" E
Eye alt 747 m



SAVILLS

AGRICULTURAL RESIDENTIAL & COMMERCIAL SURVEYORS
& FARM MANAGEMENT

136 London Road
Chelmsford Essex CM2 0RQ
Telephone Chelmsford (0245) 69311 Telex 995087

Your Ref. Our Ref. DH/73/5602

21st June 1982

01 JUL 1982

K.L. Lewin Esq
Edward Thompson Limited
East Anglian Branch
Eye
Suffolk IP23 7BE

Dear Sir

M25 Motorway (A13-12 Section) Codham Hall Farm
H.C.S. Padfield

It is understood that you wish to gain access to the land between the re-routed Mardyke and the Motorway for the purpose of doing works to the Mardyke and the length of ditch from the culvert to the Motorway. These are generally *** in the areas shaded red on the attached plan which is provided for identification only.

The new access to Mr. Padfield's "pylon" field enters a field approximately at point A and your access will be along the broken red line through Hobbs Hole. You to reinstate agricultural land.
The access will not exceed 5m in width and will be adjacent to the Motorway fence. You are able to pass under the new pylon which straddles the fence.

In order to gain this access you will have to clear a strip of the woodland adjacent to the fence and to culvert a ditch across the open land at the southern end of Hobbs Hole. The culvert is to remain in situ on completion.

Mr. Padfield is prepared to allow this access subject to:-

1. The payment of £50 to him before entry.

2. Payment of our fees and expenses in the sum of £31.63 plus VAT.

SAVILLS

3. The surface of the track through Hobbs Hole will be levelled off and made up with hardcore to be well consolidated and left to an even surface.

4. On completion of your contract, the hardcore from your Site Office area will be used to provide a track 12' in width between points B and C on the plan which is between the beginning of Hobbs Hole and the ditch from the Motorway culvert.

We realise that this must be a somewhat flexible arrangement which will need discussion with our Client on site but the principle must be accepted and we trust that if you are in agreement you will sign the copy of the attached letter and let us have it together with a cheque for £86.37 on receipt of which entry may take place.

We will of course let you have a receipted tax invoice for this firm's charges.

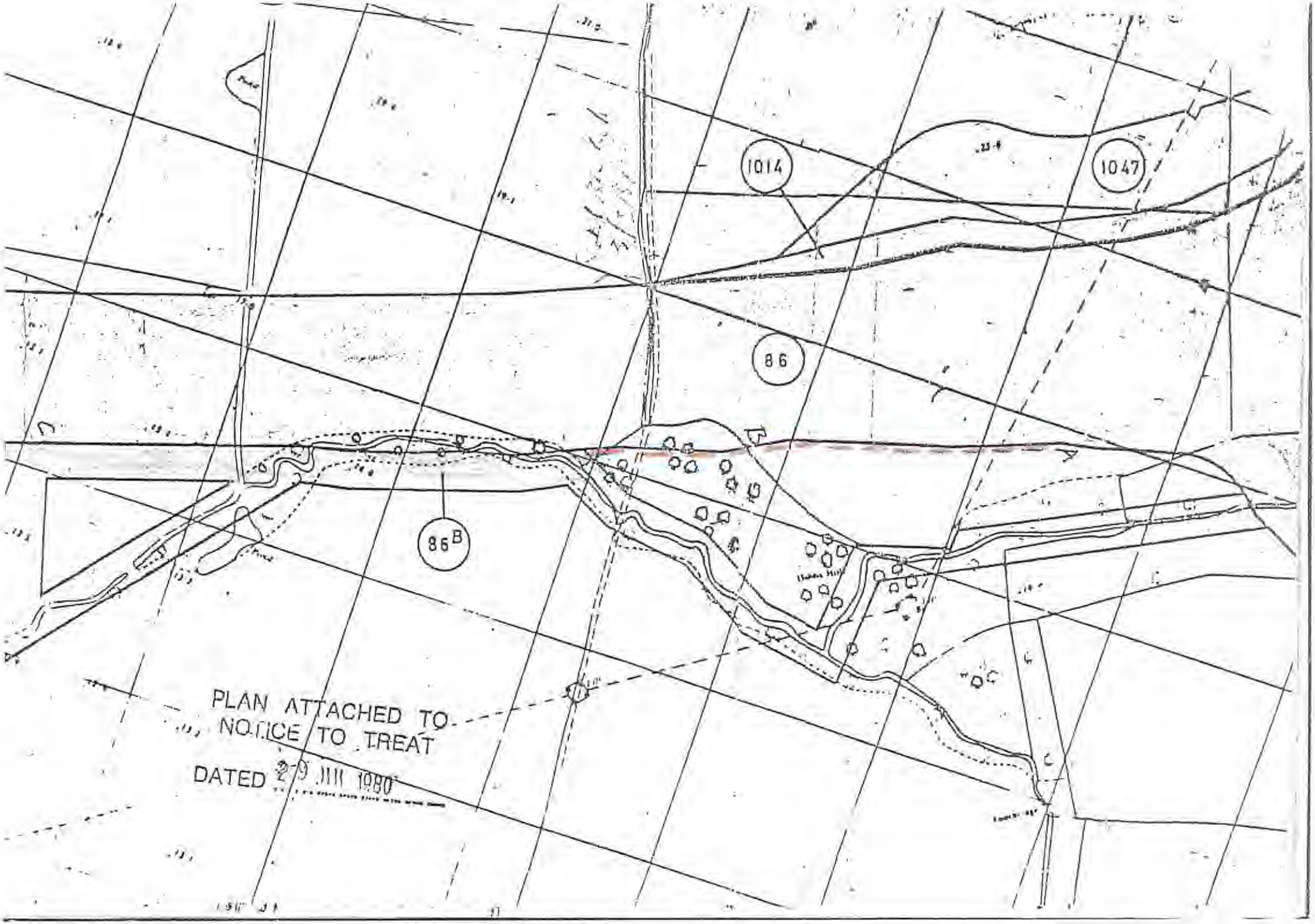
Yours faithfully,

[redacted]

We agree to the terms set out in your letter of 21 June [redacted] a true copy.

SIGNED [redacted] .....

Date .. [redacted] 82


1014
1047
86
86B
PLAN ATTACHED TO
NOTICE TO TREAT
DATED 29 JUL 1980

This is "Exhibit JWP 12" referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [redacted]

C.A. Blackwell (CONTRACTS) Ltd.
EARTHMOVING CONTRACTORS

DIRECTORS: C.A. BLACKWELL
R.S. BLACKWELL
R.B. STANDISH, A.R.I.C.S.
C.S. PUGH, C.Eng., M.I.C.E.
S.B. MARSTON, F.Inst.C.E.S. J. TYER, M.Inst.C.E.S.

TELEPHONE: EARLS COLNE 3131
(STD 07875) (5 LINES)
TELEX 98234 CABECO G

REGISTERED OFFICE:
COGGESHALL ROAD
EARLS COLNE · ESSEX · CO6 2JX
REGISTERED-ENGLAND No 570590

S &J Padfield & Partners,

[redacted]

19th November 1986.

Dear Sirs,

EMBANKMENT FAILURE, JUNCTION 29 M25

We refer to the meeting on site of 18th November 1986 with regard to the above and confirm the following:-

i) Our acceptance of the terms and conditions contained in your letter of 6th October 1986.

ii) In consideration of you providing hardstanding for three caravans at Codham Hall, we will harden the track at the toe of the embankment from the culvert to the footpath marker, by the addition of quicklime, as discussed.

We trust the foregoing is to your satisfaction and enclose herewith our cheque in the sum of £2,000.00 (Two Thousand Pounds).

Yours faithfully,
for C.A. BLACKWELL (CONTRACTS) LTD.

[redacted]

[redacted]

This is "Exhibit JWP 13", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [


S & J PADFIELD

This is "Exhibit JWP 14", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [

Chelmsford

Coval Hall, Chelmsford, Essex, CM1 2QF
Telephone +44 (0) 1245 258201 **Facsimile** +44 (0) 1245 250685
DX121930 Chelmsford 6 www.struttandparker.com

STRUTT & PARKER

C S Padfield Esq
[redacted]

E Mail alexander.creed@struttandparker.co.uk
Our Ref ASC SLH LP080.2

27th July 2004

Dear Christopher

M25 - Access

I can confirm that I have received an undertaking from the agent to the Highways Agency regarding the new licence and the payment of £5,000 to you.

They are instructing their solicitors to produce a licence, which they will send to me for approval on my return to the office on the 23rd August 2004. The original undertaking I have received in the meantime protects your position.

Kind regards.

Yours sincerely

[redacted]

[redacted]

Chelmsford

Dorset Hall Terling Road Essex CM3 3QP
Telephone +44 (0) 1245 258201 Facsimile +44 (0) 1245 258585
DX121930 Chelmsford 6 www.struttandparker.com

STRUTT & PARKER

C S Padfield Esq
[redacted]

E Mail alexander.creed@struttandparker.co.uk
Our Ref ASC SLH L P080 2

23rd July 2004

Dear Christopher

M25 Licence - payments

I write to confirm our conversation on Wednesday 21st July and that I have informed the Highways Agency your subject to contract agreement for a ten week extension for the sum of £5,000. I have asked them to send me the documentation for checking prior to your signing.

You asked for me to detail the payments you should have received so you could confirm these and these are set out in the table below:

Date	Amount
9 December 2002	£15,000
8th June 2003	£ 7,500
9th September 2003	£ 2,500
2nd February 2004	£ 6,000
2nd February 2004	£ 150 (interest payment to recognise late payment of previous amounts
26th April 2004	£ 5,000
26th April 2004	£ 737.31 (Strutt & Parker fee paid to you)

Should you not have received any of these amount please do let me know. The amounts will have been paid either directly from the Highways Agency, Lambert Smith Hampton/W S Atkins or Eversheds.

Yours sincerely

[redacted]

A S Creed

Direct dial: 01245 254639

Coval Hall Chelmsford Essex CM1 2QF
Telephone: 01245 258201 Facsimile 01245 254685
DX 121930 Chelmsford 6
www.struttandparker.com

STRUTT & PARKER

International Property Consultants

Fax Transmission

To: Christopher Padfield Fax No. 01277 234499

From: Alexander Creed

Date: 26th April 2004

No. of pages including this one: two

Message:

Dear Christopher

Highways Agency – M25 Repairs

Further to our discussions the Highways Agency have confirmed that they will require access to the site until Friday 23rd July 2004. They will be making a payment of £11,000.00 (eleven thousand pounds) direct to your bank account. This is the original payment of £6000 plus additional payment at £500 per week for ten weeks. Should they require access for longer then they are liable to make on-going weekly payments.

I also attach an amended Strutt and Parker fee account, the monies for which will be transferred with your payment directly to you. This is lower than the previous one as the Highways Agency will now only pay part of our account as the job is now continuing. We will get the balance later! I would be grateful if you could settle in due course.

I am told that the money should be transferred to you in the next 10-14 days, please let me know if it does not arrive.

Kind regards

Yours sincerely

[redacted]

Eversheds LLP
1 Callaghan Square
Cardiff
CF10 5BT

Tel +44 (0) 29 2047 1147
Fax +44 (0) 29 2046 4347
DX 33016 Cardiff
Web www.eversheds.com

EVERSHEDS

Mr C Padfield
[redacted]

Date 20 May 2004
Your Ref
Our Ref MADDOCK/062646-000228/HA127
Direct Dial 029 2047 7174
Direct Fax 029 20 46 4347
E-mail karenmaddocks@eversheds.com

Dear Sir

M25 JUNCTION 29: FRANKS FARM
LICENCE FOR ACCESS
OUR CLIENT - THE HIGHWAYS AGENCY

We act on behalf of the Highways Agency in respect of the above.

We enclose our cheque in the sum of £11,737.31 representing the following:

Compensation	£11,000.00
Surveyor's fees	£ 627.50
VAT on Surveyor's fees	£ 109.81
	£11,737.31

Yours sincerely

[redacted]

Paid to Bank.

Karen Maddocks
for EVERSHEDS LLP

This is "Exhibit JWP 15", referred to in the Statutory Declaration of Joyce Winifred Padfield declared at [

HIGHWAYS AGENCY

Safe roads, reliable journeys, informed travellers

Our ref: 544586
Your ref:

Thomas Whittingham
Asset Manager - M25 SE Quadrant
Room 3A
Federated House
London Road
Dorking RH4 1SZ
[redacted]

Mr Christopher Scott Padfield
[redacted]

1 May 2014

Dear Mr Padfield

HIGHWAYS ACT 1980, SECTION 278
TRAFFIC SIGNALS AT ACCESS TO CODHAM HALL FARM

Please find enclosed two copies of the Section 278 Highways Act 1980 agreement signed by the Highways Agency M25 Divisional Director, Simon Jones. This allows the traffic signals at the M25 Jct 29 roundabout, highlighted red on the plan, to be used to access the land with existing and agreed usage, namely a) existing farmland and b) the existing material storage, recycling and distribution facility, and for no other use.

If content, can you sign both copies of the Section 278 agreement, retaining one signed copy for yourself, and returning one signed copy to me.

I will arrange for the Highways Agency accounts department to issue you with an invoice at the end of each financial year for the sum of £1,000, or pro-rata payment to reflect the proportion of the year when the signals were operational.

[redacted]er
Email: thomas.whittingham@highways.gsi.gov.uk

HIGHWAYS AGENCY

Highways Agency
Federated House
London Road
Dorking
RH4 1SZ

Christopher Scott Padfield
[redacted]

HA Ref: 544586
HA Contact: Thomas Whittingham
[redacted]

1 May 2014

Dear Mr Padfield

HIGHWAYS ACT 1980, SECTION 278
TRAFFIC SIGNALS AT ACCESS TO CODHAM HALL FARM

I set out below the terms on which the Secretary of State for Transport (the "Secretary of State") is prepared to continue to carry out maintenance of the traffic light signals (the "signals") described in the schedule and shown on Plan No. 544586 attached to this Agreement, for the purpose of facilitating access to the site at Codham Hall Farm owned by Christopher Scott Padfield (the "Landowner").

1. The Landowner will on accepting the terms of this Agreement pay to the Secretary of State an annual sum of £1,000 (ONE THOUSAND POUNDS) ("the annual maintenance charge") being the cost to the Secretary of State of maintaining the signals situated on his land until the end of their working life.

2. The annual maintenance charge shall be payable by the Landowner in arrears into an account nominated by the Secretary of State, with the first such payment due on 31 March 2015 and subsequent payments due on each anniversary of that date.

3. In the event that the signals should become life expired part way through a year, then the Landowner shall not be obliged to pay the annual £1,000 charge but shall instead make a pro-rata payment to reflect the proportion of the year when the signals were in fact operational.

4. (a) It is agreed that the signals are and will remain at all times the property of the Secretary of State, who shall be entitled to remove them in any of the following circumstances:

   (i) upon service of 3 months written notice on the Landowner; or
   (ii) upon non-payment of the annual maintenance charge in accordance with clause 2 above.

   (b) Non-payment under clause 4(a)(ii) shall be regarded as a fundamental breach of this Agreement and if the outstanding payment is not settled within 28 days of a letter of demand, then the Secretary of State shall be entitled to terminate the Agreement forthwith and remove the signals on only 2 months written notice.

5. The Secretary of State shall bear the cost of removal and disposal of the signals whenever executed, following which the Landowner is released from his obligation to continue to pay the annual maintenance charge.

This Agreement is made pursuant to section 278 of the Highways Act 1980 and the Secretary of State is satisfied that this Agreement will be of benefit to the public.

I would be grateful if you could indicate your acceptance of the foregoing terms and conditions by having a copy of this Agreement and plan duly signed and returned to me please.

Y
N
A

[redacted]

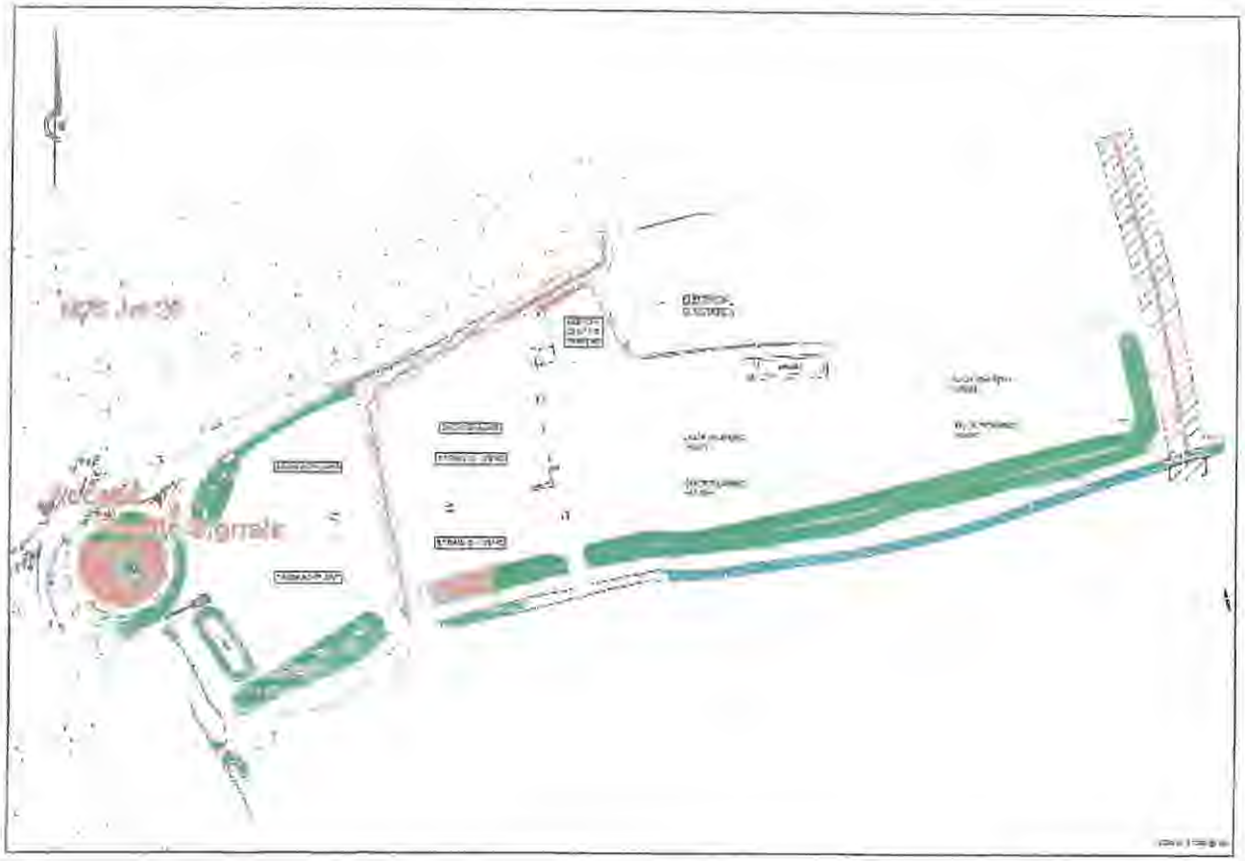
Christopher Scott Padfield hereby accepts the foregoing offer and requests the Secretary of State to continue to carry out the maintenance of the traffic light signals on the terms and conditions set out in this Agreement including the payment of a £1,000 annual maintenance charge. Copies of the plan and schedule are enclosed with the original of this agreement.

Signature [redacted]

Christopher

Date: 20th May 2014

S278 Agreement - M25 Jct 29 Codham Hall Farm Access



Plan Ref: 544586

Schedule of Works

The works to be carried out comprise the ongoing maintenance of the traffic light signals shown on the attached Plan No. 544586. This will include the carrying out of regular inspections and small scale repairs in order to keep the signals in working order for as long as possible. However, should the signals become life expired; the Secretary of State will not be required to carry out major repairs or to replace the signals. In those circumstances, he will be entitled to remove them.

HIGHWAYS AGENCY

TR110 (November 2011)

Developments Affecting Trunk Roads and Special Roads
Highways Agency Response to an Application for Planning Permission

From: Divisional Director, Network Delivery and Development, M25 DBFO, Highways Agency

To: Essex County Council

Council's Reference: ESS/07/13/BRW

Referring to the notification of a planning application dated 27 June 2013, your reference ESS/07/13/BRW, in connection with the M25 Motorway at Codham Hall Farm, Great Warley, for use of the site as a material storage, recycling and distribution facility, notice is hereby given under the Town and Country Planning (Development Management Procedure) (England) Order 2010 that the Secretary of State for Transport:-

~~a) offers no objection;~~

~~b) advises that planning permission should either be refused, or granted only subject to conditions~~

c) directs conditions to be attached to any planning permission which may be granted;

~~d) directs that planning permission is not granted for an indefinite period of time;~~

~~e) directs that planning permission not be granted for a specified period (see Annex A).~~

(delete as appropriate)

Signed by authority of the Secretary of State for Transport

Date: 10 January 2014	Signatu[redacted]
Name: Clive Cooper	Positio[redacted]

The Highways Agency:
3A Federated House,
London road,
Dorking,
Surrey,
RH4 1SZ

Annex A

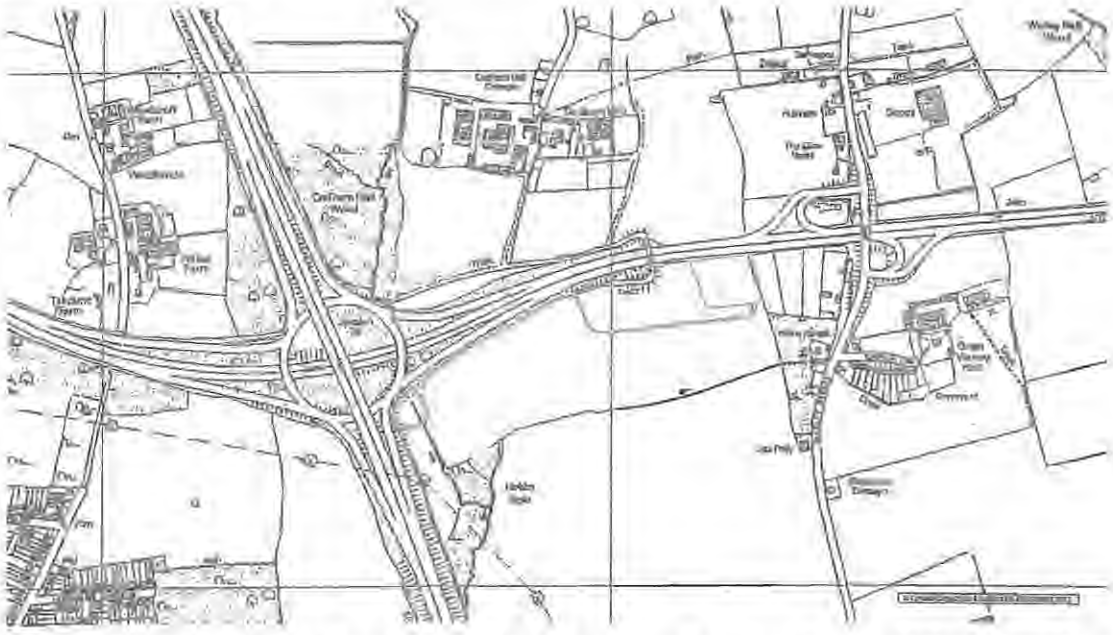
Condition(s) to be attached to any grant of planning permission:

That the access to the south of the M25 Junction 29 roundabout, highlighted in red on the site location plan, can only be used to access land with existing and agreed usage, namely a) existing farmland and b) the existing material storage, recycling and distribution facility, and for no other use.

To ensure that there is no unauthorised use of the access and unauthorised increase in trip generation on land accessing the road network through the junction.

The applicant shall enter into an agreement to undertake agreed works and maintenance at the current roundabout access to ensure the efficient and reliable operation of the traffic signals at the access.

Site location plan:



Reason(s) for the direction given at b), c) or d) overleaf and the period of time for a direction at e) when directing that the application is not granted for a specified period:

Christopher Padfield

From: Whittingham, Thomas [redacted]@highways.gsi.gov.uk>
Sent: 12 June 2014 16:28
To: 'Michael Aves'
Cc: Graham McCall; 'Christopher Padfield'
Subject: RE: Forefront Utilities - Application ESS/07/13/BRW
Attachments: S278 Agreement - Mr Christopher Padfield M25 Jct 29 Codham Hall Farm Access - Signed 1 May 2014.pdf

Michael

I have received a copy of the signed agreement, scanned copy attached, and Christopher will receive an invoice for £1,000, pro-rata from when the agreement was signed on Thursday 1 May 2014 until 31 March 2015, around March/April 2015.

Thanks
Tommy

Thomas Whittingham, Asset Manager - M25 SE Quadrant
Highways Agency | Federated House | London Road | Dorking | RH4 1SZ
[redacted]

Safe roads, reliable journeys, informed travellers
Highways Agency, an executive agency of the Department for Transport.

From: Michael Aves [redacted]
Sent: 12 June 2014 [redacted]
To: Whittingham, Thomas
Cc: Graham McCall; 'Christopher Padfield'
Subject: Forefront Utilities - Application ESS/07/13/BRW

Dear Tommy

I understand from Christopher that he sent the signed agreement back to you three weeks ago. Can you please give me an update?

Michael Aves

Michael Aves
[redacted]

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national highways

Lower Thames Crossing

5.4 Statements of Common Ground

APFP Regulation 5(2)(q)

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

Volume 5

DATE: October 2022

Planning Inspectorate Scheme Ref: TR010032
Application Document Ref: TR010032/APP/5.4

VERSION: 1.0

Lower Thames Crossing

Application Document 5.4 Statements of Common Ground

Errata

The note under Table 3.1 states that a number of document ref numbers have not been used in the application and thus not referenced in the table. This is incorrect for document ref 5.4.3.4 which has now been included in the submission. This is the Statement of Common Ground between (1) National Highways and (2) Cellnex.

Table 3.1 should also include the following:

Cohort	Document Reference	Stakeholder	SoCG Status
Statutory Undertakers, Utility Owners, and Regulator	5.4.3.4	Cellnex UK Limited	Draft Agreed

It should be noted the Statement of Engagement (Application Document 5.2) and Statement of Commonality (Application Document 5.3) have not been updated to include this inclusion.

Lower Thames Crossing

5.4 Statements of Common Ground

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1 Introduction

1.1 Purpose of this document

1.1.1 National Highways (the Applicant) has submitted an application under section 37 of the Planning Act 2008 for an order to grant development consent for the A122 Lower Thames Crossing (the Project).

1.1.2 A number of Statements of Common Ground (SoCG) are submitted as part of the application to assist the Examining Authority (ExA) in providing a snapshot in time of engagement with a number of stakeholders.

1.1.3 This document describes the overall approach to developing the SoCGs and provides a list of those submitted as part of the application.

1.1.4 The Project has been developed and designed following extensive engagement and consultation with stakeholders over several years. For more information on the approach to engagement with our stakeholders, refer to the Statement of Engagement (Application Document 5.2).

1.2 The Project

1.2.1 The Project would provide a connection between the A2 and M2 in Kent and the M25 south of junction 29, crossing under the River Thames through a tunnel. The Project route is presented in Plate 1.1.

1.2.2 The A122 would be approximately 23km long, 4.25km of which would be in tunnel. On the south side of the River Thames, the Project route would link the tunnel to the A2 and M2. On the north side, it would link to the A13, M25 junction 29 and the M25 south of junction 29. The tunnel portals would be located to the east of the village of Chalk on the south of the River Thames and to the west of East Tilbury on the north side.

1.2.3 Junctions are proposed at the following locations:

a. New junction with the A2 to the south-east of Gravesend

b. Modified junction with the A13/A1089 in Thurrock

c. New junction with the M25 between junctions 29 and 30

1.2.4 To align with National Policy Statement for National Networks (Department for Transport, 2014) policy and to help the Project meet the Scheme Objectives, it is proposed that road user charges would be levied in line with the Dartford Crossing. Vehicles would be charged for using the new tunnel.

1.2.5 The Project route would be three lanes in both directions, except for:

a. link roads

b. stretches of the carriageway through junctions

c. the southbound carriageway from the M25 to the junction with the A13/A1089, which would be two lanes

1.2.6 In common with most A-roads, the A122 would operate with no hard shoulder but would feature a 1m hard strip on either side of the carriageway. It would also feature technology including stopped vehicle and incident detection, lane control, variable speed limits and electronic signage and signalling. The A122 design outside the tunnel would include emergency areas. The tunnel would include a range of enhanced systems and response measures instead of emergency areas.

1.2.7 The A122 would be classified as an ‘all-purpose trunk road’ with green signs. For safety reasons, walkers, cyclists, horse riders and slow-moving vehicles would be prohibited from using it.

1.2.8 The Project would include adjustment to a number of local roads. There would also be changes to a number of Public Rights of Way, used by walkers, cyclists and horse riders. Construction of the Project would also require the installation and diversion of a number of utilities, including gas pipelines, overhead electricity powerlines and underground electricity cables, as well as water supplies and telecommunications assets and associated infrastructure.

1.2.9 The Project has been developed to avoid or minimise significant effects on the environment. The measures adopted include landscaping, noise mitigation, green bridges, floodplain compensation, new areas of ecological habitat and two new parks.

Plate 1.1 Lower Thames Crossing route

1.3 Statements of Common Ground Strategy

1.3.1 In March 2015, guidance was issued by the then Department for Communities and Local Government (DCLG) on the examination of applications for development consent and paragraphs 58-65 deal with SoCGs. The guidance indicates that “A statement of common ground is a written statement prepared jointly by the applicant and another party or stakeholders, setting out any matters on which they agree. As well as identifying matters which are not in real dispute, it is also useful if a statement identifies those areas where agreement has not been reached”.

1.3.2 The guidance also indicates that the government believe SoCGs help the examining authority focus on any material differences between the stakeholders. It is advised that applicants should start to work with relevant statutory consultees to agree SoCGs during the pre-application period and should aim to have reached an initial agreement in the pre-examination period.

1.3.3 Planning Inspectorate Advice Note 2 contains advice in section 22 on the importance of SoCGs and states that it is beneficial to work proactively on SoCGs in the pre-application and pre-examination period. The relevant local authorities are particularly mentioned as organisations that applicants should look to agree SoCGs with.

1.3.4 Following this guidance and advice the Project has proactively started the process of drafting and agreeing SoCGs with a number of stakeholders.

1.3.5 The preparation and agreement of SoCGs is an iterative process and it is usual for the SoCGs to be developed with and issued in draft to stakeholders, and updated several times, before a final statement is agreed by the end of the examination period.

1.3.6 The matters table contained with the SoCGs have been populated using relevant consultation responses, Excel based trackers and outcomes of applicable meetings and conversations and have, in most cases, been the subject of back-and-forth engagement for many months. In the weeks ahead of application these matters were transferred from individual bespoke trackers into a templated SoCG to provide consistency to help the ExA.

1.3.7 It is acknowledged that because the SoCGs have been produced prior to application, there are large number of matters that will remain under discussion until post application when the stakeholders will have had the opportunity to conduct a review of the application documents, notably the Draft DCO and the Environmental Statement. Following this it is expected that many matters can move to an agreed position.

1.3.8 Matters that remain under discussion following that review will be the subject of pre-examination engagement where the Applicant will continue to engage with the stakeholders to close out as many matters as possible in advance of the examination.

1.3.9 Updated SoCGs will be submitted in accordance with requests from the ExA and the examination timetable.

2 Purpose and Structure

2.1.1 The purpose of an SoCG is to capture the respective stakeholders' positions on material matters relating to the application. The SoCGs include material matters raised through the course of a consultation and engagement programme in the lead up to the submission of the DCO application.

2.1.2 A full list of the SoCGs submitted and their status at application is provided in Chapter 3.

2.1.3 To ensure consistency across the SoCGs, a uniform approach has been taken to drafting the SoCGs. Each is generally structured as follows:

a. An introduction, setting out the purpose of the document, the parties to which the SoCG is prepared in respect of, the key terminology, and confirmation of the status of the SoCG;

b. A table setting out the characterisation of the positions of the Applicant and of the stakeholder on each Matter, and the status of agreement of the Matter. Across the SoCGs this table is structured by a common list of topics;

c. A summary of engagement undertaken and information shared in order to draft the position and reach an agreed status of Matters within the SoCG; and

d. Where available, appendices providing additional information relating to the documents considered within the SoCG, and information on the engagement undertaken.

2.1.4 A uniform approach has been taken across the suite of SoCGs to document the position on each matter. The position on each matter can be one of the following:

a. Matter Agreed

b. Matter Not Agreed

c. Matter Under Discussion

2.1.5 All SoCGs follow this format.

3 List and Status at Application

3.1.1 The Applicant has prepared SoCGs with a number of statutory consultees, including statutory undertakers, and others who are expected to become interested stakeholders in the lead up to the DCO application submission.

3.1.2 This Chapter of the document provides a list of those SoCGs and a summary of the current status of each.

3.1.3 Table 3.1 provides the status of each SoCG which is summarised by one of the following:

a. **Agreed** – the final version of the SoCG has been signed by both parties and there are no matters outstanding;

b. **Draft Agreed** - a draft SoCG with matters outstanding which has been signed by the stakeholder to confirm it is an accurate description of the matters raised and the current status of each matter but there remain matters outstanding which are yet to be agreed, and engagement continues on these. In most cases, the matters outstanding have clear, defined actions to resolve; or

c. **Draft** – a draft SoCG with matters outstanding and is unsigned. The draft SoCG has been drafted by the Applicant but the stakeholder has not yet been able to complete their review in line with their governance process. The Applicant considers that these SoCGs present an accurate description of the matters raised and the status of each matter, based on the engagement that has taken place to date.

Table 3.1 List of SoCGs at Application

Cohort	Document Reference	Stakeholder	SoCG Status
Statutory Environmental Bodies	5.4.1.1	Environment Agency	Draft Agreed
	5.4.1.2	Forestry Commission	Draft Agreed
	5.4.1.3	Historic England	Draft
	5.4.1.4	Kent Downs AONB Unit	Draft Agreed
	5.4.1.5	Marine Management Organisation	Draft Agreed
	5.4.1.6	Natural England	Draft Agreed
	5.4.1.7	Port of London Authority	Draft
Business and Industry	5.4.2.1	DP World London Gateway	Draft Agreed

Cohort	Document Reference	Stakeholder	SoCG Status
	5.4.2.2	Port of Tilbury London Limited	Draft
	5.4.2.3	Thurrock Power Limited	Draft
Statutory Undertakers, Utility Owners, and Regulator	5.4.3.2	Barking Power Limited	Draft
	5.4.3.3	Cadent Gas Limited	Draft
	5.4.3.6	Essex and Suffolk Water	Draft Agreed
	5.4.3.8	EXA Infrastructure (previously known as GTT)	Draft Agreed
	5.4.3.9	Health and Safety Executive	Draft
	5.4.3.10	HS1 Limited	Draft
	5.4.3.14	Network Rail Infrastructure Limited	Draft
	5.4.3.15	NextGen Access	Draft
	5.4.3.16	Openreach Limited (including providers such as British Telecommunications)	Draft
	5.4.3.17	Royal Mail	Agreed
	5.4.3.18	Southern Gas Networks plc	Draft Agreed
	5.4.3.21	UK Power Networks	Draft Agreed
	5.4.3.22	Verizon UK Limited (also known as Edgecast Networks)	Draft Agreed
	5.4.3.23	Virgin Media Limited	Draft Agreed
	5.4.3.24	Vodafone Limited	Draft
	5.4.3.25	Zayo Group UK Limited	Draft Agreed
Local Authority and Transport Bodies	5.4.4.1	Basildon Council	Draft Agreed
	5.4.4.2	Brentwood Borough Council	Draft Agreed
	5.4.4.3	Dartford Borough Council	Draft Agreed
	5.4.4.5	Essex County Council	Draft Agreed
	5.4.4.6	Gravesham Borough Council	Draft
	5.4.4.7	Kent County Council	Draft
	5.4.4.8	London Borough of Havering	Draft
	5.4.4.10	Medway Borough Council	Draft Agreed

Cohort	Document Reference	Stakeholder	SoCG Status
	5.4.4.11	Transport for London	Draft Agreed
	5.4.4.12	Thurrock Borough Council	Draft
	5.4.4.13	Tonbridge & Malling Borough Council	Draft Agreed
Community and Parish Councils	5.4.5.1	Cobham Parish Council	Draft Agreed
	5.4.5.2	Forestry England	Draft Agreed
	5.4.5.3	Higham Parish Council	Draft Agreed
	5.4.5.4	Shorne Parish Council	Draft Agreed
	5.4.5.5	Thames Chase Trust	Draft Agreed

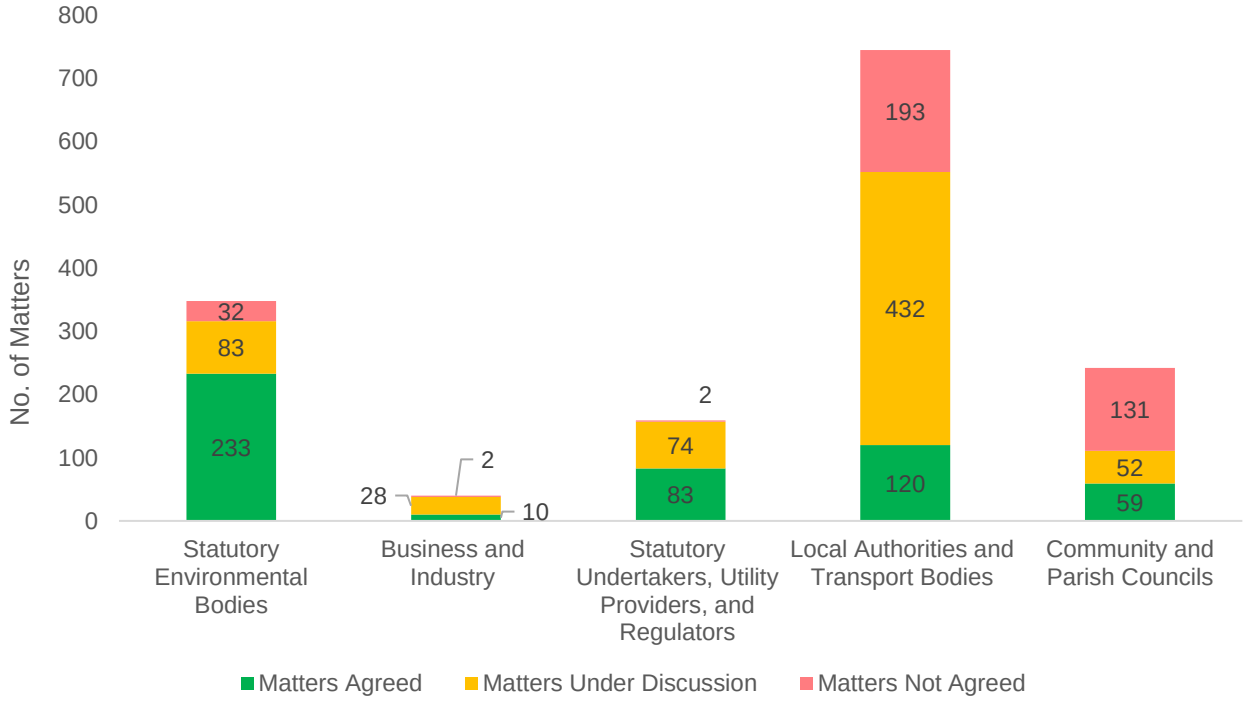
Table 3.1 note: the following document ref numbers have not been used in the application and thus not referenced in this table – 5.4.3.1, 5.4.3.4, 5.4.3.5, 5.4.3.7, 5.4.3.11, 5.4.3.12, 5.4.3.13, 5.4.3.19, 5.4.3.20 5.4.4.9 and 5.4.4.9

3.1.4 The Applicant may develop further SoCGs with additional stakeholders to those listed above as appropriate and will keep the ExA updated on proposed changes.

3.2 Status Of Matters

3.2.1 To assist the ExA, Plate 3.1 presents the distribution of matters under each of the three positions for each cohort.

Plate 3.1 Overview of the Position of Matters across each cohort



3.2.2 To further assist the ExA, Table 3.2 has been produced to set out the distribution of matters under each of the three positions for each individual SoCG submitted with the application.

Table 3.2 Summary of the status of matters in each SoCG

Cohort	Stakeholders	Number of Matters	% Matters Agreed	% Matters Under Discussion	% Matters Not Agreed
Statutory Environmental Bodies	Environment Agency	73	92%	5%	3%
	Forestry Commission	15	73%	13%	13%
	Historic England	41	93%	7%	0%
	Kent Downs AONB Unit	35	60%	14%	26%
	Marine Management Organisation	25	84%	8%	8%
	Natural England	100	63%	32%	5%
	Port of London Authority	59	20%	59%	20%
	Totals	**348**	**67%**	**24%**	**9%**
Business and Industry	DP World London Gateway	4	0%	100%	0%
	Port of Tilbury London Limited	31	19%	74%	6%

Cohort	Stakeholders	Number of Matters	% Matters Agreed	% Matters Under Discussion	% Matters Not Agreed
	Thurrock Power Limited	5	80%	20%	0%
	Totals	**40**	**25%**	**70%**	**5%**
Statutory Undertakers, Utility Owners, and Regulator	Barking Power Limited	9	44%	56%	0%
	Cadent Gas Limited	10	70%	30%	0%
	Essex and Suffolk Water	13	46%	54%	0%
	EXA Infrastructure (previously known as GTT)	9	56%	44%	0%
	Health and Safety Executive	3	67%	33%	0%
	HS1 Limited	18	44%	50%	6%
	Network Rail Infrastructure Limited	10	60%	30%	10%
	NextGen Access	2	100%	0%	0%
	Openreach Limited (including providers such as British Telecommunications)	11	73%	27%	0%
	Royal Mail	3	100%	0%	0%
	Southern Gas Networks plc	19	16%	84%	0%
	UK Power Networks	21	25%	75%	0%
	Verizon UK Limited (also known as Edgecast Networks)	10	70%	30%	0%
	Virgin Media Limited	6	67%	33%	0%
	Vodafone Limited	6	83%	17%	0%
	Zayo Group UK Limited	9	89%	11%	0%
	Totals	**159**	**53%**	**45%**	**1%**
Local Authority and Transport Bodies	Basildon Council	9	67%	33%	0%
	Brentwood Borough Council	20	20%	65%	15%
	Dartford Borough Council	9	89%	11%	0%
	Essex County Council	31	35%	48%	16%
	Gravesham Borough Council	146	6%	71%	23%
	Kent County Council	97	7%	73%	20%

Cohort	Stakeholders	Number of Matters	% Matters Agreed	% Matters Under Discussion	% Matters Not Agreed
	London Borough of Havering	75	15%	73%	12%
	Medway Borough Council	20	40%	60%	0%
	Transport for London	31	16%	71%	13%
	Thurrock Borough Council	285	16%	43%	41%
	Tonbridge & Malling Borough Council	22	23%	59%	18%
	Totals	**745**	**16%**	**58%**	**26%**
Community and Parish Councils	Cobham Parish Council	46	54%	9%	37%
	Forestry England	20	40%	40%	20%
	Higham Parish Council	44	14%	0%	86%
	Shorne Parish Council	108	6%	32%	62%
	Thames Chase Trust	24	58%	21%	21%
	Totals	**242**	**24%**	**21%**	**54%**
	Overall	**1534**	**33%**	**43%**	**23%**

3.3 Common Issues

3.3.1 A Statement of Commonality (Application Document 5.3) has been produced which shows the common themes and issues across the stakeholders listed in Table 3.1.

3.3.2 The Statement of Commonality is a “live” document and will be updated through the post-submission and examination process in order to reflect changes made within the SoCGs through ongoing discussions with the stakeholders.

If you need help accessing this or any other National Highways information, please call **0300 123 5000** and we will help you.

If you have any enquiries about this publication email **info@nationalhighways.co.uk**
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Lower Thames Crossing

2.2 Land Plans

Volume C

(Sheets 21 to 49 of 49)

APFP Regulation 5(2)(i)

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

Volume 2

DATE: October 2022

Planning Inspectorate Scheme Ref: TR010032
Application Document Ref: TR010032/APP/2.2

VERSION: 1.0

Local Authority:
London Borough of
Havering and Brentwood
Borough Council

0 50 100 150 200
METRES

SCALE 1:2500 (A1)
SCALE 1:5000 (A3)

Sheet 46
Sheet 45

Codham Hall Farm

Brentwood Borough Council

London Borough of Havering

A127

B186

Warley Street

Inset A
Scale 1:750

Inset B
Scale 1:500

Inset C
Scale 1:750

Inset D
Scale 1:500

Inset E
Scale 1:500

Inset F
Scale 1:500

Sheet 45
Sheet 44

Rev	Status	Rev. Date	Purpose of revision	Drawn	Chck'd	Apprv'd
P01	S1	03/10/2022	Issued for Information	LS	AA	TG

1. All dimensions are in metres unless stated otherwise.
2. These Land Plans should be read in conjunction with other plans and documents in the Development Consent Order application (TR020032/APP/3.1), in particular the Book of Reference (TR020032/APP/4.2).
3. All easements, servitudes and private rights in land are proposed to be extinguished on land shown coloured pink on these land plans, unless stated otherwise in the Book of Reference.
4. All easements, servitudes and private rights of the subsoil are proposed to be extinguished on land shown coloured yellow and orange on these land plans, unless stated otherwise in the Book of Reference.
5. All easements, servitudes and private rights in land are proposed to be extinguished, so far as their continued exercise would be inconsistent with the exercise of the rights or restrictions proposed to be acquired by the undertaker on land shown coloured blue, yellow and orange on these land plans, unless stated otherwise in the Book of Reference.
6. All easements, servitudes and private rights are proposed to be suspended while the undertaker is in temporary possession of the land shown coloured green, blue and orange on these land plans, unless stated otherwise in the Book of Reference.
7. The number labels relate to plot numbers. Please refer to the Book of Reference for more information about these plots, including the approximate area of each plot. In this numbering convention, a plot number comprises the sheet number followed by the actual plot number, e.g: Plot 01-24, where '01' is the sheet number.

Legend

- Order Limits
- Permanent Acquisition of Land
- Permanent Acquisition of Subsoil and Rights
- Permanent Acquisition of Subsoil and Rights and Temporary Possession of Land at Surface
- Temporary Possession of Land
- Temporary Possession of Land and Permanent Acquisition of Rights
- Local Authority Boundary

Key Plan

Client: national highways

Project: LOWER THAMES CROSSING

Status	DCO Application
Original Size	A1
Revision	P01
Application Document Number	TR010032/APP/2.2
Scale	1:2,500
Drawing Title	LAND PLANS REGULATION 5(2)(i) SHEET 45
Drawing Number	HE450039-CJV-BOP-ZZZ_BD000000_-DR-BL-20045

Department for Communities and Local Government

Planning Act 2008

Guidance related to procedures for the compulsory acquisition of land

September 2013
Department for Communities and Local Government

This document/publication is also available on our website at www.gov.uk/dclg

If you have any enquiries regarding this document/publication, email contactus@communities.gov.uk or write to us at:

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September 2013

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Contents

Introduction

1. The Planning Act 2008 ("the Planning Act") created a new development consent regime for major infrastructure projects[1] in the fields of energy, transport, water, waste water, and waste.

2. This guidance is designed to assist those intending to make an application for a development consent order under the Planning Act where their application seeks authorisation for the compulsory acquisition of land or rights over land[2]. Its aim is to help applicants understand the powers contained in the Planning Act, and how they can be used to best effect. This guidance also advises on the application of the correct procedures and statutory or administrative requirements, to help ensure that the process of dealing with such orders is as fair, straightforward and accurate for all parties as possible.

3. Sections 122 to 134 of the Planning Act set out the main provisions relating to the authorisation of compulsory acquisition of land. These provisions specify the conditions which must be satisfied if a development consent order is to authorise compulsory acquisition, apply the provisions of the Compulsory Purchase Act 1965 (with appropriate modifications), restrict the provision which may be made about compensation in an order, and set out additional requirements which apply in relation to certain special types of land and Crown land.

4. The Planning Act was amended by the Growth and Infrastructure Act 2013. In particular the Growth and Infrastructure Act made changes to the consent and certification requirements (sections 127, 131, 132, 137 and 138 of the Planning Act), and to the circumstances where special parliamentary procedure can be triggered (sections 128, 129, 131 and 132). These changes are reflected in the remainder of this guidance where they are relevant. References to the Planning Act in this guidance should be read as including the amendments made by the Growth and Infrastructure Act.

[1] Major infrastructure projects will be used throughout this guidance to refer to projects that are granted development consent under the Planning Act.

[2] Unless otherwise stated, in the remainder of this guidance document any reference to the compulsory acquisition of land also includes any compulsory acquisition of rights over such land.

Justification for seeking authorisation for compulsory acquisition

5. Applicants seeking authorisation for the compulsory acquisition of land should make appropriate provision for this in their draft development consent order.

6. Section 122 of the Planning Act provides that a development consent order may only authorise compulsory acquisition if the Secretary of State is satisfied that:

- the land is required for the development to which the consent relates, or is required to facilitate, or is incidental to, the development, or is replacement land given in exchange under section 131 or 132, and

- there is a compelling case in the public interest for the compulsory acquisition.

7. Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application. Paragraphs 8-19 below set out some of the factors which the Secretary of State will have regard to in deciding whether or not to include a provision authorising the compulsory acquisition of land in a development consent order.

General considerations

8. The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate.

9. The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire. They should also be able to demonstrate that there is a reasonable prospect of the requisite funds for acquisition becoming available. Otherwise, it will be difficult to show conclusively that the compulsory acquisition of land meets the two conditions in section 122 (see paragraphs 11-13 below).

10. The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected. In particular, regard must be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of acquisition of a dwelling, Article 8 of the Convention.

The purpose for which compulsory acquisition is sought

11. Section 122 of the Planning Act sets out two conditions which must be met to the satisfaction of the Secretary of State before compulsory acquisition can be authorised. The first of these is related to the purpose for which compulsory acquisition is sought. These three purposes are set out in section 122(2):

(i) the land is required for the development to which the development consent relates

For this to be met, the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development.

(ii) the land is required to facilitate or is incidental to the proposed development.

An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate.

(iii) the land is replacement land which is to be given in exchange under section 131 or 132 of the Planning Act.

This may arise, for example, where land which forms part of an open space or common is to be lost to the scheme, but the applicant does not hold other land in the area which may be suitable to offer in exchange. Again, the Secretary of State will need to be satisfied that the compulsory acquisition is needed for replacement land, that no more land is being taken than is reasonably necessary for that purpose, and that what is proposed is proportionate.

Compelling case in the public interest

12. In addition to establishing the purpose for which compulsory acquisition is sought, section 122 requires the Secretary of State to be satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.

13. For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.

Balancing public interest against private loss

14. In determining where the balance of public interest lies, the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.

15. In practice, there is likely to be some overlap between the factors that the Secretary of State must have regard to when considering whether to grant development consent, and the factors that must be taken into account when considering whether to authorise any proposed compulsory acquisition of land.

16. There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land. For example, this could arise where the Secretary of State is not persuaded that all of the land which the applicant wishes to acquire compulsorily has been shown to be necessary for the purposes of the scheme. Alternatively, the Secretary of State may consider that the scheme itself should be modified in a way that affects the requirement for land which would otherwise be subject to compulsory acquisition. Such scenarios could lead to a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order.

Resource implications of the proposed scheme

17. Any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required. It may be that the project is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty about the assembly of the necessary land. In such instances, the applicant should provide an indication of how any potential shortfalls are intended to be met. This should include the degree to which other bodies (public or private sector) have agreed to make financial contributions or to underwrite the scheme, and on what basis such contributions or underwriting is to be made.

18. The timing of the availability of the funding is also likely to be a relevant factor. Regulation 3(2) of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 allows for five years within which any notice to treat must be served, beginning on the date on which the order granting development consent is made, though the Secretary of State does have the discretion to make a different provision in an order granting development consent. Applicants should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of.

Other matters

19. The high profile and potentially controversial nature of major infrastructure projects means that they can potentially generate significant opposition and may be subject to legal challenge. It would be helpful for applicants to be able to demonstrate that their application is firmly rooted in any relevant national policy statement. In addition, applicants will need to be able to demonstrate that:

- any potential risks or impediments to implementation of the scheme have been properly managed;
- they have taken account of any other physical and legal matters pertaining to the application, including the programming of any necessary infrastructure accommodation works and the need to obtain any operational and other consents which may apply to the type of development for which they seek development consent.

Pre-application

20. A development consent order may only contain a provision authorising compulsory acquisition if one of the conditions set out in section 123(2)–(4) are met. These are that:

- the application for the order included a request for compulsory acquisition of land to be authorised - in which case the proposals will have been subject to pre-application consultation, and the other pre-application and application procedures set out in the Planning Act have been followed; or
- if the application did not include such a request, then the relevant procedures set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 have been followed; or
- all those with an interest in the land consent to the inclusion of the provision.

Preparatory work

21. Before an application is made, applicants will need to comply with the pre-application requirements set out in Chapter 2 of Part 5 of the Planning Act. In particular, sections 42 and 44 require applicants to consult those with interests in relevant land.

22. Applicants must also ensure that they comply with the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (“the Applications Regulations”). These contain specific requirements where compulsory acquisition is sought, including the following information:

- a statement of reasons (see paragraphs 31-33);

- a statement to explain how the proposals contained in an order which includes authorisation for compulsory acquisition will be funded (see paragraphs 17-18);

- a plan showing the land which would be acquired, including protected land and any proposed replacement land (see Annex C);

- a book of reference (see Annex D).

23. Applicants are expected to seek their own legal and professional advice when preparing an application under the Planning Act. However, where an applicant has concerns or questions about technical points concerning a draft order, including provisions regarding compulsory acquisition, the Planning Inspectorate may be able to provide advice or clarification. Advice is also available to those who wish to make representations in respect of applications for development consent.

Consultation

24. Applicants are required under section 37 of the Planning Act to produce a consultation report alongside their application, which sets out how they have complied with the consultation requirements set out in the Act. Early consultation with people who could be affected by the compulsory acquisition can help build up a good working relationship with those whose interests are affected, by showing that the applicant is willing to be open and to treat their concerns with respect. It may also help to save time during the examination process by addressing and resolving issues before an application is submitted, and reducing any potential mistrust or fear that can arise in these circumstances.

25. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset[3].

[3] It should be noted that in some cases it may be preferable, or necessary, to acquire compulsorily rather than by agreement. In the case of land belonging to and held inalienably by the National Trust, because the Trust has no power to dispose of land so held, the compulsory acquisition of Trust land must be authorised in an order even if the Trust is minded not to oppose the proposals.

26. Applicants should consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan for compulsory acquisition at the same time as conducting negotiations. Making clear during pre-application consultation that compulsory acquisition will, if necessary, be sought in an order will help to make the seriousness of the applicant's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.

Use of alternative dispute resolution techniques

27. In the interests of speed and fostering good will, applicants are urged to consider offering full access to alternative dispute resolution techniques for those with concerns about the compulsory acquisition of their land. These should involve a suitably qualified independent third party and should be available throughout the whole of the compulsory acquisition process, from the planning and preparation stage to agreeing the compensation payable for the acquired properties. For example, mediation might help to clarify concerns relating to the principle of compulsorily acquiring the land, while other techniques such as early neutral evaluation might help to relieve worries at an early stage about the potential level of compensation eventually payable if the order were to be confirmed.

28. The use of alternative dispute resolution techniques can save time and money for both parties, while its relative speed and informality may also help to reduce the stress which the process inevitably places on those whose properties are affected.

Other means of involving those affected

29. Other actions which applicants should consider initiating during the preparatory stage include:

- providing full information about what the compulsory acquisition process under the Planning Act involves, the rights and duties of those affected and an indicative timetable for the decision making process;

- appointing a specified case manager to whom those with concerns about the proposed acquisition can have easy and direct access.

30. The applicant may offer to alleviate concerns about future compensation entitlement by entering into agreements with those whose interests are directly affected. These can be used as a means of guaranteeing the minimum level of compensation which would be payable if the acquisition were to go ahead (but without prejudicing any future right of the claimant to refer the matter to the Upper Tribunal (Lands Chamber), including the basis on which disturbance costs would be assessed.)

Statement of Reasons

31. The Applications Regulations require applicants to submit with their application a statement of reasons relating to the compulsory acquisition.

32. The statement of reasons should seek to justify the compulsory acquisition sought, and explain in particular why in the applicant's opinion there is a compelling case in the public interest for it. This includes reasons for the creation of new rights.

33. When serving a compulsory acquisition notice under section 134 of the Planning Act, applicants should also send to each person they are notifying a copy of the statement of reasons and a plan showing how that person's land is affected by compulsory acquisition proposals.

Examination

34. Applications for a development consent order authorising compulsory acquisition will be subject to the same examination procedures as all other applications under the Planning Act. These procedures are set out in the Infrastructure Planning (Examination Procedure) Rules 2010 and in a guidance document[4].

35. Once an application has been accepted for examination, applicants must notify the people who have an interest in the application, and give them a deadline by which they can register their interest and assert their right to make representations about the application to the Planning Inspectorate (section 56 of the Planning Act) providing at least the minimum amount of time prescribed. When the application seeks an order authorising compulsory acquisition, applicants must also notify the Secretary of State of the names and other details of people who are affected (section 59 of the Planning Act).

36. Where the Secretary of State has accepted an application for an order which would authorise the compulsory acquisition of land, section 92 of the Planning Act requires the Secretary of State to hold an oral compulsory acquisition hearing if requested to by an "affected person"[5] within the set deadline. At this hearing each affected person will be able to make oral representations regarding the compulsory acquisition request, subject to the procedures governing the hearing.

[4] See guidance at: https://www.gov.uk/government/publications/planning-act-2008-examination-of-applications-for-development-consent

[5] As defined in section 59(5) of the Planning Act.

Authorisation

37. The Secretary of State will decide whether an order can be made granting development consent which authorises the compulsory acquisition of land. Once an order authorising compulsory acquisition has been made, applicants must also ensure that they comply with the notification requirements specified under section 134 of the Planning Act.

Other relevant provisions in the Planning Act

Special categories of land

38. The compulsory acquisition of certain types of land (land held inalienably by the National Trust, land forming part of a common (including a town or village green), open space, or fuel or field garden allotment and statutory undertakers' land) is subject to additional restrictions. These restrictions are described in more detail in Annex A.

Crown land

39. Unlike other land, interests in Crown land cannot generally be compulsorily acquired. Therefore, where such land is required for a major infrastructure project, the land, or an interest in it held by or on behalf of the Crown, will need to be acquired through negotiation and bilateral agreement. Discussions between applicants and the appropriate Crown authority should start as soon as it is clear that such land or interests will be required[6]. As it may be possible that the project as a whole will not get development consent if a voluntary agreement with the Crown authority is not reached, the aim should be to ensure that agreement is in place no later than the time that the application for the project is submitted to the Planning Inspectorate.

40. Section 135 of the Planning Act does allow development consent orders to contain provisions which authorise the compulsory acquisition of an interest in Crown land where that interest is held by a party other than the Crown. Consent to the acquisition of such an interest must be given by the appropriate Crown authority for the land concerned before the compulsory acquisition provision can be included in a development consent order. Early discussions should be entered into in relation to such land where it is clear that such a provision will be required in the development consent order. Further details on the provisions of section 135 and the need for early agreement on Crown authority consents are set out in Annex B.

[6] Land or interests held by the Crown or a Duchy as defined by section 227(3) and 227(4) of the Planning Act.

Other relevant provisions

41. Applicants should also note that section 125 of the Planning Act applies (with suitable modifications and omissions) the provisions of Part 1 of the Compulsory Purchase Act 1965 to all orders made under the Planning Act which authorise the compulsory acquisition of land (section 125 also makes suitable provision for land in Scotland). These provisions govern the procedures to be followed once the compulsory acquisition of land has been authorised under the Planning Act.

42. An order under the Planning Act may also provide for a general vesting declaration under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981.

Decisions

43. Unlike the two stage process which generally operates for compulsory purchase, whereby an order is made by an acquiring authority but then has to be confirmed by a Minister, an order under the Planning Act is made in a single stage and does not have to be confirmed by another authority. Unless it is subject to special parliamentary procedure, an order for development consent under the Planning Act becomes operative when it is made, unless a different coming into force date is provided for in the order itself.

44. Unless the order is subject to legal challenge, the applicant may then implement the compulsory acquisition provisions. Implementation of compulsory acquisition provisions may be by "notice to treat" or, if the order so provides, by "general vesting declaration". A notice to treat must be served within 5 years or within any other period specified in the order.

Further guidance

45. The ODPM circular 06/2004 *Compulsory Purchase and the Crichel Down Rules* contains further general guidance on matters related to compulsory acquisition, including on serving a "notice to treat", making a general vesting declaration, and compensation and other matters[7].

[7] Circular 06/2004 is currently being revised as part of the Government review of planning practice guidance.

Annex A:
Special categories of land

1. Certain special categories of land are subject to additional provisions in the Planning Act where it is proposed that they should be compulsorily acquired. This includes the possibility of any compulsory acquisition provision in the development consent order being subject to special parliamentary procedure.

2. Special parliamentary procedure requires those elements of a development consent order covering the compulsory acquisition of special land to be subject to further scrutiny by Parliament before it can come into effect.

3. Following the amendments to the Planning Act made by the Growth and Infrastructure Act 2013 the compulsory acquisition of the following types of land may, in certain cases, be subject to special parliamentary procedure:

   - Land held by the National Trust inalienably (section 130);
   - Land forming part of a common (including a town or village green), open space, or fuel or field garden allotment (sections 131 and 132).

   For applications for development consent made after the commencement of the Growth and Infrastructure Act[8], special parliamentary procedure will no longer apply where the land being acquired is held by a local authority or a statutory undertaker. Special parliamentary procedure will still apply, however, to land held by a local authority or statutory undertaker if that land is common land, open space, or fuel or field garden allotments and protected by sections 131 and 132.

National Trust Land

4. An order granting development consent may be subject to special parliamentary procedure to the extent that the order authorises the compulsory acquisition of land held inalienably by the National Trust.

[8] The amendments made by the Growth and Infrastructure Act in respect of special parliamentary procedure will apply to all applications for development consent made on or after 25 June 2013. In addition, certain transitional and savings provisions apply to applications made on or after 19 October 2012 - see http://www.legislation.gov.uk/uksi/2013/1124/made

5. Special parliamentary procedure will be triggered where the National Trust makes a formal objection to compulsory acquisition of that land and that objection is not withdrawn.

Commons (including town or village greens), open space, or fuel or field garden allotments

6. Sections 131 and 132 of the Planning Act make provision for special parliamentary procedure to apply where a development consent order authorises the compulsory acquisition of land, or rights over land, forming part of a common, open space, or fuel or field garden allotment.

7. Special parliamentary procedure will apply in such cases unless the Secretary of State is satisfied that one of the following circumstances applies:

- replacement land has been, or will be, given in exchange for land being compulsorily acquired (sections 131(4) or 132(4));
- the land being compulsorily acquired does not exceed 200 square metres in extent or is required for specified highway works, and the provision of land in exchange is unnecessary in the interests of people entitled to certain rights or the public (sections 131(5) or 132(5));
- for open space only, that replacement land in exchange for open space land being compulsorily acquired is not available, or is available only at a prohibitive cost, and it is strongly in the public interest for the development to proceed sooner than would be likely if special parliamentary procedure were to apply (sections 131(4A) or 132(4A));
- for open space only, if the land, or right over land, is being compulsorily acquired for a temporary purpose (sections 131(4B) or 132(4B)).

The last two of these circumstances were added by the Growth and Infrastructure Act. This Act also removed the separate procedural requirements for issuing a certificate where the Secretary of State is of the view that one of the circumstances described above applies[9]. Instead, these matters will be considered and determined as part of the development consent order application process and recommendations provided to enable the Secretary of State to reach a view.

[9] Subject to the transitional and savings arrangements set out in the Commencement Order: http://www.legislation.gov.uk/uksi/2013/1124/made

Replacement land

8. Where either section 131(4) or 132(4) of the Planning Act applies, the Secretary of State will have regard to such matters as relative size and proximity of the replacement land when compared with the land it is proposed to compulsorily acquire through the development consent order.

9. Land which is already subject to rights of common or to other rights, or used by the public, even informally, for recreation, cannot usually be given as replacement land, since this would reduce the amount of such land, which would be disadvantageous to the persons concerned. There may be some cases where a current use of proposed replacement land is temporary (e.g. pending development). In such circumstances it may be reasonable to give the land in exchange, since its current use can thereby be safeguarded for the future.

Other provisions

10. Where either section 131(5) or 132(5) of the Planning Act applies, the Secretary of State will need to be satisfied that both criteria are met:

    - the order land (in total) does not exceed 200 square metres in extent or is required for the widening or drainage of an existing highway or partly for the widening and partly for the drainage of such a highway, and

    - the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public.

11. In coming to a view as to whether the criteria are met, the Secretary of State will have regard to the overall extent of common land, open space land or fuel or field garden allotment land being acquired compulsorily. Where all or a large part of such land would be lost, the Secretary of State may be reluctant to be satisfied in terms of section 131(5) or 132(5).

Land held by statutory undertakers

12. The Growth and Infrastructure Act repealed sections 128 and 129 of the Planning Act. This removed the possibility of special parliamentary procedure applying to situations where a development consent order provided for the compulsory acquisition of land, or rights over land, held by a statutory undertaker for the purposes of their undertaking.

13. Section 127(2) of the Planning Act places restrictions on the compulsory acquisition of land held by statutory undertakers for the purposes of their undertaking. Where the land falls into the description set out in that section and a statutory undertaker makes a representation, the Secretary of State will need to be satisfied that:

- the land can be purchased and not replaced without serious detriment to the carrying on of the undertaking; or
- if purchased, it can be replaced by other land belonging to, or available for acquisition by, the undertaker without serious detriment to the carrying on of the undertaking.

14. Section 127(5) places restrictions on the compulsory acquisition of rights over statutory undertakers' land where new rights over that land are created. If the circumstances in that subsection apply the Secretary of State will need to be satisfied that:

- the rights can be purchased without any serious detriment to the carrying on of the undertaking, and;
- any consequential detriment to the carrying on of the undertaking can be made good by the undertaker by the use of other land belonging to or available for acquisition by the undertaker.

Annex B:
Crown Land

Compulsory acquisition of an interest in Crown land

1. Section 135(1) of the Planning Act enables development consent orders authorise the compulsory acquisition of an interest in Crown land where that interest is held by a party other than the Crown. Such an interest could include, for example, a lease granted over Crown land to a third party that is not itself the Crown, or an easement or right of way over Crown land granted to such a third party.

2. If provisions to compulsorily acquire such interests are to be included in a development consent order, then the consent of the appropriate Crown authority[10] is needed. It is important that such consent is obtained at the earliest opportunity as the development consent order cannot be made by the Secretary of State until the consent of the Crown authority is in place. The applicant for a project should ensure that any discussions with the Crown authority are started as soon as it is clear that an interest in Crown land will need to be acquired – i.e. before their application is submitted to the Planning Inspectorate for acceptance. The aim should be to ensure that Crown consent is in place before the application for the development consent order is submitted. If consent is not granted by the time an application is submitted, then the applicant should give an indication of when they expect consent to be received. At the very latest, this should be by the time the examination phase of the project is completed. This will allow the Examining Authority's recommendations to the Secretary of State on whether to grant development consent for the project to include a reference to the outcome of the application for Crown consent.

3. Early engagement is vital to ensure that the section 135 consenting requirement does not delay the final decision by the Secretary of State on the development consent order. It is the responsibility of applicants to notify the appropriate Crown authority if a section 135(1) consent is required. Applicants and Crown authorities are expected to do all they reasonably can to ensure an early resolution of any Crown consent needed. If, following notification by the applicant, it is clear that Crown consent is not going to be given, the appropriate Crown authority will aim to notify the applicant of the project before their application is submitted to the Planning Inspectorate.

[10] See section 227 of the Planning Act.

4. Applicants should note that certain Crown authorities may be unable to give general consents for compulsory purchase of interests in Crown land, and applicants should therefore be in a position to identify the specific third party interests which are required to be compulsorily purchased. Drafting in the development consent order may be needed to reflect this and where further specific interests are then identified, further consent would then be required from the appropriate Crown authority.

Other Provisions applying to Crown Land

5. Section 135(2) of the Planning Act allows a development consent order to include any provision which applies "in relation to Crown land or rights benefiting the Crown", but only if the appropriate Crown authority consents to the inclusion of the provision. These provisions could include, for example, a power to use Crown land temporarily for construction or maintenance of a project. “Rights benefiting the Crown” do not include rights that benefit the general public.

6. If the applicant is proposing to include such provisions in a draft development consent order, they should seek early discussions with the relevant Crown authority on whether such consent is likely to be granted before they submit their application to the Planning Inspectorate for acceptance. The Crown authority should also provide an early view on any issues that will need to be resolved if their consent is to be granted. These can then be taken into account by the applicant before they submit their application to the Planning Inspectorate. Any outstanding matters should then be identified in the application so these can be covered during the examination if relevant.

7. Wherever possible, the applicant should seek, and the Crown authority should give, a consent decision before the application is submitted, even if that is only on an “in principle basis” in advance of the examination of the project. The Crown authority should give a final decision on Crown consent by the time the examination of the project is completed. This will ensure that all relevant issues are covered during the examination and that a decision by the Secretary of State on the development consent order is not delayed by the need for Crown authority consent. If, at decision stage, the Secretary of State decides to make changes to the development consent order that go beyond the scope of the earlier Crown consent, then the Crown authority will be consulted and invited to give a final consent. Again decision on that final consent should be given promptly so the final decision on the development consent for the project is not delayed.

Annex C:
Plan which must accompany an application seeking authorisation for compulsory acquisition

1. The Applications Regulations require a land plan (see regulation 5(2)(i)) to identify any land over which it is proposed to exercise powers of compulsory acquisition or any right to use land.

2. Applicants should ensure that references to the plan in the draft order and other documentation relating to the application correspond exactly with headings on the plan itself.

3. All land to be compulsorily acquired, and any replacement land, should be clearly identified on the plan by colouring or by any other method at the discretion of the applicant. Where it is decided to use colouring, the long-standing convention (without statutory basis) is that land proposed to be acquired is shown pink, land over which a new right would subsist is shown blue, and replacement land is shown green. Where black-and-white copies are used they must still provide clear identification of the land to be compulsorily acquired and, where appropriate, any replacement land (e.g. by suitable shading or hatching).

4. The use of a sufficiently large scale, Ordnance Survey based map is important. The Applications Regulations specifies that maps should be on a scale no smaller than 1/2500. However, experience has shown that for compulsory acquisition a map of this scale is only suitable for rural areas. In general, the map scale should not be smaller than 1/1250, and for land in a densely populated urban area, the scale should be at least 1/500 and preferably larger. Where the order involves the acquisition of a considerable number of small plots, the use of insets on a larger scale is often helpful. Where a plan requires three or more separate sheets, they should be bound together, and a key plan should be provided showing how the various sheets are interrelated.

5. Where it is necessary to have more than one sheet, appropriate references must be made to each of them in the text of the draft order so that there is no doubt that they are all related to the order. If it is necessary to include a key plan, then it should be purely for the purpose of enabling a speedy identification of the whereabouts of the area to which the order relates. It should be the plan itself, and not the key plan which identifies the boundaries of the land to be acquired.

6. It is also important that the plan should show such details as are necessary to relate it to the description of each parcel of land (including land affected by temporary occupation) described in the book of reference. This may involve marking on the map the names of roads and places or local landmarks not otherwise shown.

7. The boundaries between plots should be clearly delineated and each plot separately numbered to correspond with the book of reference. Land which is delineated on the map but which is not being acquired compulsorily should be clearly distinguishable from land which is being acquired compulsorily.

8. There should be no discrepancy between the description of the land in the book of reference and the plan, and no room for doubt on anyone's part as to the precise areas of land which are to be compulsorily acquired. Where uncertainty over the true extent of the land to be acquired causes or may cause difficulties, the Secretary of State may refuse to make the order until this is made clear.

9. Where an applicant seeks authorisation for compulsory acquisition of additional land not included in the original application, and has not therefore been able to comply with the Applications Regulations, they must either secure the consent of all those with an interest in the land in question or observe the relevant procedures set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010.

Annex D:
The Book of Reference

1. The book of reference is defined in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. It comprises a book, in five Parts, together with any relevant plan.

2. Part 1 should contain the names and addresses for service of each person within Categories 1 and 2 in respect of any land which it is proposed shall be subject to:

   (i) powers of compulsory acquisition;

   (ii) rights to use land, including the right to attach brackets or other equipment to buildings; or

   (iii) rights to carry out protective works to buildings;

   Category 1 persons are the owners, lessees, tenants, or occupiers of land. Category 2 persons are those who have an interest in the land or who have the power to sell or convey the land or release the land.

3. Part 2 should contain the names and addresses for service of each person within Category 3. These are persons who might be entitled to make a relevant claim if the development consent order were to be made and fully implemented (section 57(4) of the Planning Act).

4. Part 3 should contain the names of all those entitled to enjoy easements or other private rights over land (including private rights of navigation over water) where these would be extinguished, suspended or interfered with as a result of the provisions in the development consent order for which an application is being made.

5. Part 4 should specify the owner of any Crown interest in the land which it is proposed to use for the purposes of the development consent order for which an application is being made.

6. Part 5 should specify land the acquisition of which could be subject to special parliamentary procedure, or which is special category land or which is replacement land for land being compulsorily acquired.

7. The descriptions of each plot of land included in parts 1-5 of the book of reference where it is intended that all or part of the proposed development and works shall be carried out, should include the area in square metres of each plot.

8. Applicants will need to be aware that each part in the book of reference serves a different purpose and persons may need to be identified in one or more parts. For example, a person entitled to enjoy easements or other private rights over land which the applicant proposes to extinguish, suspend or interfere with identified in Part 3 should also be recorded in Part 1 as a person within categories 1 or 2 as set out in section 57 of the Planning Act. Part 4 should specify the owner of any Crown interest in land it is proposed to be used for the purposes of the development consent order. Some (although not necessarily all) of these Crown interests may also be identified in the descriptions of land contained in Part 1 which will be subject to powers of compulsory acquisition, rights to use land or rights to carry out protective works to buildings.

9. Applicants should not add any further (non-prescribed) parts to a book of reference, for example schedules of statutory undertakers or other like bodies having or possibly having a right to keep equipment on, in or over the land within the order limits. 'Dashes' or other ambiguous descriptions should be avoided. Diligent inquiry should enable applicants to know whether or not such persons have an interest or right in land for the purposes of section 57 and if they are known to applicants the names and addresses should be contained in the relevant part(s) of the book of reference.

10. Where it is proposed to create and acquire new rights compulsorily they should be clearly identified. The book of reference should also cross-refer to the relevant articles contained in the development consent order.

Planning Act 2008 c. 29
s. 42 Duty to consult

Law In Force

Version 2 of 2

1 April 2010 - Present

Subjects
Planning

Keywords
Consultation; Development consent applications

[

42 Duty to consult

(1) The applicant must consult the following about the proposed application—

(a) such persons as may be prescribed,

(aa) the Marine Management Organisation, in any case where the proposed development would affect, or would be likely to affect, any of the areas specified in subsection (2),

(b) each local authority that is within section 43,

(c) the Greater London Authority if the land is in Greater London, and

(d) each person who is within one or more of the categories set out in section 44.

(2) The areas are—

(a) waters in or adjacent to England up to the seaward limits of the territorial sea;

(b) an exclusive economic zone, except any part of an exclusive economic zone in relation to which the Scottish Ministers have functions;

(c) a Renewable Energy Zone, except any part of a Renewable Energy Zone in relation to which the Scottish Ministers have functions;

(d) an area designated under section 1(7) of the Continental Shelf Act 1964, except any part of that area which is within a part of an exclusive economic zone or Renewable Energy Zone in relation to which the Scottish Ministers have functions.

][1]

Notes

1 Existing s.42 renumbered as s.42(1) and s.42(1)(aa) and (2) inserted by Marine and Coastal Access Act 2009 c. 23 Pt 1 c.4 s.23(2) (April 1, 2010)

s. 44 Categories for purposes of section 42(1)(d)

Law In Force

Version 3 of 3

1 April 2012 - Present

Subjects
Planning

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Consultation; Development consent applications; Proprietary interests

44 [Categories for purposes of section 42(1)(d)][1]

(1) A person is within Category 1 if the applicant, after making diligent inquiry, knows that the person is an owner, lessee, tenant (whatever the tenancy period) or occupier of the land.

(2) A person is within Category 2 if the applicant, after making diligent inquiry, knows that the person—

(a) is interested in the land, or

(b) has power—

(i) to sell and convey the land, or

(ii) to release the land.

(3) An expression, other than "the land", that appears in subsection (2) of this section and also in section 5(1) of the Compulsory Purchase Act 1965 (c. 56) has in subsection (2) the meaning that it has in section 5(1) of that Act.

(4) A person is within Category 3 if the applicant thinks that, if the order sought by the proposed application were to be made and fully implemented, the person would or might be entitled—

(a) as a result of the implementing of the order,

(b) as a result of the order having been implemented, or

(c) as a result of use of the land once the order has been implemented,

to make a relevant claim. This is subject to subsection (5).

(5) A person is within Category 3 only if the person is known to the applicant after making diligent inquiry.

(6) In subsection (4) *"relevant claim"* means—

(a) a claim under section 10 of the Compulsory Purchase Act 1965 (c. 56) (compensation where satisfaction not made for the taking, or injurious affection, of land subject to compulsory purchase);

(b) a claim under Part 1 of the Land Compensation Act 1973 (c. 26) (compensation for depreciation of land value by physical factors caused by use of public works) [;][2]

[

(c) a claim under section 152(3).

][2]

Notes

1 Heading substituted by Marine and Coastal Access Act 2009 c. 23 Pt 1 c.4 s.23(3)(b) (April 1, 2010)

2 Added by Localism Act 2011 c. 20 Pt 6 c.6 s.135(8) (April 1, 2012)

Part 5 APPLICATIONS FOR ORDERS GRANTING DEVELOPMENT CONSENT > Chapter 2 PRE-APPLICATION PROCEDURE > s. 44 Categories for purposes of section 42(1)(d)

s. 103 Secretary of State is to decide applications

Law In Force With Amendments Pending

Version 2 of 3

1 April 2012 - Present

Subjects
Planning

Keywords
Administrative decision-making; Development consent applications; Interpretation; Ministers' powers and duties

103 [Secretary of State is to decide applications][1]

(1) The Secretary of State has the function of deciding an application for an order granting development consent [.][2][...][2]

[...][3]

Notes

1 Heading substituted by Localism Act 2011 c. 20 Sch.13(1) para.48(4) (April 1, 2012)

2 Word and s.103(1)(a)-(b) repealed by Localism Act 2011 c. 20 Sch.25(20) para.1 (April 1, 2012)

3 Repealed by Localism Act 2011 c. 20 Sch.25(20) para.1 (April 1, 2012)

s. 104 Decisions in cases where national policy statement has effect

Law In Force With Amendments Pending

Version 3 of 4

1 April 2012 - Present

Subjects
Planning

Keywords
Administrative decision-making; Development consent applications; Ministers' powers and duties; National policy statements

104 [Decisions in cases where national policy statement has effect][1]

(1) This section applies in relation to an application for an order granting development consent if [a national policy statement has effect in relation to development of the description to which the application relates][2] .

(2) In deciding the application the [Secretary of State][3] must have regard to—

(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),

[

(aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009,

][4]

(b) any local impact report (within the meaning given by section 60(3)) submitted to the [Secretary of State][5] before the deadline specified in a notice under section 60(2),

(c) any matters prescribed in relation to development of the description to which the

application relates, and

(d) any other matters which the [Secretary of State][3] thinks are both important and relevant to [the Secretary of State's][6] decision.

(3) The [Secretary of State][7] must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.

(4) This subsection applies if the [Secretary of State][7] is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.

(5) This subsection applies if the [Secretary of State is][8] satisfied that deciding the application in accordance with any relevant national policy statement would lead to the [Secretary of State being in breach of any duty imposed on the Secretary of State][9] by or under any enactment.

(6) This subsection applies if the [Secretary of State][10] is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.

(7) This subsection applies if the [Secretary of State][10] is satisfied that the adverse impact of the proposed development would outweigh its benefits.

(8) This subsection applies if the [Secretary of State][10] is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

(9) For the avoidance of doubt, the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of subsections (4) to (8) from applying.

Notes

1 Heading substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(7) (April 1, 2012)

2 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(2) (April 1, 2012)

3 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(3)(a) (April 1, 2012)

4 Added by Marine and Coastal Access Act 2009 c. 23 Pt 3 c.4 s.58(5) (November 12, 2010)

5 Word substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(3)(b) (April 1, 2012)

6 Word substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(3)(c) (April 1, 2012)

7 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(4) (April 1, 2012)

8 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(5)(a) (April 1, 2012)

9 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(5)(b) (April 1, 2012)

10 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.49(6) (April 1, 2012)

s. 114 Grant or refusal of development consent

Law In Force

Version 2 of 2

1 April 2012 - Present

Subjects
Planning

Keywords
Administrative decision-making; Development consent applications; Development consent orders; Ministers' powers and duties

114 Grant or refusal of development consent

(1) When [the Secretary of State][1] has decided an application for an order granting development consent, the [Secretary of State][2] must either—

(a) make an order granting development consent, or

(b) refuse development consent.

(2) The Secretary of State may by regulations make provision regulating the procedure to be followed if the [Secretary of State][3] proposes to make an order granting development consent on terms which are materially different from those proposed in the application.

Notes

1 Word substituted by Localism Act 2011 c. 20 Sch.13(1) para.55(2)(a) (April 1, 2012)

2 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.55(2)(b) (April 1, 2012)

Notes

3 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.55(3) (April 1, 2012)

Part 6 DECIDING APPLICATIONS FOR ORDERS GRANTING DEVELOPMENT CONSENT > Chapter 8 GRANT OR REFUSAL > s. 114 Grant or refusal of development consent

s. 120 What may be included in order granting development consent

Law In Force With Amendments Pending

Version 2 of 3

1 April 2012 - Present

Subjects
Planning

Keywords
Development consent orders

120 What may be included in order granting development consent

(1) An order granting development consent may impose requirements in connection with the development for which consent is granted.

(2) The requirements may in particular include [—][1][

(a) requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation, or the giving of any notice, which (but for section 33(1)) would have been required for the development;

(b) requirements to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a).

][1]

(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.

(4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5.

(5) An order granting development consent may—

(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;

(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the [Secretary of State][2] to be necessary or expedient in consequence of a provision of the order or in connection with the order;

(c) include any provision that appears to the [Secretary of State][2] to be necessary or expedient for giving full effect to any other provision of the order;

(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings.

(6) In subsection (5) *"statutory provision"* means a provision of an Act or of an instrument made under an Act.

(7) Subsections (3) to (6) are subject to subsection (8) and the following provisions of this Chapter.

[

(8) With the exception of provision made under subsection (3) for or relating to any of the matters listed in paragraph 32B of Schedule 5, an order granting development consent may not include—

(a) provision creating offences,

(b) provision conferring power to create offences, or

(c) provision changing an existing power to create offences.

][3]

(9) To the extent that provision for or relating to a matter may be included in an order

granting development consent, none of the following may include any such provision—

(a) an order under section 14 or 16 of the Harbours Act 1964 (c. 40) (orders in relation to harbours, docks and wharves);

(b) an order under section 4(1) of the Gas Act 1965 (c. 36) (order authorising storage of gas in underground strata);

(c) an order under section 1 or 3 of the Transport and Works Act 1992 (c. 42) (orders as to railways, tramways, inland waterways etc.).

Notes

1 Existing text renumbered as s.120(2)(a) and s.120(2)(b) inserted by Localism Act 2011 c. 20 Pt 6 c.6 s.140 (April 1, 2012)

2 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.60(2) (April 1, 2012)

3 Substituted by Localism Act 2011 c. 20 Sch.13(1) para.60(3) (April 1, 2012)

s. 122 Purpose for which compulsory acquisition may be authorised

Law In Force

Version 2 of 2

1 April 2012 - Present

Subjects
Planning

Keywords
Compulsory purchase; Conditions; Development consent orders; Ministers' powers and duties

122 Purpose for which compulsory acquisition may be authorised

(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the [Secretary of State][1] is satisfied that the conditions in subsections (2) and (3) are met.

(2) The condition is that the land—

(a) is required for the development to which the development consent relates,

(b) is required to facilitate or is incidental to that development, or

(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

Notes

1 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.62 (April 1, 2012)

s. 123 Land to which authorisation of compulsory acquisition can relate

Law In Force

Version 2 of 2

1 April 2012 - Present

Subjects
Planning

Keywords
Authorisation; Compulsory purchase; Development consent orders; Ministers' powers and duties

123 Land to which authorisation of compulsory acquisition can relate

(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the [Secretary of State][1] is satisfied that one of the conditions in subsections (2) to (4) is met.

(2) The condition is that the application for the order included a request for compulsory acquisition of the land to be authorised.

(3) The condition is that all persons with an interest in the land consent to the inclusion of the provision.

(4) The condition is that the prescribed procedure has been followed in relation to the land.

Notes

1 Words substituted by Localism Act 2011 c. 20 Sch.13(1) para.62 (April 1, 2012)

Notes

Schedule 5 PROVISION RELATING TO, OR TO MATTERS ANCILLARY TO, DEVELOPMENT
para. 10

Law In Force

Version 1 of 1

1 March 2010 - Present

Subjects
Planning

Keywords
Development consent; Proprietary rights

10

The protection of the property or interests of any person.

Schedule 5 PROVISION RELATING TO, OR TO MATTERS ANCILLARY TO, DEVELOPMENT > Part 1 THE MATTERS > para. 10

STATUTORY INSTRUMENTS

2020 No. 419

INFRASTRUCTURE PLANNING

The Riverside Energy Park Order 2020

Made - - - -	*9th April 2020*
Coming into force - -	*1st May 2020*

CONTENTS

SCHEDULE 10

Article 39

PROTECTIVE PROVISIONS

PART 1

FOR THE PROTECTION OF RRRL

1. For the protection of RRRL as referred to in this part of this Schedule the following provisions have effect unless otherwise agreed in writing between the undertaker and RRRL.

2. In this part of this Schedule

"access road" means that part of the access road known as Norman Road between points C and D on the access and public rights of way plan;

"alternative apparatus" means alternative apparatus adequate to enable RRRL to fulfil its functions in a manner no less efficient than previously;

"apparatus" means any electric cables, electrical plant, drains, mains, sewers, pipes, conduits or any other apparatus belonging to or maintained by RRRL and used for, or for purposes connected with, waste treatment and disposal and the generation, transmission, distribution or supply of electricity and/or heat generated at the RRRL facility and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

"authorised development" has the same meaning as in article 2 of this Order;

"functions" includes powers and duties;

"in" in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

"internal street" means any roads that service the RRRL facility and which are located within the RRRL facility perimeter;

"plan" or "plans" include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;

"RRRL facility" means the energy from waste facility and associated infrastructure at Norman Road, Belvedere, Bexley, Kent;

"RRRL facility perimeter" means that part of the Order land identified as plots 02/01, 02/03, 02/10, 02/13, 02/14, 02/15, 02/18, 02/19, 02/25, 02/29, 02/31 and 02/32 on the land plans;

"RRRL land" means that part of the Order land in the freehold ownership of RRRL which, as at the date upon which this Order comes into force pursuant to Article 1, are those plots identified as being in the freehold ownership of RRRL in the book of reference but always excluding plots 02/43, 02/44, 02/47, 02/48, 02/49, and 02/51;

3. Upon the permanent stopping up of the access road pursuant to article 14 (permanent stopping up of streets), the undertaker must afford to RRRL the rights for RRRL and all persons authorised on its behalf to enter and pass and re-pass, on foot and/or with or without vehicles, plant and machinery, for all purposes in connection with its occupation and use of the RRRL facility.

4. The undertaker must not install pipes for the offtake of waste heat from the authorised development without first giving RRRL the option to combine its pipes with any pipes for the offtake of waste heat from the authorised development. The undertaker must have regard to any consultation responses received from RRRL when finalising the location of pipes for the offtake of waste heat from the authorised development.

5. Regardless of the temporary prohibition or restriction of use of streets under the powers conferred by article 13 (temporary prohibition or restriction of use of streets and public rights of

way), RRRL is at liberty at all times to take all necessary access across any street used to access the RRRL facility and which has been temporarily stopped up under article 13 and/or any internal street and to execute and do all such works and things in, upon or under any such street used to access the RRRL facility that has been temporarily stopped up under article 13 and/or internal street as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the prohibition or restriction is in that street used to access the RRRL facility and has been temporarily stopped up under article 13 or internal street.

6. Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus within the RRRL land otherwise than by agreement.

7.—(1) If, in the exercise of the powers conferred by this Order, the undertaker:–

(a) acquires any interest in the RRRL land in which any apparatus is placed or over which access to any apparatus is enjoyed; or

(b) requires that RRRL's apparatus within the RRRL land is relocated, diverted or removed,

any right of RRRL to any part of the RRRL land and/or to maintain that apparatus in that land and to gain access to it must not be extinguished, and that apparatus must not be relocated, diverted or removed, until equivalent rights have been granted to RRRL for alternative apparatus and equivalent alternative apparatus has vested in RRRL and (in relation to apparatus) has been constructed and is in operation, and access to it has been provided. The location of equivalent alternative apparatus and rights for the equivalent alternative apparatus must in each case be agreed between the undertaker and RRRL before any step is taken to extinguish, relocate, divert or remove as aforesaid.

(2) If, for the purpose of executing any works in, on or under the RRRL land, the undertaker requires the relocation, diversion or removal of any apparatus placed in the RRRL land, the undertaker must give to RRRL for approval written notice of that requirement, a plan and section of the work proposed and of the proposed position of the alternative apparatus together with a timetable for when the alternative apparatus is to be provided or constructed by the undertaker.

(3) The approval of RRRL under sub-paragraph (2) must not be unreasonably withheld and if by the end of the period of 28 days beginning with the date on which the notice, plan, section and timetable have been supplied to RRRL, RRRL has not intimated approval or disapproval of such notice, plan, section and timetable and the grounds of disapproval, RRRL is deemed to have approved the said notice, plan, section and timetable as submitted.

(4) When giving its approval under sub-paragraph (2), RRRL may specify such reasonable requirements that are necessary in the provision or construction of the alternative apparatus.

(5) In the event that RRRL issues a disapproval to the notice, plan, section and timetable within the 28 day period referred to in sub-paragraph (3), the undertaker may refer the matter to arbitration in accordance with article 42 (procedures in relation to certain approvals etc.).

(6) Subject to sub-paragraph (8), any alternative apparatus to be provided or constructed pursuant to this paragraph must be provided or constructed by the undertaker within a timescale, to a standard and in such manner and in such line or situation as is agreed with RRRL or in default of agreement settled by arbitration in accordance with article 42 (procedures in relation to certain approvals etc.).

(7) Where the alternative apparatus is to be provided or constructed on land of the undertaker and once the undertaker has provided or constructed the alternative apparatus, the undertaker must grant RRRL the necessary rights to access and maintain the alternative apparatus on that land.

(8) If in the approval to the notice, plan, section and timetable under sub-paragraph (2) or by the end of the period of 28 days beginning with the date on which the arbitrator settles the alternative apparatus to be provided or constructed, RRRL gives notice to the undertaker that it desires to provide or construct the alternative apparatus and this is agreed to by the undertaker, (acting reasonably) RRRL, after the grant to RRRL of the rights as are referred to in sub-paragraph (9), must proceed without unnecessary delay to provide and construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this part of this Schedule.

(9) Where RRRL is to provide or construct the alternative apparatus, and the alternative apparatus is to be provided or constructed on land of the undertaker, the undertaker must grant RRRL the necessary rights to provide or construct the alternative apparatus on that land and grant RRRL the necessary rights to access and maintain the alternative apparatus on that land.

8.—(1) Where, in accordance with the provisions of this part of this Schedule, the undertaker affords to RRRL rights in land of the undertaker for the construction and maintenance of alternative apparatus in substitution for apparatus to be removed, those rights must be granted upon such terms and conditions as may be agreed between the undertaker and RRRL or in default of agreement settled by arbitration in accordance with article 42 (procedures in relation to certain approvals etc.).

(2) If the rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those rights are to be granted, are in the opinion of the arbitrator materially less favourable on the whole to RRRL than the rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those rights are subject, the arbitrator must make such provision for the payment of compensation by the undertaker to RRRL as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

9.—(1) Not less than 28 days before starting the execution of any works in, on or under the RRRL land that may materially affect the operation of the RRRL facility, the undertaker must submit to RRRL for approval a plan, section and description of the works to be executed and a timetable for when such works are to be carried out.

(2) The approval of RRRL under sub-paragraph (1) must not be unreasonably withheld and if by the end of the period of 28 days beginning with the date on which the plan, section, description and timetable have been supplied to RRRL, RRRL has not intimated disapproval of such plan, section, description and timetable and the grounds of disapproval, RRRL is deemed to have approved the said plan, section description and timetable as submitted.

(3) When giving its approval under sub-paragraph (1), RRRL may specify such reasonable requirements which in RRRL's opinion are necessary in the execution of the works.

(4) The works described in sub-paragraph (1) must be executed only in accordance with the plan, section, description and timetable submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be given in accordance with sub-paragraph (3) by RRRL. Where RRRL reasonably requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to RRRL's reasonable satisfaction prior to the works described in sub-paragraph (1).

(5) In the event that RRRL issues a disapproval to the plan, section, description and timetable within the 28 day period referred to in sub-paragraph (1), the undertaker may refer the matter to arbitration in accordance with article 42 (procedures in relation to certain approvals etc.).

(6) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(7) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency works (as defined in the 1991 Act) but in that case it must give to RRRL notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraphs (3) and (4) in so far as is reasonably practicable in the circumstances.

10.—(1) Subject to the following provisions of this paragraph, the undertaker must repay to RRRL the reasonable expenses incurred by RRRL in, or in connection with, the inspection, removal, alteration or protection of any apparatus within the RRRL land or the provision or

construction of any alternative apparatus which RRRL elects to carry out itself as referred to in paragraph 7(8).

(2) There is to be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this part of this Schedule, that value being calculated after removal.

(3) If in accordance with the provisions of this part of this Schedule:–

(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 42 (procedures in relation to certain approvals etc.) to be necessary, then, if such placing involves cost in the construction of works under this part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to RRRL by virtue of sub-paragraph (1) will be reduced by the amount of that excess.

(4) For the purposes of sub-paragraph (3):–

(a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus where such extension is required in consequence of the execution of any such works as are referred to in paragraph 7(2); and

(b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole is to be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to RRRL in respect of works by virtue of sub-paragraph (1) if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on RRRL any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, is to be reduced by the amount which represents that benefit.

11. Nothing in this part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and RRRL in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

12. Where in consequence of the proposed construction or maintenance of any part of the authorised development, the undertaker or RRRL requires the removal of apparatus or RRRL makes requirements for the protection or alteration of apparatus, the undertaker shall use its reasonable endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution and maintenance of the authorised development and taking into account the need to ensure the safe and efficient operation of RRRL's undertaking and RRRL shall use its reasonable endeavours to co-operate with the undertaker for that purpose.

13. If in consequence of any agreement reached or the powers granted under this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative means of access to such apparatus as will enable RRRL to maintain or use the apparatus no less effectively than was possible before such obstruction.

14.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance or failure of any part of the authorised development by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, use or maintenance, including without limitation works carried out by the undertaker under this Part of this Schedule or

any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised development) or property of RRRL, or there is any interruption in any service provided, or in the supply of any goods, by RRRL, or RRRL becomes liable to pay any amount to any third party, the undertaker will:–

(a) bear and pay on demand the cost reasonably incurred by RRRL in making good such damage or restoring the supply; and

(b) indemnify RRRL for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from RRRL, by reason or in consequence of any such damage or interruption or RRRL becoming liable to any third party as aforesaid other than arising from any default of RRRL.

(2) The fact that any act or thing may have been done by RRRL on behalf of the undertaker or in accordance with a plan approved by RRRL or in accordance with any requirement of RRRL or under its supervision will not (unless sub-paragraph (3) applies), excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless RRRL fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan or as otherwise agreed between the undertaker and RRRL.

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of:–

(a) any damage or interruption to the extent that it is attributable to the neglect or default of RRRL, its officers, servants, contractors or agents; and

(b) any part of the authorised development and/or any other works authorised by this Part of this Schedule carried out by RRRL as an assignee, transferee or lessee of a person with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 8 (consent to transfer benefit of the Order) subject to the proviso that once such works become apparatus, any part of the authorised development yet to be executed and not falling within this sub-section 3(b) will be subject to the full terms of this Part of this Schedule including this paragraph 14.

(4) RRRL must give the undertaker reasonable notice of any such third party claim or demand and no settlement or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) RRRL must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 14 applies. If requested to do so by the undertaker, RRRL shall provide an explanation of how the claim has been minimised. The undertaker shall only be liable under this paragraph 14 for claims reasonably incurred by RRRL.

15.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of any works carried out by RRRL pursuant to this Part of this Schedule or in consequence of the use, maintenance or failure of any part of the RRRL facility by or on behalf of RRRL or in consequence of any act or default of RRRL (or any person employed or authorised by him) in the course of carrying out such works, use or maintenance, including without limitation works carried out by RRRL under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any part of the authorised development or property of the undertaker, or there is any interruption in any service provided, or in the supply of any goods, by the undertaker, or the undertaker becomes liable to pay any amount to any third party, RRRL will:–

(a) bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage or restoring the supply; and

(b) indemnify the undertaker for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from the undertaker, by reason or in consequence of any such damage or interruption or the undertaker becoming liable to any third party as aforesaid other than arising from any default of the undertaker.

Supreme Court

Bank Mellat *v* Her Majesty's Treasury (No 2)

[2013] UKSC 38

[2013] UKSC 39

2013 March 19, 20; 21; June 19

Lord Neuberger of Abbotsbury PSC, Lord Dyson MR, Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Reed, Lord Carnwath JJSC

Crown — Order in Council — Validity — Treasury making Order in Council containing direction prohibiting transactions or business relationships with Iranian bank in order to prevent facilitation of production of nuclear weapons in Iran — Bank not given opportunity to make representations before making of Order — Bank applying to set aside direction — Whether requirement that least measure be used — Whether Order proportionate — Whether procedurally flawed — Whether Parliament excluding common law right to make representations before direction made — Whether statutory procedure breaching Convention rights — Whether Order lawful — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6, Pt II, art 1[1] — Counter-Terrorism Act 2008 (c 28), ss 62, 63, Sch 7[2]

Supreme Court — Jurisdiction — Evidence — Closed material procedure — Order in Council containing direction prohibiting transactions or business relationships with Iranian bank in order to prevent facilitation of production of nuclear weapons in Iran — Bank's appeal from court's refusal to set aside Order — Treasury proposing to rely on closed material in resisting appeal — Whether jurisdiction for Supreme Court to entertain closed material — Whether appropriate to entertain material — Constitutional Reform Act 2005 (c 4), s 40[3]

The Treasury, pursuant to its power to impose financial restrictions under section 62 of and Schedule 7 to the Counter-Terrorism Act 2008, made the Financial Restrictions (Iran) Order 2009 which contained a direction prohibiting all persons operating in the financial sector in the United Kingdom from entering into or continuing to participate in any transaction or business relationship with the claimant, a major Iranian commercial bank, on the grounds that the Treasury reasonably believed that the development or production of nuclear weapons in Iran posed a significant risk to the national interests of the United Kingdom for the purposes of paragraph 1(4) of Schedule 7. The claimant applied, pursuant to section 63 of the Act to set aside the Order, on the grounds that (i) the Treasury's reasons for making the order were based on irrelevant considerations and factual

[1] Human Rights Act 1998, Sch 1, Pt I, art 6.1: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Sch 1, Pt II, art 1: "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 by law and by the general principles of international law."

[2] Counter-Terrorism Act 2008, s 62: "Schedule 7 makes provision conferring powers on the Treasury to act against terrorist financing, money laundering and certain other activities."

S 63: "(1) This section applies to any decision of the Treasury in connection with the exercise of any on their functions under— . . . (c) Schedule 7 to this Act (terrorist financing, money laundering and certain other activities: financial restrictions). (2) Any person affected by the decision may apply to the High Court . . . to set aside the decision. (3) In determining whether the decision should be set aside the court shall apply the principles applicable on an application for judicial review."

[3] Constitutional Reform Act 2005, s 40(2)(5): see post, jurisdiction judgments, para 30.

errors, (ii) the requirements imposed by the direction were disproportionate to the risk posed to the national interests of the United Kingdom and (iii) in failing to give the claimant an opportunity to make representations before the Order was made the Treasury had acted in breach of the rules of natural justice and of article 6.1 of, and article 1 of the First Protocol to, the Convention for the Protection of Human Rights and Fundamental Freedoms. The judge, having received closed material from the Treasury pursuant to CPR Pt 79 and reaching his conclusions in both an open and a closed judgment, found that the justification for the Order lay in the general problem for banks of preventing their facilities being used for purposes connected with the weapons programme and that the Order represented the only practicable way of ensuring that the claimant's facilities would not be misused in that way. Holding that the only procedural requirements which had to be satisfied for a direction under the 2008 Act to have effect were those prescribed in Schedule 7, which contained no provision for affected persons to make representations before a direction was made, he accordingly refused the application. The Court of Appeal, having considered the judge's judgments, affirmed his decision. On the claimant's further appeal the Treasury, having intimated that it wished to rely on closed material in responding to the appeal, applied for such material to be received in closed session.

On the application—

Held, (1) (Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Reed JJSC dissenting) that in providing that an appeal lay to the Supreme Court from any judgment of the Court of Appeal, section 40(2) of the Constitutional Reform Act 2005 extended to a judgment which was wholly or partly closed; that, for an appeal against such a decision to be effective it was implicit that the hearing before the Supreme Court would involve, at least in part, a closed material procedure; that, having regard to the Supreme Court's power under section 40(5) to determine any question necessary for the purposes of doing justice, the Supreme Court could conduct a closed material procedure where it was satisfied that it might be necessary to do so for the disposal of the appeal; and that, accordingly, the Supreme Court had jurisdiction to entertain a closed material procedure on appeals against decisions brought under section 63(2) of the Counter-Terrorism Act 2008 (post, jurisdiction judgments, paras 37, 43, 47, 62, 141).

(2) Granting the application (Lord Dyson MR, Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Reed JJSC dissenting), that, since the Treasury contended that a closed session could make a difference to the outcome of the appeal, the court could not be sure whether the material in the judge's closed judgment would affect the outcome of the appeal unless it saw, and heard submissions, on that judgment; that, if the appeal were allowed without the closed material being seen, there would be a real risk of justice not being seen to be done, and an outside possibility of justice actually not being done, to the Treasury; that, accordingly, the court would consider the judge's closed judgment in closed session; but that, having done so, the court was satisfied that the effect of the material could have no bearing on the outcome of the appeal (post, jurisdiction judgments, paras 64, 66).

Per Lord Neuberger of Abbotsbury PSC, Lord Hope of Craighead DPSC, Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Lord Sumption and Lord Carnwath JJSC. The most obnoxious feature of the closed material procedure at the stage of an appeal is the possibility that the appellate court may have to give the whole or part of its reasons for the disposal of the appeal in a judgment to which the state only, and not the other party to the appeal or anyone else, has access. It is very much to be hoped that the Supreme Court will never find itself in a position when it has to resort to the giving of a closed judgment in the disposal of an appeal. In inviting the court to look at the closed judgment when there was nothing in it which could not have been gathered equally well from a careful scrutiny of the open judgment the Treasury misused the closed material procedure. The state would need to be much more forthcoming if an invitation to the Supreme Court to look at closed

material were to be repeated in the future (post, jurisdiction judgments, paras 60, 98, 99, 100). A

Guidance on the proper approach on applications for closed material hearings on appeals (post, jurisdiction judgments, paras 68–74, 89–97, 142, 145).

On the appeal—

(1) (Lord Neuberger of Abbotsbury PSC, Lord Dyson MR, Lord Hope of Craighead DPSC and Lord Reed JSC dissenting in part) that the essential question in determining whether the Order was proportionate was whether the interruption of B the claimant's commercial dealings in the United Kingdom's financial markets bore a rational and proportionate relationship to the statutory purpose of hindering Iran's pursuit of its weapons programmes and, in particular, whether a less intrusive measure could have been adopted without compromising that objective; that the subject matter of the claimant's application lay in the area of foreign policy and national security in respect of which the Treasury was to be accorded a very wide margin of appreciation; that the consequences of nuclear proliferation justified a C precautionary approach, and called for experienced executive judgment; but that, although the Order had a rational connection with the objective of frustrating as far as possible the Iranian weapons programme, the distinction between the claimant and other Iranian banks in circumstances found by the judge to relate to the general risks of international banking, not to specific problems identified in respect of the claimant itself, was irrational and disproportionate (post, main judgments, paras 21–27, 202). D

A v Secretary of State for the Home Department [2005] 2 AC 68, HL(E) considered.

(2) (Lord Hope of Craighead DPSC, Lord Reed and Lord Carnwath JJSC dissenting in part) that the common law duty to give advance notice and an opportunity to make representations to an individual against whom it was proposed to exercise a draconian statutory power depended on the particular circumstances in which the measure was made; that unless the statute expressly or impliedly excluded E the duty, or consultation was impracticable or would frustrate the purpose of the direction, fairness required that the individual concerned should be afforded an opportunity to make prior representations; that, since the measure was directed only to the claimant and its subsidiary, since it came into effect immediately and was intended to have and did have a serious effect on its business, since it was based on specific factual allegations which the claimant could have been given an opportunity to refute, and since there were no practical impediments to effective consultation, F fairness and the principle of good administration required the claimant to be given that opportunity; that the Counter-Terrorism Act 2008 did not expressly exclude the duty to give prior consultation; that, since the right of challenge provided by section 63 of the Act arose after such a measure had been made and was, in itself, insufficient to achieve fairness and since, in any event, it amounted to no more than a remedy already available by way of judicial review, it did not impliedly exclude the common law duty; that no such exclusion could be implied from the nature of the Order as a statutory instrument approved by Parliament; that the measure did not G have the status of primary legislation and had been made in the exercise of a discretionary power conferred by the 2008 Act which was targeted against identifiable individuals; and that the character of the measure as a statutory instrument did not therefore abrogate the Treasury's duty to afford the claimant prior notice and consultation (post, main judgments, paras 28–49, 162, 178–185, 187–192, 196).

(3) Allowing the appeal (Lord Hope of Craighead DPSC and Lord Reed JSC H dissenting), that the Order was therefore unlawful and would be quashed (post, main judgments, paras 27, 49, 50, 193, 196, 202).

Quaere. Whether any infringement arose under article 6 of, and article 1 of the First Protocol to, the Convention for the Protection of Human Rights and Fundamental Freedoms (post, main judgments, paras 49, 55, 159–160, 202).

A Decision of the Court of Appeal [2011] EWCA Civ 1; [2012] QB 101; [2011] 3 WLR 714; [2011] 2 All ER 802 reversed.

The following cases are referred to in the judgments on the jurisdiction issue:

A v United Kingdom (2009) 49 EHRR 625, GC
Al Rawi v Security Service (Liberty intervening) [2010] EWCA Civ 482; [2012] 1 AC 531; [2010] 3 WLR 1069; [2010] 4 All ER 559, CA; *(JUSTICE intervening)* [2011] UKSC 34; [2012] 1 AC 531; [2011] 3 WLR 388; [2012] 1 All ER 1, SC(E)
Chahal v United Kingdom (1996) 23 EHRR 413
D (Minors) (Adoption Reports: Confidentiality), In re [1996] AC 593; [1995] 3 WLR 483; [1995] 4 All ER 385, HL(E)
H v News Group Newspapers Ltd (Practice Note) [2011] EWCA Civ 42; [2011] 1 WLR 1645; [2011] 2 All ER 324, CA
Independent News and Media Ltd v A [2010] EWCA Civ 343; [2010] 1 WLR 2262; [2010] 3 All ER 32, CA
MT (Algeria) v Secretary of State for the Home Department [2007] EWCA Civ 808; [2008] QB 533; [2008] 2 WLR 159; [2008] 2 All ER 786, CA; [2009] UKHL 10; [2010] 2 AC 110; [2009] 2 WLR 512; [2009] 4 All ER 1045, HL(E)
R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21; [2003] 1 AC 563; [2002] 2 WLR 1299; [2002] 3 All ER 1, HL(E)
R (Roberts) v Parole Board [2005] UKHL 45; [2005] 2 AC 738; [2005] 3 WLR 152, HL(E)
Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E)
Secretary of State for the Home Department v AT (Libya) [2012] EWCA Civ 42, CA
Tariq v Home Office (JUSTICE intervening) [2011] UKSC 35; [2012] 1 AC 452; [2011] 3 WLR 322; [2011] ICR 938; [2012] 1 All ER 58, SC(E)

The following additional cases were cited in argument on the jurisdiction issue:

A v HM Treasury (JUSTICE intervening) [2010] UKSC 2; [2010] UKSC 5; [2010] 2 AC 534; [2010] 2 WLR 378; [2010] 4 All ER 745; [2010] 4 All ER 829, SC(E)
Ainsbury v Millington (Note) [1987] 1 WLR 379; [1987] 1 All ER 929, HL(E)
Austin v Southwark London Borough Council [2010] UKSC 28; [2011] 1 AC 355; [2010] 3 WLR 144; [2010] PTSR 1311; [2010] 4 All ER 16, SC(E)
Bank Mellat v HM Treasury [2010] EWCA Civ 483; [2012] QB 91; [2010] 3 WLR 1090, CA
Bowman v Fels (Bar Council intervening) [2005] EWCA Civ 226; [2005] 1 WLR 3083; [2005] 4 All ER 609, CA
CM (Zimbabwe) v Secretary of State for the Home Department [2013] UKUT 59 (IAC), UT
Carnduff v Rock [2001] EWCA Civ 680; [2001] 1 WLR 1786, CA
Carnduff v United Kingdom (Application No 18905/02) (unreported) given 10 February 2004, ECtHR
Conway v Rimmer [1968] AC 910; [1968] 2 WLR 998; [1968] 1 All ER 874, HL(E); *(Note)* [1968] AC 910; [1968] 2 WLR 1535; [1968] 2 All ER 304, HL(E)
Duncan v Cammell Laird & Co Ltd [1942] AC 624; [1942] 1 All ER 587, HL(E)
General Mediterranean Holdings SA v Patel [2000] 1 WLR 272; [1999] 3 All ER 673
Grobbelaar v News Group Newspapers Ltd [2002] UKHL 40; [2002] 1 WLR 3024; [2002] 4 All ER 732, HL(E)
IR (Sri Lanka) v Secretary of State for the Home Department [2011] EWCA Civ 704; [2012] 1 WLR 232; [2011] 4 All ER 908, CA

Maaouia v France (2000) 33 EHRR 1037, GC
Office of Government Commerce v Information Comr (Attorney General intervening) [2008] EWHC 774 (Admin); [2010] QB 98; [2009] 3 WLR 627
Oxfordshire County Council v M [1994] Fam 151; [1994] 2 WLR 393; [1994] 2 All ER 269, CA
R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274; [1994] 3 WLR 433; [1994] 3 All ER 420, HL(E)
R v H [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 WLR 335; [2004] 1 All ER 1269, HL(E)
R v Secretary of State for the Home Department, Ex p Salem [1999] 1 AC 450; [1999] 2 WLR 483; [1999] 2 All ER 42, HL(E)
R v Secretary of State for Trade and Industry, Ex p Eastaway [2000] 1 WLR 2222; [2001] 1 All ER 27, HL(E)
R (AHK) v Secretary of State for the Home Department [2012] EWHC 1117 (Admin); [2012] ACD 194
R (Edison First Power Ltd) v Central Valuation Officer [2003] UKHL 20; [2003] 4 All ER 209, HL(E)
SS (Libya) v Secretary of State for the Home Department (unreported) 30 July 2010, SIAC; [2011] EWCA Civ 1547, CA
Secretary of State for the Home Department v AP [2010] UKSC 24; [2011] 2 AC 1; [2010] 3 WLR 51; [2010] 4 All ER 245, SC(E)
Secretary of State for the Home Department v E [2007] UKHL 47; [2008] AC 499; [2007] 3 WLR 720; [2008] 1 All ER 699, HL(E)
Secretary of State for the Home Department v JJ [2007] UKHL 45; [2008] AC 385; [2007] 3 WLR 642; [2008] 1 All ER 613, HL(E)
Secretary of State for the Home Department v MB [2007] UKHL 46; [2008] AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)
Spectrum Plus Ltd, In re [2005] UKHL 41; [2005] 2 AC 680; [2005] 3 WLR 58; [2005] 4 All ER 209, HL(E)
Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening) [2008] UKHL 50; [2009] AC 225; [2008] 3 WLR 593; [2008] 3 All ER 977, HL(E)
W (Algeria) v Secretary of State for the Home Department [2010] EWCA Civ 898, CA
XX (Ethiopia) v Secretary of State for the Home Department (JUSTICE intervening) [2012] EWCA Civ 742; [2013] QB 656; [2013] 2 WLR 178; [2012] 4 All ER 692, CA
Y v Secretary of State for the Home Department (unreported) 12 July 2006, SIAC

The following cases are referred to in the judgments on the main issue:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
Alberta v Hutterian Brethren of Wilson Colony 2009 SC 37; [2009] 2 SCR 567
Bates v Lord Hailsham of St Marylebone [1972] 1 WLR 1373; [1972] 3 All ER 1019
Bryan v United Kingdom (1995) 21 EHRR 342
Cooper v Wandsworth Board of Works (1863) 14 CBNS 180
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Edinburgh District Council v Secretary of State for Scotland 1985 SC 261; 1985 SLT 551, Ct of Sess
Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry [1975] AC 295; [1974] 3 WLR 104; [1974] 2 All ER 1128, HL(E)
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Illinois State Board of Elections v Socialist Workers Party (1979) 440 US 173
James v United Kingdom (1986) 8 EHRR 123

Jersild v Denmark (1994) 19 EHRR 1
John v Rees [1970] Ch 345; [1969] 2 WLR 1294; [1969] 2 All ER 274
Jokela v Finland (2002) 37 EHRR 581
Lavigne v Ontario Public Service Employees Union [1991] 2 SCR 211
Lloyd v McMahon [1987] AC 625; [1987] 2 WLR 821; [1987] 1 All ER 1118, HL(E)
Micallef v Malta (2009) 50 EHRR 920, GC
R v Barnsley Metropolitan Borough Council, Ex p Hook [1976] 1 WLR 1052; [1976] 3 All ER 452, CA
R v Birmingham City Council, Ex p Ferrero Ltd [1993] 1 All ER 530, CA
R v Edwards Books and Art Ltd [1986] 2 SCR 713
R v Electricity Comrs, Ex p London Electricity Joint Committee Co (1920) Ltd [1924] 1 KB 171, CA
R v HM Treasury, Ex p Smedley [1985] QB 657; [1985] 2 WLR 576; [1985] 1 All ER 589, CA
R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) [1990] ECR-I 4023, ECJ
R v Oakes [1986] 1 SCR 103
R v Secretary of State for the Environment, Ex p Brent London Borough Council [1982] QB 593; [1982] 2 WLR 693; [1983] 3 All ER 321, DC
R v Secretary of State for the Environment, Ex p Nottinghamshire County Council [1986] AC 240; [1986] 2 WLR 1; [1986] 1 All ER 199, HL(E)
R v Secretary of State for Health, Ex p United States Tobacco International Inc [1992] QB 353; [1991] 3 WLR 529; [1992] 1 All ER 212, DC
R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)
R v Shayler [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)
R (Asif Javed) v Secretary of State for the Home Department (AIRE Centre intervening) [2001] EWCA Civ 789; [2002] QB 129; [2001] 3 WLR 323, CA
R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139; [2008] ACD 20, CA
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (SB) v Governors of Denbigh High School [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437; [2012] QB 394; [2012] 2 WLR 304, CA
R (UNISON) v Secretary of State for Health [2010] EWHC 2655 (Admin); [2011] ACD 29
R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350; [2005] 1 All ER 755, HL(E)
R (Wheeler) v Office of the Prime Minister [2008] EWHC 1409 (Admin); [2008] ACD 281, DC
R (Wright) v Secretary of State for Health [2007] EWCA Civ 999; [2008] QB 422; [2008] 2 WLR 536; [2008] 1 All ER 886, CA; [2009] UKHL 3; [2009] AC 739; [2009] 2 WLR 267; [2009] PTSR 401; [2009] 2 All ER 129, HL(E)
RJR-MacDonald Inc v Canada (Attorney General) [1995] 3 SCR 199
Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E)
Sinclair Collis v Lord Advocate [2012] CSIH 80; 2013 SLT 100
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wiseman v Borneman [1971] AC 297; [1969] 3 WLR 706; [1969] 3 All ER 275, HL(E)

The following additional cases were cited in argument on the main issue:

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Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471
Agrotexim v Greece (1995) 21 EHRR 250
Airey v Ireland (1979) 2 EHRR 305
Al-Skeini v United Kingdom (2011) 53 EHRR 589, GC
Allgemeine Gold- und Silberscheideanstalt v United Kingdom (1986) 9 EHRR 1
Antonetto v Italy (2000) 36 EHRR 120
Associated Provincial Picture Houses Corpn v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Attorney General v Ryan [1980] AC 718; [1980] 2 WLR 143, PC
Ayadi v Council of the European Union (Case T-253/02) [2006] ECR II-2139, CFI
Bank Mellat v Council of the European Union (Case T-496/10) 29 January 2013, EGC
Banković v Belgium (2001) 11 BHRC 435, GC
Benthem v The Netherlands (1985) 8 EHRR 1
Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland (2005) 42 EHRR 1, GC
Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland (Case C-84/95) [1996] ECR I-3953, ECJ
Bramelid v Sweden (1982) 29 DR 64
Broniowski v Poland (2004) 40 EHRR 495, GC
Bruncrona v Finland (2004) 41 EHRR 592
Capital Bank AD v Bulgaria (2005) 44 EHRR 952
Drozd and Janousek v France and Spain (1992) 14 EHRR 745
E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351, CA
Forminster Enterprises Ltd v Czech Republic (Application No 38238/04) (unreported) given 9 October 2008, ECtHR
Gabrić v Croatia (Application No 9702/04) (unreported) given 5 February 2009, ECtHR
Gentilhomme, Schaff-Benhadji and Zerouki v France (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002, ECtHR
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Grifhorst v France (Application No 28336/02) (unreported) given 26 February 2009, ECtHR
Hentrich v France (1994) 18 EHRR 440
Humberclyde Finance Group Ltd v Hicks (unreported) 14 November 2001, Neuberger J
Hutten-Czapska v Poland (2006) 45 EHRR 52, GC
International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158; [2003] QB 728; [2002] 3 WLR 344, CA
Ismayilov v Russia (Application No 30352/03) (unreported) given 6 November 2008, ECtHR
Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E)
Kadi v Commission of the European Communities (Council of the European Union intervening) (Case T-85/09) [2011] 1 CMLR 697, EGC
Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225; [2009] 3 WLR 872; [2010] All ER (EC) 1105, ECJ
Le Compte, Van Leuven and De Meyere v Belgium (1981) 4 EHRR 1
Lithgow v United Kingdom (1986) 8 EHRR 329
McInnes v Onslow-Fane [1978] 1 WLR 1520; [1978] 3 All ER 211
Malcolm, In re [2004] EWCA Civ 1748; [2005] 1 WLR 1238; [2005] ICR 611, CA
Matos e Silva Lda v Portugal (1996) 24 EHRR 573

A *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641; [2013] ICR 270; [2012] 4 All ER 359, CA
Nasser v United Bank of Kuwait [2001] EWCA Civ 556; [2002] 1 WLR 1868; [2002] 1 All ER 401, CA
R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Gaming Board for Great Britain, Ex p Benaim and Khaida [1970] 2 QB 417;
B [1970] 2 WLR 1009; [1970] 2 All ER 528, CA
R v Ministry of Defence, Ex p Smith [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA
R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA
R v Parliamentary Comr for Administration, Ex p Balchin [1998] 1 PLR 1
R v Secretary of State for Health, Ex p Eastside Cheese Co [1999] 3 CMLR 123, CA
C *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R v Secretary of State for the Home Department, Ex p Bugdaycay [1987] AC 514; [1987] 2 WLR 606; [1987] 1 All ER 940, HL(E)
R v Secretary of State for the Home Department, Ex p Fayed [1998] 1 WLR 763; [1997] 1 All ER 228, CA
R v Thames Magistrates' Court, Ex p Polemis [1974] 1 WLR 1371; [1974] 2 All ER
D 1219, DC
R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1910 (Admin); [2009] ACD 290, DC
R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR
E 1389; [2001] 2 All ER 929, HL(E)
R (C) v Secretary of State for Justice [2008] EWHC 171 (Admin); [2010] 1 Prison LR 146; [2008] ACD 117, DC
R (Clays Lanes Housing Co-operative Ltd) v The Housing Corporation [2004] EWCA Civ 1658; [2005] 1 WLR 2229, CA
R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719; [2007] 3 WLR 922; [2008] 2 All ER 95, HL(E)
F *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332; [2013] 1 WLR 444; [2012] 3 All ER 301, CA
R (G) v Governors of X School (Secretary of State for the Home Department intervening) [2011] UKSC 30; [2012] 1 AC 167; [2011] 3 WLR 237; [2011] ICR 1033; [2011] PTSR 1230; [2011] 4 All ER 625, SC(E)
R (Khatun) v Newham London Borough Council [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417, CA
G *R (New College Ltd) v Secretary of State for the Home Department* [2011] EWHC 856 (Admin)
R (SRM Global Master Fund LP) v Treasury Comrs [2009] EWCA Civ 788; [2009] UKHRR 1219, CA
Ridge v Baldwin [1964] AC 40; [1963] 2 WLR 935; [1963] 2 All ER 66, HL(E)
Ringeisen v Austria (1971) 1 EHRR 455
S v Brent London Borough [2002] EWCA Civ 693; [2002] ELR 556, CA
H *Secretary of State for the Home Department v Rahman* [2011] EWCA Civ 814, CA
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Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, CA
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Southampton Port Health Authority v Seahawk Marine Foods Ltd [2002] EWCA Civ 54; [2002] EHLR 306, CA
Sud Fondi Srl v Italy (Application No 75909/01) (unreported) given 20 January 2009, ECtHR
Tsironis v Greece (2001) 37 EHRR 183
Vatan v Russia (2004) 42 EHRR 129
WM (Democratic Republic of Congo) v Secretary of State for the Home Department [2006] EWCA Civ 1495; [2007] Imm AR 337, CA
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)
X and Y v Switzerland (1977) 9 DR 57

APPEAL from the Court of Appeal

By a claim form issued on 20 November 2009 the claimant, Bank Mellat, applied under section 63(2) of the Counter-Terrorism Act 2008 to set aside the decision of the defendant, Her Majesty's Treasury, in the exercise of its powers under Schedule 7 to the 2008 Act on 12 October 2009, to make the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) which directed all persons operating in the financial sector in the United Kingdom not to enter into or continue to participate in any transactions or business relationships with the claimant. By order dated 11 June 2010 Mitting J [2010] Lloyd's Rep FC 504 dismissed the claim and granted permission to appeal.

By an appellant's notice dated 2 July 2010 the claimant appealed. By an order dated 13 January 2011, the Court of Appeal (Maurice Kay, and Pitchford LJJ, Elias LJ dissenting in part) dismissed the appeal [2012] QB 101.

Pursuant to permission granted on 11 April 2011 by the Supreme Court (Lord Hope of Craighead DPSC, Lord Brown of Eaton-under-Heywood and Lord Kerr of Tonaghmore JJSC) the claimant appealed on the grounds, inter alia, that the Court of Appeal should have found that the Order was unlawful, in particular, (1) as a matter of procedure, having regard to the failure of the majority of the Court of Appeal to hold that (a) the principles of natural justice and the common law duty to allow representations to be made before the restriction order was made required the Treasury to afford the claimant the opportunity to know the case against it and to make representations; (b) the claimant should have been afforded such an opportunity in order to comply with article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; (c) the making of the Order was incompatible with article 1 of the First Protocol to the Convention since section 63 of the 2008 Act did not provide sufficient procedural protection to satisfy that article; (d) the Order was not proportionate within the meaning of paragraph 9(6) of Schedule 7 to the 2008 Act since there was no procedural protection for the claimant before it was made; and (e) the Treasury had not given adequate reasons for making the Order; and (2) as a matter of substance, in particular, that (a) the Order was based on factual premises which were incorrect; (b) the Court of Appeal should have concluded that there was no finding by the judge that the claimant had ever been engaged in trade finance transactions related to any alleged nuclear or proliferation in Iran or that any entity with links to proliferation had ever transacted business through the claimant in the

A United Kingdom, or that it was likely that the claimant would provide trade finance or banking facilities to any such entities, but that the judge had accepted that the claimant had in place mechanisms which it operated conscientiously to ensure that its facilities were not provided to such entities; and (c) the Court of Appeal should have found that the Order was not rationally connected to the Treasury's objective, that its effect was unnecessarily draconian and discriminatory, and that, accordingly it was B disproportionate and ultra vires.

Prior to the hearing in the Supreme Court the Treasury intimated that it wished to rely on closed material in responding to the claimant's appeal. At the outset of the hearing the court accordingly heard argument directed to whether it had jurisdiction to entertain closed material. Liberty, the first intervener, intervened on the jurisdiction issue. The court determined, by a C majority and for reasons to be given later, that it had such jurisdiction, and proceeded to decide, by a majority and for reasons to be given later, that it would accede to the Treasury's application to hear the material in closed session.

Certain shareholders, the second interveners, intervened on the appeal on the substantive issues.

The facts are stated in the judgments of Lord Neuberger of D Abbotsbury PSC on the jurisdiction issue and of Lord Sumption JSC on the main issue.

Jonathan Swift QC, Tim Eicke QC and *Robert Wastell* (instructed by *Treasury Solicitor*) for the Treasury on the application.

The Supreme Court has power to consider the judge's closed reasons and E should do so. There is no jurisdiction issue. The Supreme Court's jurisdiction is governed by section 40 of the Constitutional Reform Act 2005. It can determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment (see section 40(5)) and an appeal lies to the Supreme Court from any order or judgment of the Court of Appeal in civil proceedings (see section 40(2)) and that will plainly include any judgment which includes closed reasons as F permitted by CPR r 79.28. The court's own Rules expressly anticipate that closed reasons can be considered in the course of a hearing: see rules 27 and 29 of the Rules of the Supreme Court 2009. The court's ability to exclude a party under rule 27 depends on the appointment of a special advocate (see rule 27(2)) and that is expressly anticipated for the purposes of the present appeal by section 68(1)(b) of the Counter-Terrorism Act 2008.

G There is no sensible reading down of those provisions to disable the Supreme Court from properly and fairly determining appeals such as the present in proceedings under Part 6 of the 2008 Act: see rule 2(2)(3) of the 2009 Rules. No principle of statutory interpretation requires or favours such an approach and it would be contrary to a purposive approach to the application of the 2005 Act and the 2009 Rules. If a closed part of a judgment cannot be shown to the Supreme Court it will be unable to H discharge its obligations under the 2005 Act and that could lead to the court being unable to determine an appeal which falls within its jurisdiction. That would not only be a narrow reading of the material statutory and regulatory provisions but would be in contradiction to the purpose of those provisions. Regardless of the identity of the party concerned, if the Supreme Court is not

in a position to consider the closed reasons it will not be in a position to consider whole case. Where, as here, closed reasons were given for the judge's judgment it would be strange if the Supreme Court could not consider those reasons when the judgment was the subject of an appeal to the court.

It is necessary to have regard to the judge's closed reasons if the court's jurisdiction on the present appeal is to be exercised properly and fairly. The bank's challenge to the 2009 Order as being substantially unlawful, irrational and disproportionate engages material the Treasury can contradict factually but it cannot do so on the basis of the judge's open reasons. If the court is unwilling or unable to have regard to the closed reasons, that part of the appellant's appeal would fall to be dismissed and the judgment of the Court of Appeal on that part would continue to govern: see *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) and *Bank Mellat v HM Treasury* [2012] QB 91. The decision in *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531 is immaterial in the significantly different circumstances of the present case.

Michael Brindle QC, Amy Rogers and *Dr Gunnar Beck* (instructed by *Zaiwalla & Co*) for the claimant on the application.

The submissions made by the first interveners, post, pp 712F–715B, are adopted: the court does not have power to read the judge's closed judgment and should therefore decline to do so: see *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531, paras 10–13, 21–22. That decision is not "immaterial" but closely to the point: see, in particular, paras 69, 74, 85, 120, 192. Open justice and natural justice are fundamental to common law principles which provide a constitutional check on the court's power to control its own procedure. Any closed procedure under which the court considers a judgment or evidence which is not supplied to one of the parties and reaches a decision without hearing from that party on the issues in dispute, entails a far-reaching and fundamental departure from those principles: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 and *R (Roberts) v Parole Board* [2005] 2 AC 738. The use of special advocates does not compensate for that departure. Absent express statutory authority the courts have no power to depart from them and may not consider closed material, hear argument in closed session or promulgate a closed judgment.

There is no express statutory authority for such a procedure. While sections 66 and 67 of the Counter-Terrorism Act 2008 permit the making of rules of court which govern a challenge to a financial restrictions order to allow for consideration of closed material with the assistance of special advocates, the relevant rules only apply to the High Court, Court of Appeal or Court of Session. Thus Parliament directed its mind to the question of closed material, including closed judgments, and concluded that such procedures, while necessary in other courts, did not extend to the Supreme Court, or the Appellate Committee of the House of Lords, as then constituted. Therefore the express provisions of the 2008 Act preclude any implication that the Supreme Court is authorised to consider closed material.

There is no such authority under the Civil Procedure Rules since they do not govern practice and procedure in the Supreme Court. Nor can authority

A be derived from the Constitutional Reform Act 2005. Section 40 contains no such authority, nor do the rule-making provisions in section 45 or 46, in neither of which is there any reference to a closed procedure, consideration of closed judgments or of any other departure from the principles of natural and open justice. Given (a) the principle of legality (see *A v HM Treasury (JUSTICE intervening)* [2010] 2 AC 534; *R v Secretary of State for the* B *Home Department, Ex p Simms* [2000] 2 AC 115 and *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209) and (b) the presumption against creating judicial jurisdictions (see *Craies on Legislation*, 10th ed (2012), para 19.1.17–22), no such authority can be derived by implication.

That is borne out by the 2009 Rules of the Supreme Court. Rules 27–29 make provision for hearings in private; but they reflect the established C exceptions to open justice and natural justice identified in the *Al Rawi* case [2012] 1 AC 531 and the possibility that Parliament would confer express authority on the court to operate a closed procedure in particular classes of case is not in contemplation. They do not themselves provide any independent authority for the court to consider closed evidence and closed judgments, to sit in private excluding a party or to issue a closed judgment. D The Rules should therefore be read down on the basis that (i) their scope is limited by the authority conferred in sections 45 and 46 of the 2005 Act, and that there is no express authority in the 2005 Act for any form of closed procedure; and that (ii) secondary legislation will not be taken impliedly to override any rule of the general law, not least fundamental rules as to open and natural justice: see *Oxfordshire County Council v M* [1994] Fam 151, 163 and *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272. E That outcome is consistent with the remainder of the 2009 Rules and Practice Directions that there is no provision for closed documentation to be provided to the court.

If the scope of the court's power under section 40 contained the powers claimed by the Treasury, (a) Parliament would, by a general provision as to jurisdiction, have conferred on the Supreme Court a back door power to F operate the most controversial procedures without the need for express parliamentary approval; and (b) a closed material procedure would be permissible in the Supreme Court in any case where the court judged it necessary in the public interest or in the interests of justice to sit in private for part of an appeal hearing, irrespective of whether it would have been legitimate to adopt that procedure in the courts below. That, however, is not the law.

G In any event, irrespective of the question of vires, it is not necessary for the court to consider the closed judgment of the judge in order to determine the issues on the appeal.

Martin Chamberlain and *Melanie Plimmer* (instructed by *Treasury Solicitor, Special Advocates Support Office*) as special advocates for the claimant on the application.

H The submissions of the claimant are adopted on the question whether the Supreme Court has power to consider closed material under the principles in *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531. If, however, such material is admissible, the court should only consider it if and to the extent that the material is relevant to a question which the court must

determine on the appeal. Most obviously that would be the case where there is a closed ground of appeal and the special advocates, or the Government, indicate that the closed reasoning of the court below discloses an error of law. Where there is no such ground of appeal, closed material will rarely be relevant to any issue on an appeal to the Supreme Court: see *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110. In the present case article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms required information to be provided by the Treasury, not only to enable the claimant to deny what was said against it, but also in sufficient detail to enable it to refute the case against it. That can be achieved by "article 6 gisting".

Where the judge hears closed material in a case such as the present where the article 6 gisting requirement applies in order to determine a significant issue, he must make that clear in his judgment and must satisfy himself that the subject has adequate notice of the points against him; the open judgment must stand on its own in the sense that the key conclusions justifying the decision must be stated openly. In those circumstances it should not be necessary to refer to the closed material in determining the open grounds of appeal: see *Secretary of State for the Home Department v AT (Libya)* [2012] EWCA Civ 42.

There is no closed ground of appeal in the present case. The judge's open judgment identifies only two respects in which he found it necessary to rely on the closed material and neither of those findings was in issue on the appeal. The court does not need to consider closed material in order to determine the claimant's case that the findings were insufficient to justify the Order. It should not therefore do so.

If, however, the court considers it should look at the judge's closed judgment it should invite the Treasury to indicate, in closed written submissions, the passages on which it relies and the questions in the appeal to which they are relevant. It should then invite the special advocate to respond in short closed written submissions.

Dinah Rose QC and *Charlotte Kilroy* (instructed by *Liberty*) for the first intervener on the application.

The Supreme Court has no general inherent power to conduct a closed material procedure ("CMP") for the purposes of determining any substantive issue in the appeal. Such a procedure is contrary to the fundamental principles of natural justice and open justice which govern that court's procedures and define the limits of its jurisdiction: see *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531. That case establishes that (1) such principles, which include the right to know the case a party has to meet, are fundamental common law principles which are essential to our system of justice (see paras 10–14, 72–89); (2) the court's inherent power to regulate its own procedures cannot be exercised so as to deny parties their right to participate in the proceedings in accordance with those principles (see paras 19, 21–22, 73); (3) there is no common law power to require a CMP (see paras 35–48); (4) it could never be fair or in the interests of justice to deny a litigant in ordinary civil claims the rights which are entrenched in the common law system as being fundamental to justice itself (see paras 39, 42, 89), and (5) a CMP of the type used in the Counter-Terrorism Act 2008, in which there has been no prior public interest

A immunity exercise, may not be introduced into ordinary civil litigation unless Parliament legislates to that effect: see paras 47, 69, 73–76, 78, 87–89, 120, 152, 192.

Any interference with those principles may only be made consistently with the principle of legality which precludes the court's exercise of its inherent jurisdiction in a way which is incompatible with fundamental rights, including the principle of natural justice: see the *Al Rawi* case, B para 72. Furthermore, fundamental rights cannot be overridden by general or ambiguous statutory wording. In the absence of express language or necessary implication to the contrary, courts presume that even the most general statutory words are intended to be subject to the basic rights of the individual: see *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, paras 130, 131 and *R v Secretary of State for the Home* C *Department, Ex p Pierson* [1998] AC 539, paras 573–575, 587–590. "Necessary implication" is a high hurdle and is not to be confused with "reasonable implication": see *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 45.

Accordingly the only circumstances in which the Supreme Court can entertain submissions or evidence in the absence of a party are (i) where such a procedure is specifically authorised or required by Parliament by clear D statutory language or necessary implication or (ii) where an ex parte hearing is permissible at common law, as where a court examines material for the purpose of deciding whether a public interest immunity claim should be upheld.

Neither of those conditions is satisfied in the present case. The Counter-Terrorism Act 2008 contains no provision which permits or requires the E Supreme Court to conduct a CMP. The explicit powers provided for in the Act to modify the rules of court so as to allow for CMPs only apply to the High Court and the Court of Appeal: see sections 66, 67, 72 and 73. Disqualification of the law of public interest immunity under section 67 of the 2008 Act is an essential element of the statutory regime: the Act not only gives the court a power it would not otherwise possess, to entertain evidence and submissions in the absence of one party, it also deprives the court of its F normal power, when the state claims public interest immunity over evidence which is otherwise disclosable to balance the interests of national security or international relations against other elements of the public interest which might lie in favour of disclosure, and to decide whether, despite the harm which disclosure might cause to the public interest, the document is nevertheless to be disclosed: see *W (Algeria) v Secretary of State for the* G *Home Department* [2010] EWCA Civ 898 at [37].

The general powers of the Supreme Court, set out at section 40 of the Constitutional Reform Act 2005 do not expressly or by necessary implication permit or require the court to conduct a CMP. Section 40(5) confers power to determine any question necessary to be determined for the purposes of doing justice in the appeal under any enactment, but it does not H authorise the adoption, in whole or in part, of the procedure mandated by statute and statutory instrument for the proceedings below. Moreover, the Supreme Court's power to determine any question must be exercised for the purposes of doing justice: a power to act unfairly, contrary to natural justice, cannot be implied into that provision since it would be inconsistent with its express terms. That is why the 2008 Act requires modification of the Civil

Procedure Rules in respect of the courts below, to modify the overriding objective.

Unlike the 2008 Act and the Civil Procedure Rules, there is no provision in the Rules of the Supreme Court 2009, made under section 45 of the 2005 Act, for any modification of the Supreme Court's power to do justice by reference to a requirement to ensure that information is not disclosed contrary to the public interest. On the contrary, section 45(3) and rule 2 impose an overriding requirement of fairness. Parliament did not intend the Rules to contain provisions which overrode fundamental common law rights: see section 46 of the 2005 Act, and contrast section 72 of the 2008 Act. The majority of the Rules are wholly inconsistent with the adoption of a CMP. Rule 27(2) is the only rule which might be so read; but, as compared with CPR Pt 79, it is inadequate to achieve the introduction of the CMP procedure. Properly understood, rule 27(2) makes provision for the Supreme Court of conduct an ex parte hearing when that is permitted at common law, provided that a special advocate is provided: see *R v H* [2004] 2 AC 134, paras 18–22; *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531, para 49; *Conway v Rimmer* [1968] AC 910 and *Conway v Rimmer (Note)* [1968] AC 910.

The special constitutional role of the Supreme Court is a further consideration relevant to the determination of whether a power to hold a CMP should be included in the 2005 Act by necessary implication. That role is an essential part of the context in which the right of appeal under section 40 must be construed. In a legislative scheme which expressly permits the use of CMP in the courts below, it is not necessary to the Supreme Court's appellate role that it should have such power on appeal. The position of the House of Lords, and now the Supreme Court, as the ultimate court of appeal has always been different from the High Court and the Court of Appeal. Unlike the Court of Appeal where the requirement of leave, or permission, is relatively recent, there has always been a requirement of leave to appeal; the practice of granting leave in the House of Lords has always been restrictive and limited to arguable points of law of general public importance: see *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222. The result has been that the Court of Appeal has been reticent about granting permission to appeal, so that the power to choose appeals raising such points has come to rest with the Supreme Court itself. Like the House of Lords, it has always had its own separate rules, practices and procedures, distinct from the lower courts and enacted under separate legislation. As the ultimate appeal court in a system of law governed by precedent, the House of Lords, and now the Supreme Court, occupy an unique constitutional position in the development of the law and the supervision of the common law and the interpretation of statutes: see *Austin v Southwark London Borough Council* [2011] 1 AC 355 and *In re Spectrum Plus Ltd* [2005] 2 AC 680.

That unique position provides a further reason for concluding that the implication into the 2005 Act of a CMP on appeals under the 2008 Act is neither necessary nor appropriate and would produce legal difficulty, confusion and uncertainty. In particular, the adoption of a CMP would undermine the court's supervisory appellate function. The different design of its procedures from those of lower courts is a reasonable response to the different issues likely to be before it: see *Secretary of State for the Home*

Department v AF (No 3) [2010] 2 AC 269 and *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024. Its adoption would conflict with the court's role as guardian of the law of precedent since it would inexorably lead to closed judgments. Such a result ought not to be held to be the proper intention of the 2005 Act in the absence of express statutory language.

Even if the Supreme Court does have power to adopt all or any part of a CMP, it should only rarely exercise the power do so: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 88. [Reference was made to *Van Colle v Chief Constable of the Hertfordshire Police (Secretary of State for the Home Department intervening)* [2009] AC 225.] In the present case that is neither appropriate nor necessary.

Robin Tam QC (appointed by HM Attorney General) as the advocate to the court on the application.

Statutory closed material procedures ("CMPs") have long been controversial, despite the endorsement given by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 144. Nevertheless it is inherent that in any forum in which sensitive information might be relevant, some adjustment from normal procedures has to be made; and the use of confidential material may be unavoidable where national security is at stake: see the *Chahal* case, para 131 and *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110, para 230. At the lowest end of the scale of sensitivity, that procedural compromise can be achieved by conducting a hearing in private. While that solution is commonplace, it obviously involves a departure from the open justice principle. For more sensitive material the common law has developed the doctrine of public interest immunity ("PII") to govern the disclosure of such material, striking the balance between the public interest in protecting the material and the need for fairness and openness: see *Al Rawi v Security Service (Liberty intervening)* [2012] 1 AC 531. But that solution involves compromise: either the evidence is disclosed, and, if there is an open trial, published despite its sensitivity, or it is kept from the other party and disregarded by the court in reaching its conclusion, even if it is probative of the issues in the case: see *Duncan v Cammell Laird & Co Ltd* [1942] AC 624; *Conway v Rimmer* [1968] AC 910; the *Al Rawi* case and *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274. The problems of the PII approach include that it can lead to a case becoming untriable and the claim being struck out: see *Carnduff v Rock* [2001] 1 WLR 1786 and *Carnduff v United Kingdom* (Application No 18905/02) (unreported) given 10 February 2004.

Statutory CMPs strike the balance in a different way: see the *MT* case; *Y v Secretary of State for the Home Deprtment* (unreported) 12 July 2006 and *CM (Zimbabwe) v Secretary of State for the Home Department* [2013] UKUT 59 (IAC). They do so with statutory backing which is different in the two scenarios which have developed: (a) unmodified statutory CMPs where the proceedings do not determine civil rights or obligations for the purposes of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the statutory procedures can be applied without modification: see *Maaouia v France* (2000) 33 EHRR 1037 and *IR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 232; and (b) statutory CMPs in which the statutory scheme is to be read down in

order to remain compliant with article 6: see *Secretary of State for the Home Department v MB* [2008] AC 440. In those cases the law which resolves the tension between the competing public interests includes the Human Rights Act 1998 and its techniques for securing compliance with the Convention, such as "reading down" under section 3 of the 1998 Act: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. In cases under both (a) and (b) the applicable procedure is authorised by statute and is Convention-compliant.

Consideration of the fairness of proceedings was largely focused on the first instance trial in which evidence is adduced by each party and the trial judge must make findings of fact. It is in this context that most criticisms of the CMP arise: see the *MB* case [2008] AC 440; the *AF (No 3)* case [2010] 2 AC 269; *A v United Kingdom* (2009) 49 EHRR 625 and *Office of Government Commerce v Information Comr (Attorney General intervening)* [2010] QB 98.

The task of the appeal courts is different. Frequently the appeal lies only on a question of law and in any event the appeal court would rarely, if ever, venture into a fact-finding role. If such an exercise were necessary, the appellate court would be more likely to consider remitting the matter for factual determination by the judge. In the appellate scenario a simple complaint that CMPs are unfair does not properly focus on the issue. The legal or procedural restriction of appeals to questions of law does not mean that the appeal court only exists to decide legal issues. Two main purposes are served: the private purpose of doing justice in the individual case by correcting wrongs and the public purpose of ensuring public confidence in the administration of justice by making corrections, clarifying and developing the law and establishing precedents: see Lord Woolf, "Access to Justice: final report to the Lord Chancellor on the civil justice system in England and Wales", ch 14, para 22 (July 1996).

The public and private purposes to be served apply as much to the Supreme Court as to first appeals. They are reflected in the principle that appeals lie from orders below, not from reasons, and that unless the appellant wishes the order to be varied, no appeal lies. As a corollary there has been reluctance to hear an appeal which has become academic: see *Ainsbury v Millington (Note)* [1987] 1 WLR 379; contrast *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450 and *Bowman v Fels (Bar Council intervening)* [2005] 1 WLR 3083.

That is no mere technical distinction. The question whether the expression of a legal view was the basis on which the court arrived at its ultimate result in the individual case has a bearing on whether it is to be regarded as part of the ratio and thus binding on other courts, or whether it is merely non-binding obiter dictum. Consequently when the court considers whether it has power to consider a closed judgment, or other closed material, it must bear in mind that part of its function is to decide whether the result of the individual case should be different from the decision below. The court should consider whether, if it were to conclude that it did not have power to look at the closed judgment, it could nevertheless be confident that it would arrive at the correct result simply by applying its legal rules to matters set out in open court without considering those in the closed judgment.

A Some cases can be decided entirely openly: see *Secretary of State for the Home Department v JJ* [2008] AC 385; *Secretary of State for the Home Department v E* [2008] AC 499; *Secretary of State for the Home Department v AP* [2011] 2 AC 1 and *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. By contrast where closed grounds of appeal are raised it may not be possible for them to be considered openly and in that
B situation an appeal court could only do so in closed session: see *XX (Ethiopia) v Secretary of State for the Home Department (JUSTICE intervening)* [2013] QB 656.

There are two major disadvantages to the appeal court's use of closed material. The first is that, inevitably, the party against whom the closed material is adduced will not be given all the reasons for the court's decision. While that is unsatisfactory, the overall position is no different from the first
C instance trial where the individual's ignorance is authorised by Parliament and is Convention-compliant. The second disadvantage is that appeals decided on the basis of closed material will tend to produce a body of closed legal rulings which the appeal courts intend to be authoritative but which cannot be published. That does not sit happily with the normal functions of an appeal court, in particular, having regard to its public purpose of
D clarifying and developing the law and establishing precedents. Since there is no closed ground of appeal in the present case, that problem does not arise here.

The primary advantage of the appeal court considering the closed material is that it assists the court in arriving at the correct result in the individual case and fully discharges its private purpose: see *SS (Libya) v Secretary of State for the Home Department* (unreported) 30 July 2010,
E SIAC; [2011] EWCA Civ 1547 and the *MT* case [2008] QB 533.

If the court had no power to consider the closed judgment it would either (a) have to assume that it was unimpeachable and allow the appeal on grounds which did not depend on its content; or (b) ignore entirely the contents of the closed judgment and approach the appeal only on the basis of the open judgment. Both options are unsatisfactory and could be productive
F of injustice to the individual. The restrictive approach to the grant of permission to appeal is a red herring.

Thus on balance the Supreme Court should consider the closed judgment in order to get the correct result in a case of which it is seised and to avoid a real risk of injustice. While the opposing considerations are not trivial, they are continuing problems inherent in statutory CMPs, but such problems have not deterred Parliament from enacting them.

G Rule 27(2) of the Supreme Court Rules 2009 expressly contemplates closed or ex parte hearings. Clearly it is a condition that there is a special advocate to represent the individual's interests. The rule-making power in the Constitutional Reform Act 2005 is in general terms and contains nothing specific to closed hearings; there is scope for argument as to whether the power is wide enough to permit closed hearings under rule 27(2) or whether
H it might be ultra vires or limited to PII hearings. The Supreme Court should therefore give serious consideration to a broad reading of its statutory powers. In particular where the effect of a technical reading would be productive of injustice, the power under section 40(5) of the 2005 Act could be construed as conferring jurisdiction to determine whether the closed judgment disclosed any material error of law which required correction.

Rule 29(1) could be construed as not being limited to powers of disposal, as enumerated in the subsequent list. The objections to "necessary implication" are also less cogent in relation to an appeal to the Supreme Court, since most critical concern centres on the first instance trial and different considerations apply to appellate courts. Given the anomalies which would result if the appeal courts could not properly examine the whole of the decision under appeal there could be said to be a greater necessity to imply powers which allowed the appeal courts to function properly.

The availability of the power does not mean that it should always be exercised. The court may consider that in normal circumstances it can expect to look only at important points of law after the Court of Appeal has had the opportunity to deal with a wider selection of points which are more likely to require examination of factual reasoning. That may be reflected by the fact the House of Lords and the Supreme Court have hitherto declined to consider closed material, although they have not shut the door against doing so: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. The court may now think that there are foreseeable circumstances in which it should do so as the only just way of disposing of an appeal.

In the present case the ground of appeal relating to procedure does not contain anything which might indicate that the closed judgment would be relevant. The ground relating to proportionality may suggest a different approach by the court. It may be more useful to make the decision whether to consider the closed judgment after hearing the oral argument. By that stage the court may have become confident that such a course will be unnecessary.

Swift QC replied.

Michael Brindle QC, Amy Rogers and *Dr Gunnar Beck* (instructed by *Zaiwalla & Co*) for the claimant in the main appeal.

The Financial Protection (Iran) Order 2009 made purportedly under section 62 of and Schedule 7 to the Counter-Terrorism Act 2008 is unlawful. While that legislative scheme, although onerous, is carefully drawn, the 2008 Act is not intended to permit blanket economic sanctions against a particular jurisdiction. Parliament's concern was to insulate the United Kingdom financial sector from involvement in transactions related to nuclear or ballistic proliferation abroad. By express provision, the requirements imposed by a direction must be proportionate: see Schedule 7, paragraphs 3, 9.

The Treasury's decision to make the Order was irrational, tainted by mistakes of fact and irrelevant considerations. It was made on a mistaken basis of the material facts: in particular, in the belief that the claimant was state-owned and state-controlled, not a private commercial entity: see *E v Secretary of State for the Home Department* [2004] QB 1044. That belief was a legally irrelevant consideration. But the error undermined a large part of the Treasury's justification for making the Order. [Reference was made to *R (FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444 and *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306.] To sanction a private commercial bank in the erroneous belief that it is under the control of an unfriendly foreign power is plainly irrational: see *R v Parliamentary Comr for Administration, Ex p Balchin*

A [1998] 1 PLR 1. The error was of such materiality as alone to justify the setting aside of the Order.

The Treasury fell into further material error in making the Order on the basis of the assertion that the claimant had provided services to particular customers over many years to facilitate nuclear proliferation in Iran. Its later justification, that the claimant was an unknowing and unwilling actor, was not the basis on which the Order was made and is misconceived when B applied to the claimant. It is not reasonable to close down the claimant's entire United Kingdom business simply on the basis that it is an Iranian bank with international reach, without identifying any particular risk that it would facilitate any Iranian nuclear programme, willingly, knowingly or otherwise. The Treasury's assertion relating to two particular customers, out of its 19 million customers, does not bear scrutiny, given that it ceased its C dealing with them. For that further reason it was irrational to make the Order.

The effect of the Order is to freeze the claimant's assets in the United Kingdom although the 2008 Act confers no asset freezing power and the Treasury has expressly disclaimed the suggestion that the Order is an asset freeze. In those circumstances to impose a de facto freeze is oppressive and perverse: see *R (Khatun) v Newham London Borough Council* [2005] QB D 37, para 41.

Although the claimant's case is made on the basis of ordinary *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), the manifest interference which the Order entails with the claimant's fundamental rights is such as requires the court to adopt a test of anxious scrutiny: see *R v Ministry of Defence, Ex p Smith* [1996] QB 517 and *R v Secretary of State for the Home* E *Department, Ex p Bugdaycay* [1987] AC 514. It is the test which the Treasury itself should have applied in considering whether to make the Order at all: see *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *A v HM Treasury (JUSTICE intervening)* [2010] 2 AC 534; *WM (Democratic Republic of Congo) v Secretary of State for the Home* F *Department* [2007] Imm AR 337. Approached through the lens of that test, the bases on which the Treasury acted and now seeks to justify its actions are illogical and unreasonable

Not only is the Order irrational, it is also disproportionate and therefore ultra vires the express proportionality condition in paragraph 9 of Schedule 7; and it is an unjustifiable breach of the claimant's rights under article 1 of the First Protocol to the Convention ("A1P1"), of article 14 of the G Convention for the Protection of Human Rights and Fundamental Freedoms and of the Treasury's own obligations under section 6 of the Human Rights Act 1998. The appropriate test is whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right, (2) the measures designed to meet the legislative objective are rationally connected to it; (3) the means used to impair the right or freedom are no more than H necessary to achieve the objective (see *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R v Ministry of Defence, Ex p Smith* [1996] QB 517; *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023 and *International Transport Roth GmbH v Secretary of State for the*

Home Department [2003] QB 728) and (4) the measure strikes a fair balance: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 and *R v Shayler* [2003] 1 AC 247. Those conditions are supported in the European Court of Human Rights case law: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 and *Broniowski v Poland* (2004) 40 EHRR 495.

The Order is not rationally connected to the Treasury's policy objective. The Treasury has not shown why, if the threat posed to the integrity of the United Kingdom financial sector by other international banks which might, as "unwilling and unknowing actors", facilitate proliferation-related transactions could be met without shutting those banks out from business with the United Kingdom, similar measures could not adequately address the threat presented by the claimant: see the analogous situation in *A v Secretary of State for the Home Department* [2005] 2 AC 68. The Order also goes further than is required to meet the Treasury's objective and fails to strike a fair balance: (a) its consequences are immediate, irreparable and exceptionally severe, even though there is nothing material, on the Treasury's unknown and unwilling actor case, to distinguish the claimant's position from that of any other Iranian or other international bank offering trade finance facilities and (b) a fair procedure was not adopted: the claimant was not informed of the charges against it, was afforded no chance of being heard and given no adequate reasons: see *Ismayilov v Russia* (Application No 30352/03) (unreported) given 6 November 2008; *Grifhorst v France* (Application No 28336/02) (unreported) given 26 February 2009; *Sud Fondi Srl v Italy* (Application No 75909/01) (unreported) given 20 January 2009 and *Gabrić v Croatia* (Application No 9702/04) (unreported) given 5 February 2009. Contrast *Kadi v Commission of the European Communities (Council of the European Union intervening)* (Case T-85/09) [2011] 1 CMLR 697.

The Treasury could have undertaken factual and technical research of the claimant's transactions, but there is no evidence of its having done so: contrast *Southampton Port Health Authority v Seahawk Marine Foods Ltd* [2002] EHLR 306. It chose to adduce no substantive evidence on whether a less restrictive measure would have sufficed and it cannot be heard to say now that no such measure would have sufficed. It is wrong to suggest that the question for the court is whether any other measure would be as effective a sanction as a blanket prohibition on business with the claimant. It is not sufficient for it to establish that its chosen measure under Schedule 7 would be the most effective means to reduce the relevant risk to the UK's national interests. The 2008 Act and the jurisprudence of the European Court of Human Rights require a searching analysis of whether there truly was no less restrictive means of achieving that chosen policy: and, in the present case, there were adequate alternative measures. The Treasury's assertion that a complete ban on transactions with the claimant is required does not bear analysis: before making the Order no efforts were made to discover the nature of the checks in fact carried out by the claimant. The courts below were wrong to place great weight on the Treasury's assessment of proportionality: the appropriate test is one of anxious scrutiny, particularly in circumstances in which the Treasury's reasoned justification post-dated the Order and was founded on material errors of fact and approach. The Order is accordingly disproportionate and thus both ultra vires Schedule 7

A and an unlawful violation of the claimant's rights under A1P1 of the Convention and section 6 of the 1998 Act.

The unwilling and unknowing actor justification also falls foul of the prohibition on discrimination under article 14 of the Convention. The courts below state that the Treasury's reason for making the Order was that the claimant is Iranian and under state control: contrast *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, para 58 and *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 68. Yet the Treasury expressly disavowed any suggestion that the Order was by way of a general sanction against Iran and made no substantive attempt to justify the Order on the basis of nationality alone. The Order therefore constitutes a violation of the claimant's article 14 rights read with its rights under A1P1.

In any event, the Order was made in breach of the rules of natural justice, without adequate reasons and in breach of the claimant's rights under articles 6.1 and 14 and A1P1. It was made without notice to the claimant and, by adopting a closed procedure, without affording it any opportunity to be heard, or to answer the case against it. Natural justice requires, as a basic and fundamental principle, that a person whose rights are to be adversely affected by an administrative decision is to be given an opportunity to know the case against him and to make representations on his own behalf before the decision is made and it is axiomatic that the common law will supply the omission of the legislature. There is nothing in the 2008 Act expressly or impliedly excluding that common law implication and nothing in the rules of natural justice which would frustrate its legislative purpose. Plainly such an opportunity should have been accorded to the claimant here: reliance is placed on the dissenting judgment of Elias LJ in the Court of Appeal [2012] QB 101: see *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Wiseman v Borneman* [1971] AC 297; *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763; *R v Gaming Board for Great Britain, Ex p Benaim and Khaida* [1970] 2 QB 417; *McInnes v Onslow-Fane* [1978] 1 WLR 1520; *Attorney General v Ryan* [1980] AC 718; *Lloyd v McMahon* [1987] AC 625 and *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. The decision in *R (BAPIO Action Ltd)) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 does not compel a different conclusion: see *R (C) v Secretary of State for Justice* [2010] 1 Prison LR 146.

The affirmative resolution procedure or the right to commence post hoc litigation against the Treasury under section 63 of the 2008 Act does not achieve what fairness requires and does not exclude basic procedural rights: see *S v Brent London Borough* [2002] ELR 556, para 14 and *R (West) v Parole Board* [2005] 1 WLR 350, para 29. The function of the affirmative procedure is to provide an element of democratic accountability for executive action and it provides no protection for the claimant which has no locus before Parliament. Post hoc litigation under section 63 does not meet the purpose for which a right to be heard is implied: it provides no chance to persuade the decision-maker from acting so as to avoid the irreparable harm. The process by which the Treasury justifies its position offers no fairness at all: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. It cannot be said that it was impossible that exercise of the right to be heard would have made any difference to the Treasury's evaluation: see *John v Rees* [1970] Ch 345 and *Ridge v Baldwin* [1964] AC 40. The

direction should be quashed to ensure public confidence by ensuring that such regimes as the present are seen to operate fairly: see *R v Thames Magistrates' Court, Ex p Polemis* [1974] 1 WLR 1371.

The Treasury's failure to act fairly at common law was also a breach of the claimant's rights under article 6(1) of the Convention: see *R (Wright) v Secretary of State for Health* [2009] AC 739, which is directly in point. The European Court of Human Rights' decision in *Micallef v Malta* (2009) 50 EHRR 920 does not cast doubt on the decision in the *Wright* case. In the present case the Order was draconian, causing, and being calculated to cause, immediate and irreversible prejudice to the claimant. It had a clear and decisive effect on the claimant's civil rights: in particular, it constituted an immediate interference with the claimant's fundamental right to the peaceful enjoyment of its possessions and an immediate impediment to the exercise of its contractual obligations and to conduct business with the United Kingdom financial sector. Yet the process of making the Order did not begin fairly. The claimant had no opportunity to make representations to the Treasury at the outset, to correct factual errors and misplaced suspicions, to provide exculpatory material or to persuade the Treasury that less extreme restrictions would suffice. The courts were wrong to give great weight to the Treasury's assessments of fact and approach. There had been no searching or fair review of the allegations and the factual case levelled against the claimant: contrast *Kadi v Commission of the European Communities (Council of the European Union intervening)* (Case T-85/09) [2011] 1 CMLR 697 and *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225. In those circumstances the Treasury's decision to make the Order was itself a determination of the claimant's civil rights within the scope of article 6.1 and its failure to allow the claimant any opportunity to make representations was a plain breach.

The Order is not, as suggested by the Treasury, akin to an interim measure for a freezing order, imposed only pending a final determination by the court. It is plainly a determination of the claimant's rights: see the *Micallef* case. In any event the Order did not satisfy the requirements of article 6.1 on the basis that it was a composite procedure including the right of challenge under section 63 of the 2008 Act: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. A composite procedure would only suffice for article 6 purposes where an executive decision is subject to the court's control or tribunal with full jurisdiction to deal with the case as the nature of the decision required and that would depend on all the circumstances: see the *Wright* case [2009] AC 739, para 105. Thus the Treasury's failure to act fairly at the outset of the Schedule 7 process precludes any conclusion that the possibility of legal challenge under section 63 of the 2008 Act can give "composite" effect to the claimant's article 6.1 rights.

It is untenable to suggest, as the Treasury now appears to do, that its decision to make the Order is not a determination of the claimant's civil rights for the purposes of the European Court of Human Rights' jurisprudence: the decision is directly decisive of the claimant's effective exercise of those rights: see *Ringeisen v Austria* (1971) 1 EHRR 455 and *R (G) v Governors of X School (Secretary of State for the Home Department intervening)* [2012] 1 AC 167. It cannot be said that the Order showed only a tenuous connection with the claimant's right to conduct business with the

A United Kingdom financial sector: see *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1 and *Benthem v The Netherlands* (1985) 8 EHRR 1. As the judge held, the Order impinges directly on the claimant's rights.

There is nothing in the scheme of the 2008 Act to preclude the reading in of appropriate words to ensure compatibility with article 6.1 (see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557) or alternatively, and in so far as
B necessary, to seek a declaration of incompatibility as to Schedule 7.

The Treasury's failure to afford the claimant any measure of procedural protection when making the Order amounted to a breach of the claimant's rights under A1P1. To the extent that it was unlawful at common law for want of procedural fairness, it was not made in accordance with the law and thus failed at the first hurdle in any analysis under A1P1. In any event in the
C absence of meaningful procedural protection the Order further failed to strike a fair balance for A1P1: see *R (New College Ltd) v Secretary of State for the Home Department* [2011] EWHC 856 (Admin). A1P1 contains no explicit procedural requirements but the proceedings must afford the individual a reasonable opportunity of putting his or her case to the responsible authorities so as to challenge a measure interfering with
D the rights guaranteed by A1P1. In ascertaining whether that condition is satisfied a comprehensive view is to be taken of the applicable procedures; Convention rights must be given force in a way that is practical and effective. A challenge under section 63 of the 2008 Act does not provide an effective check on arbitrary interference with the claimant's rights and falls far short of the protection required: see *Jokela v Finland* (2003) 37 EHRR 581; *Kadi v Commission of the European Communities (Council of the European Union*
E *intervening)* (Case T-85/09) [2011] 1 CMLR 697; *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225; *Hentrich v France* (1994) 18 EHRR 440; *Tsironis v Greece* (2003) 37 EHRR 183; *Bruncrona v Finland* (2004) 41 EHRR 592; *Capital Bank AD v Bulgaria* (2005) 44 EHRR 952; *Forminster Enterprises Ltd v Czech Republic* (Application No 38238/04) (unreported) given 9 October 2008
F and *Airey v Ireland* (1979) 2 EHRR 305.

Therefore, in addition to the broader considerations of proportionality, the Order violates the claimant's rights under A1P1 and the Treasury's decision to make the direction in the Order was in breach of section 6 of the 1998 Act.

The Court of Appeal was wrong to conclude that the Treasury's reasons were intelligible and adequate: see *South Bucks District Council v Porter*
G *(No 2)* [2004] 1 WLR 1953, para 36. Given the interference with fundamental rights caused by the Order reasons should be full, clear and cogent: they were not and did not permit the claimant to assess the lawfulness of the Order or even its true factual underpinning. Failure to give reasons is a distinct ground of unlawfulness and the direction should be quashed for such a failure, even if remedied subsequently in evidence.

H *Nicholas Vineall QC* (instructed by *Zaiwalla & Co*) for the second interveners in the main appeal.

The second interveners include two long-standing customers of the claimant and a number of private shareholders. The factual basis on which the Treasury made the Financial Restrictions (Iran) Order 2009 is shown, by

the evidence before the court, to be materially incorrect. As that evidence shows, the Treasury's position was fundamentally misconceived and wrong in almost every detail. In particular, it overestimated the likely impact on the Iranian state, and underestimated the extent to which private interests would be adversely affected. Those are matters which go directly to the proportionality of the Order which requires the court's assessment to be informed both by a proper understanding of the adverse effect of the Order on the interveners and a close examination of the factual justification given by the Treasury: see *R v Shayler* [2003] 1 AC 247, paras 33, 60–61.

The second interveners' rights qua customers and shareholders are protected by the right to the peaceful enjoyment of their property under article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1") constituted by their contractual rights generally and ownership rights in particular: see *AB & Co AS v Federal Republic of Germany* (1978) 14 DR 146; *In re Malcolm* [2005] 1 WLR 1238; *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 and *Bramelid v Sweden* (1982) 29 DR 64. Significant interference with their rights is shown by the adverse effect on the value of their property: see *Antonetto v Italy* (2000) 36 EHRR 120. Although interference can be justified by reference to the principle of lawfulness, the principle of legitimate aim in the general interest and the principle of a fair balance (see *Hutten-Czapska v Poland* (2006) 45 EHRR 52), there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the interference and a fair balance between the general interests of the community and the individual's fundamental rights. Protection of property rights, such as those of the interveners, is also provided under the Universal Declaration of Human Rights (1948): see the Preamble and article 17.

The claimant's submissions on the disproportionality of the Order are adopted: no fair balance was struck and the Treasury failed to take account of, or give any proper weight to, their interests. The Order constitutes therefore an unlawful interference with their rights under A1P1.

By way of anticipation: if it is said that the second interveners, qua shareholders, do not have standing to advance their complaints, they accept that under the Human Rights Act 1998 only a person who is or would be a victim may bring proceedings or rely on any Convention rights in any legal proceedings (see section 7(1) of the 1998 Act) and that it is unlikely that they would be regarded as having victim status: see *Agrotexim v Greece* (1996) 21 EHRR 250 and *Humberclyde Finance Group Ltd v Hicks* (unreported) 14 November 2001. But that does not matter. The reason the shareholders cannot complain is not because there is no infringement but because of the procedural bar. [Reference was made to *Johnson v Gore Wood & Co* [2002] 2 AC 1.] Since they do not seek to become parties the fact that they have no locus is irrelevant; but what is relevant in assessing the dispute between the claimant and the Treasury is that the interveners' A1P1 rights are engaged and have been infringed.

Jonathan Swift QC, Tim Eicke QC and *Robert Wastell* (instructed by *Treasury Solicitor*) for the Treasury in the main appeal.

The Supreme Court should not entertain any claim by the second interveners. If they were to bring proceedings they should have done so

A under section 63 of the Counter-Terrorism Act 2008 for the Financial Restrictions (Iran) Order 2009 to be set aside, but they did not do so. In any event, their claims should be dismissed. There is no documentary evidence beyond bare assertion that there was interference with their contractual rights. Their claims that their rights under article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms
B ("A1P1") have been breached cannot be heard because, on any analysis, the claims are not freestanding and the interveners are not victims for Convention purposes: see *Agrotexim v Greece* (1996) 21 EHRR 250; *Vatan v Russia* (2004) 42 EHRR 129; *Johnson v Gore Wood & Co* [2002] 2 AC 1 and *Humberclyde Finance Group Ltd v Hicks* (unreported) 14 November 2001.

C In so far as the second interveners' claims are distinct from those of the claimant, they fall outside the jurisdiction of the Convention which applies an essentially territorial concept of jurisdiction: see *Banković v Belgium* (2001) 11 BHRC 435. None of the exceptions in which extraterritorial jurisdiction has been held to apply is relevant here: see *Soering v United Kingdom* (1989) 11 EHRR 439; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *R (Al-Skeini) v Secretary of State for Defence (The*
D *Redress Trust intervening)* [2008] AC 153; *Al-Skeini v United Kingdom* (2011) 53 EHRR 589; *X and Y v Switzerland* (1977) 9 DR 57 and *Gentilhomme, Schaff-Benhadji and Zerouki v France* (Applications Nos 48205/99, 48207/99 and 48209/99) (unreported) given 14 May 2002.

In any event, in so far as the making of the Order impacted on the claimant's property there would be consequential impact on those with
E interests in the claimant, such as customers and shareholders. But any interference was proportionate and the interveners' complaints do not affect the assessment of the proportionality of the Order to the legislative aim of preventing or impeding Iran's nuclear programme. The Universal Declaration of Human Rights (1948) is not part of national law. But the provisions of article 17 do not add to the claim under A1P1. The submission
F that the Order arbitrarily interfered with their property relies on the claimant's contention that there was no rational basis for it. In each case that submission fails for the reasons advanced in the Treasury's case.

Eicke QC following.

The key factual premise on which the Financial Restrictions (Iran) Order 2009 was made, as appears in the closed and open evidence, was the
G Treasury's reasonable belief that the development or production of nuclear weapons in Iran and the facilitating of such activities posed a significant risk to the UK's national interests. It was entitled to make the Order directing the UK financial sector to cease business with the claimant on the evidence available to it, in particular that the claimant was owned and controlled by the Iranian state and had provided banking services which facilitated that programme. For the purposes of the proceedings it is unnecessary to assert
H that the claimant knew that it had provided such services. The Order can clearly be justified on the basis of the claimant's being an unwitting conduit for such proliferation. Contrary to the claimant's assertion, the Treasury did not fall into fundamental factual error in making the Order and any claim to irrationality on that head must fail.

The test of proportionality in paragraph 9(6) of Schedule 7 to the Counter-Terrorism Act 2008 differs from the test applied domestically under the Human Rights Act 1998 which applies that enunciated in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 and *Huang v Secretary of State for the Home Department* [2007] 2 AC 167. Where, as here, the value of the legitimate aim is very high it is necessary to accord the decision-maker a wide margin of appreciation. Thus the minimum interference test, set out in the third limb of the *de Freitas* analysis is not a significant feature for the purposes of the statutory provision in paragraph 9(6) of Schedule 7 to the 2008 Act. In considering whether the decision to make the Order was in accordance with paragraph 9(6), the correct approach is to ask (1) whether the nuclear proliferation in Iran poses a risk to UK national security, as to which there is no issue, (2) does the "cease business" direction in the Order seek to address that risk, and (3) is there a reasonable relationship of proportionality between the risk and the measures contained in the direction.

While it might be relevant to consider whether a different form of direction could have been made when considering the third limb in *de Freitas*, in the present context that would not mean identifying a minimally intrusive measure. If a lesser direction were to be given, the material point is whether it would have been possible without compromising the legitimate aim. The question is then not of proportionality as to the claimant's right to its commercial property but as to the risk to national security. The impact on the claimant's commercial property does not have the significance for the purposes of the application of paragraph 9(6) that it has qua Convention rights under the 1998 Act. No minimum interference principle could be applied here since it would assume some form of safe level, whereas so far as national security is concerned, there is no such level. The minimum interference test in the *de Freitas* analysis has therefore no practical application for the purposes of Schedule 7.

It follows that the governing principle as regards proportionality in respect of the claimant's claim under the 1998 Act is whether a fair balance has been struck between the interest of the general community and the requirement of protection for the claimant's rights under article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1"): see *R (SRM Global Master Fund LP) v Treasury Comrs* [2009] UKHRR 1219. What is required is that the measure is not wholly unreasonable. A court should respect the legislature's judgment as to what is in the public interest unless the result is manifestly without reasonable foundation: see *James v United Kingdom* (1986) 8 EHRR 123. The court should permit a significant margin of discretion to the decision-maker. It should also take particular care where interference with enjoyment of property under A1P1 is justified by reason of threats or danger to the public: see *R v Secretary of State for Health, Ex p Eastside Cheese Co* [1999] 3 CMLR 123. Such matters are essentially political and do not call for judicial expertise or insight. Thus, in this case, the choice of the means to be pursued in what is ultimately a foreign policy objective is largely a political matter and the margin of discretion should be a wide one: see *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* (2005) 42 EHRR 1; *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport,*

Energy and Communications, Ireland (Case C-84/95) [1996] ECR I–3953 and *Secretary of State for the Home Department, Ex p Rehman* [2003] 1 AC 153. The courts below correctly rejected the minimum interference test: see *R (Clays Lane Housing Co-operative) Ltd v The Housing Corporation* [2005] 1 WLR 2229; *R (Countryside Alliance) v Attorney General* [2008] AC 719 and *Wilson v First County Trust (No 2) Ltd* [2004] 1 AC 816. Further, the claimant's proportionality challenge based on the facts was correctly rejected by the courts below.

It is wrong to suggest that the Order failed to strike a fair balance by failing to adopt any fair procedure: see *Matos e Silva Lda v Portgual* (1996) 24 EHRR 573; *Allgemeine Gold- und Silberscheideanstalt v United Kingdom* (1997) 9 EHRR 1; the *Bosphorus* case (Case C-84/95) [1996] ECR I–3953; the *Bosphorus v Ireland* case 42 EHRR 1; *Ayadi v Council of the European Union* (Case T-253/02) [2006] ECR II-2139 and *Kadi v Commission of the European Communites (Council of the European Union intervening)* (Case T-85/09) [2011] 1 CMLR 697.

Section 63(3) of the 2008 Act requires the challenge to the making of the Order to be determined under principles of judicial review. Under common law principles the level of review will vary depending on the nature and subject matter of the decision under challenge. In the present case, the decision concerns national security and foreign policy, areas in which the courts, exercising their reviewing functions, have long recognised the pre-eminent role of the executive: see *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin) and *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. As to a claim under the 1998 Act, the court's role remains that of review; proportionality is a standard capable of being applied sensitively with regard to the context in which it arises: see *Wilson v First County Trust (No 2) Ltd* [2004] 1 AC 816. There is therefore no obvious role for the "anxious scrutiny" test: the phrase is merely a label for circumstances which justify a narrower margin of appreciation. It is not relevant in the present context. The claimant's challenge to the proportionality of the Order must fail.

The claimant's challenge to its rationality is not a separate challenge from that of proportionality. The matters raised manifestly do not undermine the rational connection between the Order and its legislative aim. First, the allegation that the Treasury made a material error of fact as to the control of the claimant is immaterial, as found by the courts below. Secondly, the Order is lawful regardless of whether the claimant provided knowing or unknowing banking facilities to the Iranian nuclear programmes. [Reference was made to *Bank Mellat v Council of the European Union* (Case T-496/10) 29 January 2013.] The overall proportionality, and rationality, of the direction contained in the Order are readily justifiable and entirely consistent with the evidence provided at the time. Thirdly, its rationality cannot be undermined on the basis that the Order was a de facto freeze. The Order is not a freeze, but a direction to cease business, subject to a system which is reviewable by way of judicial review. That is neither oppressive nor perverse.

Justification for the Order does not fall foul of the prohibition on discrimination in article 14 of the Convention read with A1P1, on the basis that the claimant was unlawfully targeted by virtue of its incorporation in Iran. For the purposes of article 14 there must be objective and reasonable

justification, it must pursue a legitimate aim and a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The Order was not made simply because the claimant is Iranian, but rests on the fact of the claimant's having provided banking /financial services to entities engaged in the nuclear programme. So long as those principles apply interference with property can be justified because of the nationality of the owner. The decision was clearly justified both to the extent that it was recognised that, by making the Order, pressure could be brought to bear on the Iranian Government and to the extent that it could be construed as a decision based on nationality: see *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland* (Case C-84/95) [1996] ECR I–3953 and *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.

Consistently with the conclusions reached by the judge and the majority in the Court of Appeal, there was no requirement on the Treasury to consult with or seek representations from the claimant before the Order was made: see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] ACD 20 and *Secretary of State for the Home Department v Rahman* [2011] EWCA Civ 814 The claimant was incorrect to contend that as a matter of common law fairness such opportunities had to be given. The protection given to the subject of the Order by the affirmative resolution procedure and by section 63 of the 2008 Act is sufficient and there is no need or room for any further requirement, in the form of a duty to consult, to be implied: see *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373 and *Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; *Wiseman v Borneman* [1971] AC 297; *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763 and *Lloyd v McMahon* [1987] AC 625 are not in point. *S v Brent London Borough* [2002] ELR 556 and *R (West) v Parole Board* [2005] 1 WLR 350 are distinguished on their facts.

The Treasury's decision to make the Order did not amount to a determination of the claimant's civil and obligations for the purposes of article 6.1 of the Convention. The decision was no more than the event that gave rise to the "disputes" as to such rights and obligations. Any such "dispute" is to be determined by an independent and impartial tribunal: see *Lithgow v United Kingdom* (1986) 8 EHRR 329. There is no sense in which the Treasury's decision to make the Order can be characterised as the determination of a dispute. Here the article 6-compliant adjudication took place in the Administrative Court in the section 63 proceedings. [Reference was made to *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2013] ICR 270 and *R (G) v Governors of X School (Secretary of State for the Home Department intervening)* [2012] 1 AC 167.] The 2008 Act recognises that Schedule 7 decisions will probably rest in part on sensitive intelligence information: hence the provision for a closed evidence procedure in section 63 proceedings. Such information could not appropriately be provided to the claimant for the purposes of pre-decision consultation. Contrary to the claimant's case, *R (Wright) v Secretary of State for Health* [2008] QB 422; [2009] AC 739 is distinguished and the claimant's reliance on it is misplaced. For the purposes of the present case, the decision to make the Order cannot be equated with interim proceedings

directly decisive of the claimant's civil rights: see *Micallef v Malta* 50 EHRR 920.

Alternatively, if the decision to make the Order is equivalent to a form of interim proceedings, the object, purpose and urgency of the Order is relevant. The Treasury concluded that urgent action was necessary to counter the risks to the UK and accordingly was entitled to adopt a non-compliant procedure: see *R (G) v Governors of X School* [2012] 1 AC 167, para 67. Further, since the decision to make and affirm the Order is part of a composite process of determination (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295), even if article 6.1 is engaged at an earlier stage, the section 63 procedure secures Convention compliance. In any event, in cases of interference with A1P1 rights the requirement of procedural fairness is to avoid arbitrary expropriations and the availability of judicial review will be sufficient: see *R (SRM Global Master Fund LP) v Treasury Comrs* [2009] UKHRR 1219.

If the Treasury is correct that the making of the Order was not unfair at common law, and not in breach of article 6, no additional matter arises by reason of A1P1. In that context, any procedural obligation is an aspect of the overall fair balance requirement. The express provisions of the 2008 Act are sufficient to discharge any procedural obligation under A1P1: see paragraph 14 of Schedule 7 to the 2008 Act, section 63 of the Act and also CPR Pt 79.

The requirement for reasons to be given which explain why a decision was made is to enable a challenge to be made to it. In the present context, there was no failure to give reasons for the making of the Order: an adequate summary had been given to Parliament and provided in the evidence in the proceedings; the claimant was aware of the Treasury's essential reasons and even if any failure by the Treasury is established, it could not have made any difference or caused substantial prejudice: *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 is distinguished on its facts.

Brindle QC replied.

The court took time for consideration.

19 June 2013. The following judgments on the jurisdiction issue were handed down.

LORD NEUBERGER OF ABBOTSBURY PSC (with whom **BARONESS HALE OF RICHMOND, LORD CLARKE OF STONE-CUM-EBONY, LORD SUMPTION** and **LORD CARNWATH JJSC** agreed)

1 This judgment is concerned with two connected questions: (i) Is it possible in principle for the Supreme Court to adopt a closed material procedure on an appeal? If so, (ii) Is it appropriate to adopt a closed material procedure on this particular appeal? A closed material procedure involves the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (i e a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (i e a judgment part of which will not be seen by one of the parties).

Open justice and natural justice

2 The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum: see, for instance *Independent News and Media Ltd v A* [2010] 1 WLR 2262, and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.

3 Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions.

4 In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson JSC made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings:

> "the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that."

5 The effect of the Strasbourg court's decisions in *Chahal v United Kingdom* (1996) 23 EHRR 413 and *A v United Kingdom* (2009) 49 EHRR 625 is that article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("article 6", which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that (i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public, (ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge, (iii) a summary, which is both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party, and (iv) an independent advocate, who has seen all the material, is able to challenge the need for the

A procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance
of the material and to make submissions about it.

6 The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269. At para 59, Lord Phillips of Worth Matravers said that an
B excluded party "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations", and that this need not include "the detail or the sources of the evidence forming the basis of the allegations". As he went on to explain:

> "Where, however, the open material consists purely of general assertions and the case against the [excluded party] is based solely or to a
C decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

7 The nature and functions of a special advocate are discussed in *Al Rawi* [2012] 1 AC 531, by Lord Dyson JSC, paras 36–37, and by Lord Kerr of Tonaghmore JSC, para 94. As Lord Dyson JSC said, the use of special
D advocates has "limitations", despite the fact that the rule-makers and the judges have done their best to ensure that they are given all the facilities that they need, and despite the fact that the Treasury Solicitor has ensured (to the credit of the Government) that they are of consistently high quality.

8 In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed
E must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament.

F *The statutory and factual background to this appeal*

9 The statute in question in this case is the Counter-Terrorism Act 2008 ("the 2008 Act"), which, as its name suggests, is concerned with enabling steps to be taken to prevent terrorist financing and the proliferation of nuclear weapons, and thereby to improve the security of citizens of the United Kingdom. The particular provisions which apply in the present case
G are in Parts 5 and 6 of the 2008 Act. The first relevant provision is section 62, which is in Part 5 and "confer[s] powers on the Treasury to act against terrorist financing, money laundering and certain other activities" in accordance with Schedule 7.

10 Paragraphs 1(4), 3(1) and 4(1) of Schedule 7 to the 2008 Act permit the Treasury to "give a direction" to any "credit or financial institution", if
H "the Treasury reasonably believes" that "the development or production of nuclear . . . weapons in [a] country . . . poses a significant risk to the national interests of the United Kingdom". According to paragraphs 9 and 13 of the Schedule, such a direction may "require" the person on whom it is served "not to enter into or to continue to participate in . . . a specified description of transactions or business relationships with a designated

person". Paragraph 14 requires any such direction to be approved by affirmative resolution of Parliament.

11 Pursuant to these provisions, on 9 October 2009, the Treasury made the order the subject of these proceedings, the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) ("the 2009 Order"), which, three days later, was laid before Parliament, where it was approved. The 2009 Order, which was in force for a year, directed "all persons operating in the financial sector" not to "enter into, or . . . continue to participate in, any transaction or business relationship" with two companies, one of which was Bank Mellat ("the Bank"), or any branch of either of those two companies.

12 The Bank is a large Iranian bank, with some 1,800 branches and nearly 20 million customers, mostly in Iran, but also in other countries, including the United Kingdom. In 2009, prior to the 2009 Order, it was issuing letters of credit in an aggregate sum of over US$11bn, of which around 25% arose out of business transacted in this country. It has a 60% owned subsidiary bank incorporated and carrying on business here, which was at all material times regulated by the Financial Services Authority. The Order effectively shut down the United Kingdom operations of the Bank and its subsidiary, and it is said to have damaged the Bank's reputation and goodwill both in this country and abroad.

13 The first section of Part 6 of the 2008 Act is section 63, of which subsection (2) gives any person affected by a direction the right to apply to the High Court (or the Court of Session) to set it aside, and any such application is defined by section 65 as "financial restrictions proceedings". The Bank issued such proceedings to set aside the Order on 20 November 2009. The Government took the view that some of the evidence relied on by the Treasury to justify the 2009 Order was of such sensitivity that it could not be shown to the Bank or its representatives. Mitting J accepted the Government's case that justice required that the evidence in question be put before the court and that it had to be dealt with by a closed material procedure. Accordingly, he gave appropriate directions as to how the hearing should proceed.

14 The two day hearing before him was partly in open court and partly a closed hearing. The open hearing involved all evidence and arguments (save the closed material) being produced at a public hearing, with both parties, the Bank and the Treasury, seeing the evidence and addressing the court through their respective counsel, in the normal way. The closed hearing was conducted in private, in the absence of the Bank, its counsel, and the public, and involved the Treasury producing the closed material and making submissions on it through counsel. The interests of the Bank were protected, at least to an extent, by (i) the Treasury providing the Bank with a document which gave the gist of the closed material, and (ii) the presence at the closed hearing of special advocates, who had been cleared to see the material, and who made such submissions as they could on behalf of the Bank about the closed material.

15 Following the two-day hearing, Mitting J handed down two judgments on 11 June 2010. The first judgment [2010] Lloyd's Rep FC 504 was an open judgment, in which the judge dismissed the Bank's application for the reasons which he explained. The second judgment was a closed judgment, which was seen by the Treasury, but not by the Bank, and is, of course, not publicly available. The closed judgment was much shorter than

A the open judgment, although it should be added that the open judgment is not particularly long.

16 In his open judgment, Mitting J referred to his closed judgment in two passages. The judge considered [2010] Lloyd's Rep FC 504, para 16, inter alia, the activities of one of the Bank's former customers, Novin. Having referred to the fact that Novin had been "designated by the [UN] Security Council . . . as a company which 'operates within . . . and has B transferred funds on behalf of" the Atomic Energy Organisation of Iran ("AEOI"), he said that "By reason of the designation and for reasons set out in the closed judgment I accept that Novin was an AEOI financial conduit and did facilitate Iran's nuclear weapons programme". At para 18, the judge considered the activities of another of the Bank's former customers, Doostan International and its managing director, Mr Shabani. He said that

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> "for reasons which are set out in the closed judgment, I am not satisfied that Mr Shabani has made a full disclosure . . . and am satisfied that he and Doostan have played a part in the Iranian nuclear weapons programme."

17 The Bank appealed, and the appeal was heard by the Court of D Appeal largely by way of an ordinary, open, hearing. However, there was a short closed hearing at which they considered the closed judgment of Mitting J, and at which the special advocates, but not representatives of the Bank, were present. The Bank's appeal was dismissed by the Court of Appeal (Maurice Kay and Pitchford LJJ, Elias LJ dissenting in part) [2012] QB 101 in an open judgment, which was handed down on 13 January 2011. In the last paragraph of his judgment, at para 83, Maurice Kay LJ said that E although the court "held a brief closed hearing in the course of the appeal", he did not "find it necessary to refer to it or to the closed judgment of Mitting J".

18 The Bank then appealed to this court. Before the hearing of the appeal, it was clear that the Treasury would ask this court to look at the closed judgment of Mitting J. Therefore, it was agreed between the parties that the first day of the three day appeal should be given over to the question F of whether the Supreme Court could conduct a closed hearing. At the end of that day's argument, we announced that, by a majority, we had decided that we could do so and that we would give our reasons later.

19 The second day and most of the third day of the hearing were given over to submissions made in open court by counsel for the Bank (and counsel for certain interested parties, shareholders in the Bank) in support of the G appeal, and to submissions in reply on behalf of the Treasury. We were then asked by counsel for the Treasury to go into closed session in order to consider the closed judgment of Mitting J. This was opposed by counsel for the Bank and by the special advocates. While we were openly sceptical about the necessity of acceding to the application, by a bare majority we decided to do so. Accordingly, the court had a closed hearing which lasted about 20 minutes, at which we heard brief submissions on behalf of the H Treasury and counter-submissions from the special advocates. We then resumed the open hearing for the purpose of counsel for the Bank making his closing submissions.

20 Contemporaneously with this judgment, we are giving our judgment on the substantive issue, namely whether the 2009 Order should be quashed.

The purpose of this judgment is (i) to explain why we decided that we had power to have a closed material hearing, and (ii) to consider the closed material procedure we adopted on this appeal, and to give some guidance for the future in relation to the closed material hearing procedure on appeals.

The closed material procedure in the courts of England and Wales

21 The practice and procedure of the civil courts of England and Wales (the county court, the High Court and the Court of Appeal) are governed by the Civil Procedure Act 1997 ("the 1997 Act"). Section 1(1) of the 1997 Act provides for the practice and procedure to be set out in the Civil Procedure Rules ("CPR"), and states that they are to be made, and modified, by the negative statutory instrument procedure. Section 1(3) of the 1997 Act states that the power to make the CPR "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient".

22 The underlying purpose of the CPR is enshrined in the so-called "overriding objective" in CPR r 1(1), which requires every case to be dealt with "justly". By CPR r 1(2), this expression is stipulated to include "so far as is practicable . . . ensuring that the parties are on an equal footing [and] ensuring that [every case] is dealt with . . . fairly". The CPR contain detailed rules with regard to procedures before, during and after trial, which seek to ensure that all civil proceedings are conducted in a way which is fair and effective, and, in particular for present purposes, in a way which achieves, as far as is possible in this imperfect, complex and unequal world, openness and equality of treatment as between the parties.

23 In a series of provisions in Part 6 of the 2008 Act, Parliament has recognised that financial restrictions proceedings may require the rules of general application in the CPR to be changed or adapted if a closed material procedure is to be permitted. The first of those provisions is section 66(1), which explains that "The following provisions apply to rules of court relating to— (a) financial restrictions proceedings, or (b) proceedings on an appeal relating to financial restrictions proceedings". Section 66(2) requires the "rules of court" to have regard to "the need to secure that" both (a) directions made under Schedule 7 to the 2008 Act "are properly reviewed", and (b) that information is not disclosed "when [it] would be contrary to the public interest".

24 Section 66(3) of the 2008 Act states that "rules of court" may make provision for various aspects of financial restrictions proceedings, including (a) "the mode of proof and about evidence" and (c) "about legal representation". Section 66(4) states that "rules of court" may (a) enable "the proceedings to take place without full particulars of the [direction] being given to a party . . .", (b) enable "the court to conduct proceedings in the absence of any person, including a party . . .", (c) deal with "the functions of . . . a special advocate", (d) empower the court "to give [an excluded] party . . . a summary of evidence taken in the party's absence."

25 Section 67 of the 2008 Act is concerned with rules about disclosure in cases covered by section 66(1). Section 67(2) provides that, subject to the ensuing subsections, "rules of court" must secure that the Treasury give disclosure on the normal principles—i e that they must disclose material which (i) they rely on, (ii) adversely affects their case, and (iii) supports the case of another party. Section 67(3) states that "rules of court" must secure that (a) the Treasury can apply not to disclose material, (b) they can do so

A under a closed material procedure, with a special advocate present, and (c) the court should accede to the application "if it considers that the disclosure of the material would be contrary to the public interest", in which case (d) the court must "consider requiring the Treasury to provide a summary of the material to every party", provided that (e) the summary should not include material "the disclosure of which would be contrary to the public interest". Section 67(6) emphasises that nothing in the section B should require the court to act in such a way as to contravene article 6.

26 Section 68 of the 2008 Act is concerned with the appointment of special advocates for the purpose of financial restrictions proceedings. Section 72 of the 2008 Act enabled the Lord Chancellor to make the original rules referred to in the preceding sections. Section 72(4) provides that (a) any such rules should be laid before both Houses of Parliament, and (b) if C they are not approved within 40 days, any such rules will "cease to have effect".

27 The final provision in Part 6 of the 2008 Act is section 73, the interpretation section, which states that, for the purposes of Part 6 of the 2008 Act: "'rules of court' means rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the D Court of Session."

28 Pursuant to sections 66 and 67 of the 2008 Act, the Civil Procedure (Amendment No 2) Rules (SI 2008/3085) were made by the Lord Chancellor on 2 December 2008, laid before Parliament the next day, and came into force on 4 December 2008. As a result, the CPR now include a new rule 79, which applies to "Proceedings under the Counter-Terrorism Act 2008". CPR r 79.2(1) modifies the overriding objective "and so far as relevant any E other rule", to accommodate (2) the court's duty to "ensure that information is not disclosed contrary to the public interest".

29 CPR Pt 79 then goes on to modify, disapply or replace many of the generally applicable provisions of the CPR in relation to proceedings under the 2008 Act. Most of these variations arise from the provision for a closed material procedure in some such proceedings. Thus, the CPR are amended F to take into account the potential need for (i) involvement of special advocates (in eg CPR r 79.8, CPR rr 79.18–21), (ii) an application for a closed material procedure (dealt with in CPR r 79.11 and CPR r 79.25), (iii) directions if such a procedure is ordered (in CPR r 79.26), (iv) modification of the rules in relation to evidence and disclosure, including disapplication of CPR Pt 31 relating to public interest immunity (in CPR G r 79.22), and (v) the possibility of a closed judgment (in CPR r 79.28).

The statutory provisions and procedural rules of the Supreme Court

30 The Supreme Court was created by the Constitutional Reform Act 2005 ("the 2005 Act"). Section 40(2) of the 2005 Act states that "an appeal lies to the court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings". The effect of section 40(3) is that H the right of appeal to the Supreme Court from any Scottish court remains the same as it was in relation to appeals to the House of Lords. Section 40(5) states that the Supreme Court "has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". Section 40(6) provides that "An appeal under

subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court . . ."

31 Section 45(1) of the 2005 Act provides that the President of the Supreme Court "may make rules (to be known as 'Supreme Court Rules') governing the practice and procedure to be followed in the court". Section 45(3) states that this power must be exercised so as to ensure that "(a) the court is accessible, fair and efficient", and "(b) the rules are both simple and simply expressed". Section 46 of the 2005 Act states that these rules (1) must be submitted to the Lord Chancellor by the President of the Supreme Court (or, in the case of the initial rules, the senior Lord of Appeal in Ordinary), and then (2) must be laid before Parliament by the Lord Chancellor, and (3) are then subject to the negative resolution procedure.

32 Pursuant to sections 45 and 46 of the 2005 Act, the Supreme Court Rules 2009 (SI 2009/1603) were duly made and laid before Parliament, and came into force on 1 October 2009, the day on which the Supreme Court opened. These rules ("SCR") now govern the procedure of this court. They are far simpler than the CPR (unsurprisingly, as they are only concerned with appeals, indeed appeals which are almost always second, or even third, appeals).

33 SCR rule 2 is headed "Scope and objective", and SCR rule 2(2) states that "the overriding objective" of the SCR is "to secure that the court is accessible, fair and efficient". The SCR contain no provisions which enable public interest immunity to be avoided, and no express provisions for closed procedures other than SCR rule 27(2), as set out in the next paragraph. Thus, SCR rule 22(1)(b) provides for the service by the appellant of "an appendix . . . of the essential documents which were in evidence before, or which record the proceedings in, the courts below", and SCR rule 28 states that a Supreme Court judgment "may be . . . delivered in open court; or . . . promulgated by the registrar". However, it is to be noted that SCR rule 29(1) begins by stating that "In relation to an appeal . . . , the Supreme Court has all the powers of the court below".

34 SCR rule 27 is headed "Hearing in open court", and it provides:

> "(1) Every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.
>
> "(2) Where the court considers it necessary for a party . . . to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the court must conduct the hearing, or that part of it from which the party [is] excluded, in private but the court may exclude a party . . . only if a person who has been appointed as a special advocate to represent the interests of that party is present when the party [is] excluded.
>
> "(3) Where the court decides it is necessary for the court to sit in private, it shall announce its reasons for so doing publicly before the hearing begins."

Can the Supreme Court conduct a closed material procedure: introductory

35 If a closed material procedure was lawfully conducted at the first instance hearing, it would seem a little surprising if an appellate court was precluded from adopting such a procedure on an appeal from the first

instance judgment. As the advocate to the court said in the course of his full and balanced argument, one would normally expect an appeal court to be entitled to have access to all the material available to the court below and to see all the reasoning of the court below. Otherwise, it is hard to see how an appeal process could be conducted fairly or even sensibly. And, if that involves the appellate court seeing and considering closed material, it would seem to follow that that court would have to adopt a closed material procedure.

36 However, particularly in the light of the fundamental principle established in *Al Rawi* [2012] 1 AC 531, the question needs to be looked at with great care. In particular, it is necessary to inquire whether statute requires the Supreme Court to adopt a closed material procedure, at least in some circumstances, on an appeal from the Court of Appeal upholding (or reversing) a first instance decision on an application under section 63(2) of the 2008 Act. As was said by counsel for Liberty (interveners on this appeal), supported by counsel for the Bank, any contention that a closed material procedure in a particular court in particular circumstances is sanctioned by a statute must be closely and critically scrutinised.

The case for saying that this court can conduct a closed material procedure

37 The contention that this court has the power to have a closed material procedure is based on section 40(2) of the 2005 Act, supported by section 40(5). The argument proceeds as follows: (i) section 40(2) provides that an appeal lies to the Supreme Court against "any" judgment of the Court of Appeal; (ii) that must extend to a judgment which is wholly or partially closed; (iii) in order for an appeal against a wholly or partially closed judgment to be effective, the hearing would have to involve, normally only in part, a closed material procedure; (iv) such a conclusion is reinforced by the power accorded to the court by section 40(5) to "determine any question necessary . . . for the purposes of doing justice", as justice will not be able to be done in some such cases if the appellate court cannot consider the closed material.

38 The strength of this argument is reinforced when one considers the possible outcomes if the Supreme Court cannot consider a closed judgment (or the closed part of the judgment) under a closed material procedure. If that were the case, then, as I see it, there would be five possible consequences.

39 The first possibility would be that the appeal could not be entertained: that cannot be right, because it would conflict with section 40(2), which simply and unambiguously confers on the Supreme Court the power to hear appeals from "any" judgment of the Court of Appeal. The Supreme Court frequently refuses permission to bring an appeal from the Court of Appeal, but that is covered by section 40(6) of the 2005 Act, which expressly provides for such permission. It is one thing to cut down section 40(2) by providing that permission to appeal can be refused on a case by case basis expressly catered for in section 40(6); it is quite another to suggest that a whole class of appeals is impliedly excluded from the wide and general words of section 40(2).

40 The second possibility would be that the Supreme Court could consider the whole judgment, with the closed part being considered in open court. While it can be said that such a course would not involve a breach of

any specific provision of Part 6 of the 2008 Act, if construed on a strictly semantic basis, it would wholly undermine its purpose, and the procedural structure it has set up. Unsurprisingly, this second possibility was not canvassed in argument. A

41 The third possibility would be that the appeal could be entertained, but only on the basis that the Supreme Court could not look at the closed material. In an extreme case, where the whole judgment of the Court of Appeal was closed, this would be impossible, and would run into the same difficulty under section 40(2) as identified in para 39 above. Even in a case where the Court of Appeal judgment was only closed in part, such a course would be self-evidently unsatisfactory and would seriously risk injustice, and in some cases it would be absurd. B

42 The fourth possibility would be that the court was bound to allow the appeal; the fifth possibility would be that, conversely, the court was bound to dismiss the appeal. There are clearly theoretical arguments in favour of either course, but it is unnecessary to consider them, because each of those courses is self-evidently equally unsatisfactory. If either of them was correct, it would mean that, when exercising its power to give permission under section 40(6) of the 2005 Act, the Supreme Court would effectively be deciding the appeal, and, indeed, would be doing so without seeing the whole of the judgment below, and without hearing oral argument. C D

43 In my view, subject to any arguments to the contrary, this analysis establishes that the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal. This conclusion is reinforced by section 40(5) of the 2005 Act. An appeal under section 40(2) is "an appeal . . . under any enactment". Accordingly, where an appeal is brought against a decision under the 2008 Act, the Supreme Court has "power to determine any question necessary to be determined for the purposes of doing justice in" such an appeal. On any appeal where the judgment is wholly or partly closed, it seems to me that this court could not do justice, or at least would run a very serious risk of not doing justice, if it could not consider the closed material, and it could only do that if it adopted a closed material procedure. E F

44 It might, I suppose, be said that adopting a closed material procedure on any appeal would involve the antithesis of "doing justice in" that appeal. In a case where Parliament and the CPR have lawfully provided for a closed material procedure at first instance and in the Court of Appeal, I am of the view that, on the contrary, for this court to entertain an appeal without considering the closed material would, at least in many cases, not be doing justice, either in the sense of fairly determining the appeal or in the sense of being seen fairly to determine the appeal, notwithstanding that the material will be considered in a closed hearing. G

45 The view that the Supreme Court can conduct a closed material procedure also derives some support from the provisions of SCR rule 27(2), and from SCR rule 29(1). However, if the Supreme Court would not otherwise have the power to conduct a closed material procedure, it could not, in my view, derive such a power solely from its rules. Accordingly those two rules can fairly be said to do no more than to give comfort to my conclusion. H

46 It is right to mention that on this appeal, we are not being invited to consider a closed judgment of the Court of Appeal, as they did not find it

A necessary to give a closed judgment or even to include a closed paragraph in their open judgment. However, the trial judge gave a closed judgment, and, if it is open to this court to consider, in a closed material procedure, a closed Court of Appeal judgment for the reasons just discussed, it must follow that we can consider, in a closed material procedure, a closed judgment given by the trial judge.

B **47** Accordingly, I conclude that, unless there are stronger arguments to the contrary, the Supreme Court has power to entertain a closed material procedure on appeals against decisions of the courts of England and Wales on applications brought under section 63(2) of the 2008 Act.

The arguments that we cannot conduct a closed material procedure

C **48** Having reached this provisional conclusion, it is right to acknowledge and consider the contrary arguments. Those arguments are:

(i) A closed material procedure is such a serious inroad into natural justice that it can only be justified by clear and unambiguous statutory words, such as are found in Part 6 of the 2008 Act, but not in the 2005 Act;

(ii) Parliament has plainly limited the closed material procedure under the 2008 Act to the High Court, the Court of Appeal and the Court of Session;

D (iii) It is appropriate to exclude the Supreme Court from the courts which can have a closed material procedure, given its role as a constitutional court and ultimate guardian of the common law;

(iv) A closed material procedure requires a set of rules such as CPR Pt 79 which are detailed and appropriately modify the generally applicable rules, and there is no such set of rules for the Supreme Court.

49 None of these points meets the basic argument which persuades me E that it is open to the Supreme Court to undertake a closed material procedure, but they none the less merit careful attention. Before discussing them, however, it is right to address Liberty's understandable reliance on the fact that, in *Al Rawi* [2012] 1 AC 531, this court uncompromisingly set its face against introducing a closed material procedure.

50 The stand taken by this court in *Al Rawi* [2012] 1 AC 531 remains F unquestioned, but it does not amount to any sort of indication that there could be no circumstances in which those concerned with the administration of justice could reasonably introduce a closed material procedure. Indeed, at the end of the short passage quoted in para 4 above from Lord Dyson JSC's judgment, he acknowledged that Parliament can do so.

51 Having said that, any judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed material G procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However, such distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question.

52 At a relatively high level, in terms of constitutional principle and H governmental functions, it seems to me that the following propositions apply. (i) The executive has a duty to maintain national security, which includes both stopping the financing of terrorism and nuclear proliferation and ensuring that some of the information relating to the financing of terrorism remains confidential; (ii) the rule of law requires that any steps aimed at preventing financing of terrorism which damage a person should be

reviewable by the courts, and, as far as possible in open court and in accordance with natural justice; (iii) given that such reviews will often involve the executive relying on confidential material, it is for the legislature to decide and to prescribe in general how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest; (iv) in the absence of a written constitution, it is the European Convention, through article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism on what the legislature can prescribe in this connection; (v) it is for the courts to decide, within the parameters laid down by the legislature, how the tension between the two needs of natural justice and confidentiality is to be resolved in any particular case.

53 In the more specific context of the issues with which the 2008 Act is concerned, it would be unreasonable not to accept that (i) the Act's aims of fighting the spread of terrorist activity and nuclear proliferation, and improving the security of UK citizens, are important aspects of the most fundamental duties of the executive, and (ii) those aims would be at real risk of being severely hampered if the courts hearing financial restrictions proceedings could not adopt a closed material procedure. Point (i) is self-evident: the two most fundamental functions of the executive are the maintenance of the defence of the realm and of the rule of law, and the 2008 Act appears to me to be within the scope of both those functions. In relation to point (ii), if there can be no closed material procedure, either (a) sensitive material would be seen by a person who may be supporting terrorism or nuclear proliferation, which might advance the very activities which the 2008 Act is designed to deter, or (b) such material would not be put in evidence, in which case a direction under that Act, which was appropriate and in the public interest, may be discharged for lack of evidential support.

54 The legislature has laid down in Part 6 of the 2008 Act, as expanded by CPR Pt 79, how challenges to a direction under Schedule 7 to the 2008 Act should be dealt with by the courts, and this includes a closed material procedure, which aims to strike a balance between two competing public interests, and it is a balance which has been held by the Strasbourg Court to be compatible in principle with article 6. Whether or not one agrees with it, the justification for the way in which the balance has been struck by the legislature in Part 6 of the 2008 Act is clear, lawful and rational. It is against that background that the issue of principle raised on this appeal must be judged.

55 Turning now to the four arguments raised by the intervener and the Bank, there is a basic principle that fundamental rights cannot be taken away by a generally or ambiguously expressed provision in a statute: see e g per Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132. There is also a basic principle that fundamental rights can only be overridden by a statutory provision through express words or by necessary implication, not merely by reasonable implication: see e g per Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 45.

56 While these two basic principles are of fundamental importance, they should not be applied without regard to the purpose and context of the

A statutory provision in issue. Section 40(2) is plainly intended to render every decision of the Court of Appeal to be capable of being appealed to the Supreme Court (unless specifically precluded by another statute), and, as explained, where it is necessary for this court to consider closed material in order to dispose of the appeal justly, this would only be achievable if a closed material procedure could be adopted. In any event, I am unconvinced that the wording of section 40(2) of the 2005 Act could be fairly described as
B "general" in the sense that that word is used in *Ex p Simms* [2000] 2 AC 115, 132: it would be more accurate to describe it as being broad, indeed as broad as possible, in its intended application. Further, if section 40(2) is to be given its full natural meaning, then, for the reasons discussed in the preceding section of this judgment, it necessarily means that the Supreme Court can adopt a closed material procedure.

C 57 It is true that section 67, read together with section 73, of the 2008 Act only extends to the rules of the Court of Appeal, High Court and Court of Session, but there were no Supreme Court Rules 2009 when that Act was passed. Indeed, there was no Supreme Court at that time: the Appellate Committee of the House of Lords, the Law Lords, were still in place, although they had a very short life expectancy (as an institution). They sat as a committee of the House of Lords, and could have been
D expected to look after their own procedure. It is true that the 2005 Act had been enacted by the time that the Bill which became the 2008 Act was being considered, but those drafting and debating the Bill would have known that the 2005 Act contained section 40(2)(5); they would also have known that the SCR had yet to be promulgated, and could have assumed that they would provide for a closed material procedure—as indeed they do in SCR
E rule 27(2), and, indirectly, in SCR rule 29(1).

58 In any event, rules governing what should be done before and during a trial have to be far more detailed than those governing what should be done before and during an appeal. Given that there were to be very detailed procedures prescribed for a closed material procedure at first instance (and on the first appeal), Parliament could fairly have assumed that there would be no need for very detailed provisions for a closed material procedure in this
F court: again, in the light of SCR rules 27(2) and 29(1), such a view would have been prescient. It is true that sections 66–73 of the 2008 Act apply to the Court of Appeal as well as to the High Court, but that is because the CPR apply to both courts.

59 I am unimpressed by the argument that the Supreme Court was intentionally excluded from the ambit of closed material procedures in
G sections 66–73 of the 2008 Act, because of the court's status. If that was the legislative intention, one would have expected it not only to have been spelt out, but to have been catered for, especially in the light of section 40(2) of the 2005 Act. It seems most unlikely that Parliament would have left section 40(2) unamended, while intending the Supreme Court to be unable to adopt a closed material procedure. If it had had such an intention, Parliament would, in my view, have provided that, in relation to cases where
H the courts below had adopted a closed material procedure, appeals to the Supreme Court were excluded, or could only proceed on a certain specified procedural basis. Otherwise, on this hypothesis, Parliament would have intended to leave this court with the series of unsatisfactory options considered in paras 39–42 above.

60 The notion that the Supreme Court's constitutional role is so important that it cannot conduct a closed material procedure has a certain appeal (particularly perhaps to a Supreme Court Justice), but I am unimpressed by it. The Supreme Court is not a special constitutional court, but it generally limits the appeals it considers to those that raise points of general public importance. If the Supreme Court were to adopt a closed material procedure on an appeal, it would be most unlikely to result in a judgment which contained any statements of general public importance, or even of general significance, which were in closed form. Almost by definition, the closed evidence will be factual (including, possibly, expert) in nature, and it will normally be specific to the particular case. It is hard to believe that there could be circumstances in which it would be impossible for the court to provide an open judgment which dealt clearly and comprehensively with all the points of any general legal significance in the appeal, even if some of the discussion of the details of the evidence and arguments has to remain closed. And if such circumstances did arise, then the problem would be a measure of the extraordinary sensitivity of the material concerned, which would make it all the more important that it remained closed. Having read in draft the judgment of Lord Hope of Craighead DPSC, I would like to record my agreement with what he says in paras 98–100 in connection with this court giving a closed judgment.

61 We were taken to other statutes which provide for a closed material procedure, but all that they establish, in my view, is that there is more than one drafting technique available to prescribe for such procedures.

62 All in all, therefore, I am unpersuaded by the various arguments raised against my provisional view that it is open to this court to adopt a closed material procedure in an appeal under the 2008 Act if justice requires it.

The decision to have a closed material procedure on this appeal

63 At the end of their open submissions in defence of the decision of the Court of Appeal that the 2009 Order should be discharged, counsel for the Treasury asked us to adopt a closed material procedure in order to consider the closed judgment of Mitting J. We were sceptical about the need to do so, for three reasons. First, the proposal was opposed on the ground that it was unnecessary, by the special advocates (who had seen the closed judgment) and by counsel on behalf of the Bank (who had not seen the closed judgment). Secondly, the judge had referred in his open judgment to the closed judgment on two occasions; on each occasion, it was to draw support for a conclusion which was not challenged before us, and we thought it unlikely that he would have relied to any significant extent on any other part of his closed judgment without saying so in his open judgment. Thirdly, the Court of Appeal had found it unnecessary to refer to any part of the closed judgment.

64 None the less, on instructions from his clients, counsel for the Treasury told us that a closed session could make a difference to the outcome of this appeal. By a bare majority, with those in the majority (which included me) all having real misgivings, the court decided that it should accede to the proposal to have a closed material procedure. Although we strongly suspected that nothing in the closed judgment would have any effect on the outcome of the appeal, we could not be sure in the absence of seeing

A the closed judgment and listening to submissions on it. And, as we all appreciated that there was a real possibility that we were going to allow the appeal, and therefore to disagree with Mitting J (who gave the closed judgment) and the Court of Appeal (who had seen the closed judgment), we felt that there would be a real risk of justice not being seen to be done, and an outside possibility of justice actually not being done, to the Treasury if we did not proceed to hold a closed hearing, as the Treasury requested.

B **65** In anticipation that we might take that course, we had required counsel for the Treasury to supply the special advocates with a note summarising the Treasury's case on the closed judgment. Having decided to have a closed hearing, we proceeded to read the closed judgment and heard argument on it in a closed hearing from counsel for the Treasury, from the special advocate, and from the advocate to the court (who, like us, saw the C closed judgment for the first time just before the closed hearing).

66 In my opinion, there was no point in our seeing the closed judgment. There was nothing in it which could have affected our reasoning in relation to the substantive appeal, let alone which could have influenced the outcome of that appeal. So far as it was said to have included relevant findings, the most that could be said of the closed judgment is that it put some evidential flesh on some fairly bare bones embodying some of the conclusions of fact D reached in the open judgment. It is fair to say that, in two respects, Mitting J made findings in his closed judgment, which supported views he had expressed in his open judgment, over and above the two passages referred to in para 16 above. However, as with the views expressed in those two passages, the views were not ones which were challenged on this appeal.

E *Applications for closed material hearings on appeal*

67 I draw certain conclusions from this experience.

68 First, where a judge gives an open judgment and a closed judgment, it is highly desirable that, in the open judgment, the judge (i) identifies every conclusion in that judgment which has been reached in whole or in part in the light of points made or evidence referred to in the closed judgment, and F (ii) that the judge says that this is what he or she has done. This was a point made by Carnwath LJ, in a judgment given after Mitting J's judgments in this case, in *Secretary of State for the Home Department v AT (Libya)* [2012] EWCA Civ 42 at [51].

69 Secondly, a judge who has relied on closed material in a closed judgment, should say in the open judgment as much as can properly be said about the closed material which he has relied on. Any party who has been G excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and arguments it received. Further, the more the judge can say about the closed material in the open judgment, the less likely it is that a closed hearing will be asked for or accorded on an appeal. In cases where judges have to give a closed judgment, they should say in their open judgment, as far as they properly can, what the closed material has contributed to the overall assessment they have reached in their H open judgment.

70 On an appeal against an open and closed judgment, an appellate court should, of course, only be asked to conduct a closed hearing if it is strictly necessary for fairly determining the appeal. So my third point is that any party who is proposing to invite the appellate court to take such a course

should consider very carefully whether it really is necessary to go outside the open material in order for the appeal to be fairly heard. If the advocate for one of the parties invites an appellate court to look at the closed judgment on the ground that it may be relevant to the appeal, it is very difficult for the court to reject the application, at least without looking at the closed judgment, which involves the initiation of a closed material procedure, which should be avoided if at all possible. This puts an important onus on the legal representatives of the party asking an appeal court to look at closed material. An advocate acting for a party who wants a closed hearing should carefully consider whether the request is one which should, or even can properly, be made and advise the client whether such a course is necessary or appropriate. Advocates, perhaps particularly when acting for the executive, have a duty to the court as well as a duty to their clients, and the court itself is under a duty to avoid a closed material procedure if that can be achieved.

71 Fourthly, if the appellate court decides that it should look at closed material, careful consideration should be given by the advocates, and indeed by the court, to the question whether it would none the less be possible to avoid a closed substantive hearing. It is quite feasible for a court to consider, and be addressed on, confidential material in open court. If such a course is taken, the advocates and the court must obviously take care in how they refer to the contents of the closed material, and sometimes a brief closed hearing will be necessary to set the ground rules. Sometimes, the closed material will be so sensitive or so difficult to refer to elliptically, that such a course will be impracticable. However, it should always be considered, as it is plainly less objectionable to have a brief closed procedural hearing to discuss the possibility than to have a closed hearing which considers substantive issues. I should add that, if such a course is taken, the court should order that, despite it being referred to and looked at in open court, the documents in issue cannot be shown to anyone and their contents cannot be referred to out of court.

72 Fifthly, if the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing. This would also involve the legal representatives to the parties to any such appeal advising their clients accordingly, and, if a closed hearing is needed, doing their best to agree a gist of any relevant closed document (including any closed judgment below).

73 Sixthly, if there is a closed hearing, the lawyers representing the party who is relying on the closed material, as well as that party itself, should ensure that, well in advance of the hearing of the appeal, (i) the excluded party is given as much information as possible about any closed documents (including any closed judgment) relied on, and (ii) the special advocates are given as full information as possible as to the nature of the passages relied on in such closed documents and the arguments which will be advanced in relation thereto.

74 Finally, appellate courts should be robust about acceding to applications to go into closed session or even to look at closed material. Given that the issues will have already been debated and adjudicated upon, there must be very few appeals where any sort of closed material procedure is likely to be necessary. And, in those few cases where it may be necessary, it is hard to believe that an advocate seeking to rely on closed material or seeking a closed hearing, could be unable to articulate convincing reasons in

A open court for taking such a course. As already mentioned, the closed material procedure on this appeal added nothing. Had counsel for the Secretary of State had the benefit of the guidance set out above, and in particular in paras 70 and 71, I very much doubt that he would have felt able to contend that we should have a closed material procedure. For the future, any party or appellate court considering whether to adopt such a procedure
B would do well to bear in mind what Lord Hope DPSC says in paras 89–97 of his judgment, with which I agree.

LORD HOPE OF CRAIGHEAD DPSC (dissenting)

75 This case raises some fundamental issues about the effect of provisions in Parts 5 and 6 of the Counter-Terrorism Act 2008. Part 5 of the Act, which gives effect to Schedule 7, confers far reaching powers on the
C Treasury to deal with terrorist financing and money laundering. Part 6 creates a scheme for appeals against financial restrictions decisions by the Treasury. In a nutshell these issues can be summarised in a single sentence: how much attention should this court pay to what Parliament has, or has not, actually said as to how financial restrictions proceedings are to be conducted in the courts?

D 76 Parliament has set out in Part 6 of the 2008 Act provisions for the use in appeals against financial restrictions decisions of the Treasury of material that the Treasury refuse to disclose to appellants or their legal representatives, commonly referred to as "closed material". Chapter 2 of Part 6 is closely modelled on the Schedule to the Prevention of Terrorism Act 2005. Section 67(3), which appears in that Chapter, requires that rules of
E court must provide the Treasury with the opportunity to apply to the court for permission not to disclose material otherwise than to the court and to any person appointed as a special advocate. Section 73 provides that in that Chapter the expression "rules of court" means "rules for regulating the practice and procedure to be followed in the High Court or the Court of Appeal or in the Court of Session".

F 77 But no mention is made here, or anywhere else in the 2008 Act, of the use of closed material in the court of last resort in the United Kingdom—the appellate committee of the House of Lords as it then was, or the Supreme Court of the United Kingdom as it was to become. The 2008 Act received the Royal Assent on 26 November 2008. The bulk of Part 3 of the Constitutional Reform Act 2005, which made provision for the Supreme Court, was not brought into force until 1 October 2009:
G Constitutional Reform Act 2005 (Commencement No 11) Order 2009 (SI 2009/1604). But sections 45 and 46, which provide for the making of the Rules of the Supreme Court, were brought into force on 27 February 2006: Constitutional Reform Act 2005 (Commencement No 4) Order (SI 2006/228). These rules were already in draft and had been circulated to consultees for their comments by 28 November 2008. Yet the Treasury, by
H which the legislation in Parts 5 and 6 of the 2008 Act was being promoted, did not seek the views of Parliament as to whether the Rules of the Supreme Court should, like those of the other courts mentioned in section 73, make provision for the use of closed material in proceedings brought under Part 6 of the 2008 Act.

78 In the light of this background, which leaves the issue for decision by this court uninstructed by Parliament, I am unable, with respect, to agree with the conclusions reached on it by the majority.

Closed material

79 The issue as to the use of closed material, as I see it, raises three distinct questions, although they are all interconnected. The first is an issue of principle: when, if ever, will it be open to the Supreme Court to adopt a closed material procedure? The second is whether it is necessary, in the interests of justice or in the public interest, for the closed material to be seen and considered by the court in this case. The third is whether, having done so, the court should issue a closed judgment, bearing in mind that the effect of doing this will be that the party to whom the material has not been disclosed will be unable to see the court's reasons for the conclusions that it has reached on a consideration of that material.

(a) The issue of principle

80 The issue of principle as to the use of closed material was examined by Lord Dyson JSC in *Al Rawi v Security Service* [2012] 1 AC 531. He concluded that a closed material procedure should only be introduced in ordinary civil procedure if Parliament saw fit to do so. I said that I agreed with the reasons that he gave, as did Lord Kerr of Tonaghmore JSC. But we both added some further reasons of our own. It is worth noting too the width of the issue to which the argument both in the Court of Appeal and in this court was addressed: see para 71. I thought that the view which we took would resolve the issue in a case of this kind too.

81 The crucial points that we all made can be summarised, quite briefly, in this way. The right to know and effectively challenge the opposing party's case is a fundamental feature of the judicial process. The right to a fair trial includes the right to be confronted by one's accusers and the right to know the reasons for the outcome. It is fundamental to our system of justice that, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. There may come a point where a line must be drawn when procedural choices of one kind or another have to be made. A distinction may be drawn between choices which do not raise issues of principle and choices that affect the very substance of a fair trial. There is no room for compromise where the choices are of the latter kind. The court cannot abrogate the fundamental common law right by the exercise of any inherent power. Any weakening of the law's defences would be bound to lead to state of uncertainty and, sooner or later, to attempts to widen the breach still further. The court has for centuries been the guardian of these fundamental principles. The rule of law depends on its continuing to fulfil that role.

82 Acknowledging that closed material procedures and the use of special advocates were controversial, Lord Dyson JSC said in para 47 of his judgment in *Al Rawi* that it was not for the courts to extend the procedure beyond the boundaries which had been drawn for its use by Parliament. I said in para 74 of my judgment that fundamental issues as to where the balance lay between the principles of open justice and of fairness and the demands of national security were best left for determination through

A the democratic process by Parliament. Lord Brown of Eaton-under-Heywood and Lord Kerr JJSC were doubtful whether it would be possible as a matter of principle for the court to be invested with jurisdiction in this way: paras 86, 99.

83 I would, for my part, be content to agree with the way Lord Dyson JSC put it in para 48 of *Al Rawi*, where he said:

B "The common law principles to which I have referred are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved. It is not surprising that Parliament has seen fit to make provision for a closed material procedure in certain carefully defined situations and has required the making of detailed procedural rules to give effect to the C legislation."

In para 69 he agreed with the Court of Appeal that the issues of principle raised by the closed material procedure were so fundamental that a closed material procedure should only be introduced in ordinary civil litigation if Parliament saw fit to do so. He then added these words:

D "No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Pts 76 and 79) to regulate the procedure."

84 The answer which I would give to the first of the three questions which I have identified in para 79, above, is that it will be open to the Supreme Court to adopt a closed material procedure if, but only if and only E to the extent that, the use of that procedure has been expressly sanctioned by Parliament. The fact that this procedure has been sanctioned for use in the lower courts does not meet Lord Dyson MR's point that the procedure nevertheless erodes fundamental common law principles. And the fact that it has been used in the lower courts leaves open the question whether it would be consistent with fundamental principle for it to be used in the court of last resort. It leaves open the question whether it can ever be right for the F Supreme Court, of all courts, without the sanction of Parliament to hear argument on points of which one of the parties has had no notice and is unable to address in argument, and whether it can ever be right for it to have to give its reasons, in whole or in part, in a closed judgment.

85 The word "fundamental", which appears so often in Lord Dyson JSC's judgment in *Al Rawi*, and appears again in my own judgment in G paras 72–74 and Lord Kerr of Tonaghmore JSC's judgment in para 94, serves to emphasise the enormity of the issues that are at stake if the objections to such a procedure are to be overcome. If the procedure is to be used in this court, the issues of principle require that its use should always be carefully provided for and defined by Parliament and never be left to implication. Only then can one be confident that Parliament really has squarely confronted what it is doing. Otherwise, as Lord Hoffmann said in H *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132, there is too great a risk that the full implications may have passed unnoticed in the democratic process.

86 The absence of a direction in Part 6 of the 2008 Act that the provisions about rules of court relating to proceedings on an appeal relating

to financial restrictions proceedings extend to the Supreme Court is, therefore, especially significant. This makes it plain that Parliament was not asked to address its mind to this issue at all. Nor was the Supreme Court, for its part, put on notice that the President when making the Supreme Court Rules 2009, the provisions about which were already in force (see para 77, above), was to have regard to the matters set out in section 63(2)–(4) of the Act. The fact that rule 27(2) of the Supreme Court Rules 2009 contemplates that the court might consider it necessary for a party and that party's representative to be excluded from a hearing in order to secure that information is not disclosed contrary to the public interest does not answer this point. It was, no doubt, a wise precaution to make provision for a variety of situations of that kind that might arise. But it does not address directly the use of a closed material procedure with all the consequences that might then follow, including the possibility of having to issue a closed judgment. The question whether the Supreme Court had power to adopt such a procedure had not yet been tested in argument when the rules were made, and it was not open to the President in the exercise of his rule-making function to confer on the court a power that it did not have.

87 The argument that the provisions of section 40(2)(5) of the 2005 Act show that this court can conduct such a procedure to dispose of an appeal where the judgment appealed against was wholly or partly closed does not meet my point that the issue is so fundamental that it must be left to an express and carefully defined provision by Parliament. I do not think that a point of such fundamental importance can be left to implication. It is plain that the issue was not brought before Parliament when it enacted Part 3 of the 2005 Act. There is nothing in the express language of section 40 which shows that the statute must have given authority to the Supreme Court for the use of this procedure: see *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2003] 1 AC 563, para 45, per Lord Hobhouse of Woodborough.

88 For these reasons I was of the opinion at the end of the hearing on the first day's argument that it was not open to the Supreme Court to adopt a closed material procedure in this case, as it had not been expressly authorised by Parliament. I remain of that opinion. The effect of the decision of the majority, however, is that there is now no way back on this issue. The Rubicon has been crossed.

(b) Should the closed material be seen and considered in this case?

89 As the majority view was in favour of the view that it was open in principle to the court to resort to the closed material procedure, I gave careful thought to the question whether it should be resorted to in this case. It seemed to me that the onus was on the Treasury to show that this was necessary. It was not just a question of asserting, without reasons, that there was material in Mitting J's closed judgment [2010] Lloyd's Rep FC 504 that was relevant to the issues in the appeal. I do not think that it would be inconsistent with the majority's decision on the issue of principle for the court to set a high standard on the issue of necessity. Convincing reasons must be given as to why the closed material should be looked at.

90 The Treasury submitted that the court would have to have regard to the judgment if it was to be in a position properly and fairly to exercise its jurisdiction in the appeal, unless it was prepared to dismiss the Bank's case.

This was because the closed reasons formed part of Mitting J's findings on the Treasury's evidence and of his conclusions as to its case. So it might be impossible for the appeal to be fairly determined if the court was not willing to have regard to them. But there are various reasons why, as it seemed to me, the Treasury's approach fell far short of what was needed to show that it was necessary for this procedure to be resorted to.

91 First, there is the fact that the Court of Appeal, which did see and consider Mitting J's closed judgment and held a brief closed hearing in the course of the appeal to that court, did not find it necessary to refer to the closed judgment in more detail than the judge himself did [2012] QB 101, para 83. That, in itself, would not be a conclusive reason for not resorting to the procedure in this court if it was necessary to do justice on the appeal. But it does point to the need for the Treasury to give convincing reasons as to why this should be done. Mitting J referred to his closed judgment in para 16 of his judgment, where he said that he accepted that Novin Energy Company was a conduit for the Atomic Energy Organisation of Iran and that it did facilitate Iran's nuclear weapons programme. He referred to it again in para 18, where he said that for the reasons set out in the closed judgment, he was satisfied that Doostan International had played a part in the Iranian nuclear programme. The Court of Appeal had the opportunity to say if those findings were not justified. It did not do so, and it was not submitted for the Bank that the reasons that the judge gave for those findings should be reviewed again by this court.

92 Second, there are the views of the special advocates to which close attention should always be paid. Mr Chamberlain drew attention to the fact that there was no closed ground of appeal in this case, and that neither of the two findings which were based on material in the closed judgment was in issue. This was because the Bank's case was that those findings were not enough to justify the order made by the Treasury. His advice was that the court did not need to consider closed material in order to determine that issue.

93 Third, there are the reasons that were set out in a note that was provided to the special advocate at the court's request by the Treasury and which the special advocates had seen when Mr Chamberlain gave the advice referred to in the previous paragraph. It was to the contents of this note that much of the discussion as to whether it was necessary for the court to see the closed judgment was directed.

94 The first three paragraphs of the note refer to various passages in the closed judgment which, as was stated in the fourth paragraph, demonstrated the weight to be attached to the judge's conclusion that the Bank had the capacity to assist proliferators, that such assistance could be afforded to a range of companies involved in proliferation and that the assistance provided was material. It did not seem to me that it was necessary to look at the closed material to reinforce this point, as its importance was already apparent from points made by Mitting J in his open judgment. In the last sentence of para 16, having described the Bank's relationship with Novin, the judge said that he accepted the conclusion of the Treasury's witness Mr Robertson that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes.

95 The fifth paragraph of the note was in these terms:

> "See further, the last sentence of para 5 of the closed judgment. This point is important in its own right in demonstrating the existence of the rational/proportionate connection."

Mr Eicke QC for the Treasury was asked repeatedly to say what "the point" was to which this paragraph refers. It was made clear that the court was looking not for the details which supported whatever was said in that sentence, but simply for an indication of its subject matter. Mr Eicke declined, no doubt on instruction, to provide this information. He declined also to say what "the point" was to which para 6(3) was directed, where it was said that, to the extent that it was necessary to do so, the Bank's case at para 60 was contradicted by the point at para 2 of the closed judgment. In para 60 of its case the Bank states that there is nothing in the judge's findings to suggest that the Bank had done anything to materially increase the risk that the United Kingdom financial sector would be embroiled in proliferation-related transactions. It seemed reasonable to ask how looking at the closed judgment would assist on this point, but the court was provided with no answer as to how it might do so.

96 I was not impressed by Mr Eicke's inability to answer these questions. The guiding principles seem to me to be these. Resort to the closed material procedure will result in every case in an inequality of arms between the state, which will always be the party who invokes the procedure and will always have access to that material, and the other party against whom the state has taken action and to whom access to that material is always denied. Regard must, of course, be had to the national interest which requires that some sensitive material must be kept secret. But the court must be astute not to allow the system to be over-used by those in charge of that material. The need for care in this respect increases as the issues are refined at the stage of an appeal. In a case of this kind, where the judge has told the appellate courts in his open judgment how he has used the closed material and the Court of Appeal has found nothing in the closed judgment that required comment, resort to it for further information could only be justified if there was a point of real substance in it that had, in fairness to the state, to be taken into account at the stage of the appeal. The Treasury's refusal to come out of its closet and provide even the merest hint as to what these points were was as unattractive as it was unconvincing.

97 I would therefore, if left to myself, have declined to look at the closed judgment. It seemed to me that the judge had said enough in his judgment to explain the significance of the points to which the Treasury had regard when they decided to make the Order. Any points to which emphasis had to be attached could be made sufficiently in open court in the course of the oral argument.

(c) Should the court issue a closed judgment?

98 The most obnoxious feature of the closed material procedure at the stage of an appeal is the possibility that the appellate court may have to give the whole or part of its reasons for the disposal of the appeal in a judgment to which the state only, and not the other party to the appeal or anyone else, has access. As was stressed several times by Lord Dyson JSC and those who agreed with him in *Al Rawi* [2012] 1 AC 531, fundamental principles of the

A right to a fair trial include the right to know the reasons for the outcome: see, for example, para 45. This point loses none of its force at the stage of an appeal. And it has even more force at the stage of a final appeal, as once the Supreme Court has given its reasons in a judgment of that kind there will be no opportunity for any further review of the closed material by a special advocate or by anyone else. Secret justice at this level is really not justice at all.

B **99** I very much hope that the Supreme Court will never find itself in a position when it has to resort to the giving of a closed judgment in the disposal of an appeal. A stern and steadfast resistance to the use of that procedure would go some way to redressing the unwelcome departure from the principle of open justice that the decision that the Supreme Court may in principle adopt a closed material procedure will inevitably give rise to. C In itself, merely looking at a closed judgment to see whether there is anything in it that might be of significance may be thought not give rise to any unfairness to the party who does not have access to that material. A check of that kind may not seem a large step to take. It is an entirely different matter if it leads to the issuing of even more material in the form of a closed judgment that the other party cannot see.

D **100** As it happened, it was not necessary to answer this question. It became clear in this case, when the judge's closed judgment had been seen and considered, that there was nothing in it which required any such judgment to be issued by this court. The fact this was so reinforces my suspicion that the Treasury were being over-cautious in their refusal to offer any assistance as to what the points were to which reference was made in their note to the special advocates and that they were over-using the E procedure. I am not to be taken as suggesting that it was wrong for the Treasury to make use of closed material in the lower courts, where its use has been expressly authorised by Parliament. But the attitude which they have adopted in this appeal was a misuse of the procedure, because they invited the court to look at the closed judgment when there was nothing in it that could not have been gathered equally well from a careful scrutiny of the F open judgment. This experience should serve as a warning that the state will need to be much more forthcoming if an invitation to this court to look at closed material were to be repeated in the future.

LORD KERR OF TONAGHMORE JSC (dissenting)

101 Two principles of absolute clarity govern the law in relation to the manner in which trials should be conducted. The first is that a party to G proceedings should be informed of the case against him and should have full opportunity to answer that case in open court. The second principle is that the first principle may not be derogated from except by clear parliamentary authority.

102 These principles received emphatic endorsement by the Supreme Court in *Al Rawi v Security Service* [2012] 1 AC 531. In delivering the H leading judgment, Lord Dyson JSC said, at paras 10–13:

> "10. There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open

justice principle has been emphasised many times: see, for example, *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, per Lord Hewart CJ, *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449H–450B, per Lord Diplock, and recently *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* QB 218, paras 38–39, per Lord Judge CJ.

"11. The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting 'a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack on the very foundations of public and private security'. Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question 'as one of principle, and as turning, not on convenience, but on necessity'.

"12. Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance. The Privy Council said in the civil case of *Kanda v Government of Malaya* [1962] AC 322, 337: 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.'

"13. Another aspect of the principle of natural justice is that the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses. As was said by the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594, para 32: 'Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.' "

103 The essential ratio of *Al Rawi*, so far as concerns the present appeal, was neatly expressed by Lord Dyson JSC in para 35 where he said:

"the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that."

The simple question which lies at the heart of this appeal is whether Parliament has done that for hearings before the Supreme Court.

104 It was suggested that the decision in *Al Rawi* can be distinguished or that it has no application to the present appeal because it was concerned with a trial and not with an appeal from a decision in proceedings where there was statutory authority to conduct a closed hearing. I do not accept this argument. The principle recognised in *Al Rawi* is both fundamental and general. Its effect is straightforward. Courts do not have power to authorise a closed material procedure unless they has been given that power by

A Parliament. If Parliament has not conferred the power on this court, it matters not that those courts from which an appeal lies to this court have been empowered to conduct such a hearing.

105 Representing as it does such a radical departure from the conventional mode of trial and, more importantly, such a drastic infringement on a centuries old right, it is to be expected that a closed materials procedure would be provided for in the most unambiguous and B forthright terms or by unmistakably necessary implication. On that basis alone, section 40(5) of the Constitutional Reform Act 2005 is hardly a promising candidate. But before looking more closely at that provision, I should say something about the relevant provisions in the Counter-Terrorism Act 2008, principally to examine how Parliament has in fact set about making explicit provision for closed material procedures in other C courts and to point up the contrast with the route that the respondent in this case would have us take to arrive at the same destination.

106 The first and most obvious thing to say about the Counter-Terrorism Act 2008 is, of course, that it was enacted three years after the Constitutional Reform Act 2005. We now know (not least by reason of *Al Rawi*) that the High Court and the Court of Appeal could not have ordered a D closed material procedure in a case such as the present by recourse to an inherent power. This required the authorisation of the 2008 Act. It appears to me, therefore, that an argument that the Supreme Court did have power to hold such a hearing before 2008, when the High Court and the Court of Appeal did not, would be utterly implausible. But if section 40(5) did not empower the Supreme Court before 2008 to hold a closed material procedure hearing, how can it be said to have done so after the enactment of E the Counter-Terrorism Act and Rules made thereunder, all of which conspicuously make no reference whatever to this court? I shall return to this question briefly below.

107 Bank Mellat's proceedings before the High Court were brought under section 63 of the 2008 Act. Section 63(2) gives a person affected by a decision taken by the Treasury in connection with a range of asset freezing and F other financial powers the right to apply to the High Court to have that decision set aside. These are known as "financial restrictions proceedings": section 65. Provisions as to how they are to be conducted are made in sections 66–72.

108 Section 66 contains general provisions about rules of court to be made in relation to financial restrictions proceedings. Subsection (2) enjoins the person making the rules to have regard to (a) the need to secure that the decisions that are the subject of the proceedings are properly reviewed; and G (b) the need to secure that disclosures of information are not made where they would be contrary to the public interest. Subsection (3) states that rules of court may make provision (a) about the mode of proof and about evidence in the proceedings; (b) enabling or requiring the proceedings to be determined without a hearing; and (c) about legal representation in the proceedings.

109 Section 66(4) is an important provision which foreshadows rules of H court authorising significant differences from the conventional mode of trial in the way that financial restrictions proceedings may be conducted. It provides:

> "Rules of court may make provision— (a) enabling the proceedings to take place without full particulars of the reasons for the decisions to

which the proceedings relate being given to a party to the proceedings (or to any legal representative of that party); (b) enabling the court to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party); (c) about the functions of a person appointed as a special advocate; (d) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence."

110 Section 67(2) provides that rules of court must secure that the Treasury is required to disclose material on which they rely; material which adversely affects its case; and material which supports the case of a party to the proceedings. This subsection is made subject to the succeeding provisions of the section, however. These include subsection (3) which introduces significant qualifications on the duties imposed in subsection (2). It provides:

"Rules of court must secure— (a) that the Treasury have the opportunity to make an application to the court for permission not to disclose material otherwise than to— (i) the court, and (ii) any person appointed as a special advocate; (b) that such an application is always considered in the absence of every party to the proceedings (and every party's legal representative); (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be contrary to the public interest; (d) that, if permission is given by the court not to disclose material, it must consider requiring the Treasury to provide a summary of the material to every party to the proceedings (and every party's legal representative); (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be contrary to the public interest."

111 As the interveners, Liberty, have pointed out, section 67(3) heralded the effective disapplication of the law relating to public interest immunity. Simply stated, that law required a court, faced with a request by a party to authorise the withholding of relevant evidence, to balance the public interest which the application was said to protect against those public interests which favoured its production, including the fair administration of justice. No such weighing of competing interests could take place after the enactment of the rules which section 67(3) stipulated should secure, among other things, that the court *must* give permission for material not to be disclosed if it considered that its disclosure would be contrary to the public interest. That outcome was inevitable as soon as the conclusion that revelation of the material was contrary to the public interest. Countervailing interests such as the due and fair administration of justice were to be of no consequence.

112 The effective abolition of public interest immunity in financial restrictions proceedings and the requirement that applications be entertained for evidence to be withheld from all except the court and special advocates clearly called for the protection, in some other guise, of the interests of the litigant who had been denied access to the withheld material. This was provided for in section 68. Subsection (1) of that section provides:

"The relevant law officer may appoint a person to represent the interests of a party to— (a) financial restrictions proceedings, or

A (b) proceedings on an appeal, or further appeal, relating to financial restrictions proceedings, in any of those proceedings from which the party (and any legal representative of the party) is excluded. This is referred to in this Chapter as appointment as 'a special advocate'."

113 The 2008 Act had therefore set up a reasonably elaborate structure for the making of rules which would authorise, in financial restrictions B proceedings, a significant departure from the system of trial that would normally obtain in most other forms of civil disputes. But section 73 of the Act made it clear that this system of trial was intended only for the High Court, the Court of Appeal and the Court of Session for it provided that "rules of court", where that expression had been used in the legislation, meant rules for regulating the practice and procedure to be followed in the C High Court or the Court of Appeal or in the Court of Session.

114 The principal rules in the Civil Procedure Rules are made pursuant to section 1 of the Civil Procedure Act 1997. Section 1(3) of this Act provides that the power to make Civil Procedure Rules shall be exercised with a view to securing that the civil justice system is accessible fair and efficient. CPR Pt 79 (which was designed to implement the rules which Part 6 of the 2008 Act, dealing with financial restrictions proceedings, D contemplated) was inserted in the Civil Procedure Rules by the Civil Procedure (Amendment No 2) Rules (SI 2008/3085). As well as making detailed rules to fulfil the provisions of sections 66 and 67, Rules 79.2 and 79.13 modified the overriding objective which otherwise applies to proceedings in both the High Court and the Court of Appeal. That objective is stated in CPR r 1.1, to be to deal with cases justly. Rule 1.1(2)(a) provides E that dealing with cases justly includes, so far as is practicable, ensuring that parties are on an equal footing. But by rules 79.2 and 79.13 this overall objective (in so far as it related to financial restrictions proceedings) was to be read and given effect to compatibly with the court's statutory duty (in section 66(2) of the 2008 Act) to ensure that information was not disclosed contrary to the public interest. Rule 79.22 disapplied in its entirety Part 31 of the CPR which had contained the procedural rules relating to public F interest immunity. Again it can be seen that, in relation to financial restrictions proceedings a fairly radical re-ordering of the rules that governed most forms of civil litigation was introduced.

115 All of this is in stark contrast to the position as regards the Supreme Court. Section 40(5) of the Constitutional Reform Act 2005 provides:

G "The court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

116 As I have said, there cannot be any plausible argument that this provision gave the Supreme Court power to conduct a closed procedures hearing before the enactment of the Counter-Terrorism Act in November 2008. Is it possible that the power of the court to conduct such a hearing has H been animated by the 2008 Act? One can recognise a theoretical argument that in order to determine any question in an appeal against a finding made by a lower court in a closed material procedure hearing, it is necessary for the Supreme Court to be able to conduct such a hearing. That argument must, however, immediately confront the fact that nothing in the 2008 Act

refers to the Supreme Court. Notwithstanding the elaborate structure that has been put in place to govern the conduct of such a hearing in the High Court, the Court of Appeal and the Court of Session, no provision has been made as to how a closed material procedure hearing in the Supreme Court might take place. For my part, I find it inconceivable that it was intended that the Supreme Court should have power to carry out a closed material procedure while leaving it bereft of the structure and safeguards which were deemed essential for the other courts in which such a hearing is expressly permitted.

117 Moreover, the use of a closed material procedure involves the suspension of the law relating to public interest immunity. Thus, for the Supreme Court to recognise that it has power to conduct a closed material procedure hearing necessarily involves an acceptance that its power to conduct an inquiry into whether public interest immunity requires the withholding of the material is no longer available. That this should be the effect of section 40(5) would be surprising enough. But that it should have that effect for the first time three years after the Constitutional Reform Act 2005 was passed is surely wholly improbable.

118 Section 40(5) gives the Supreme Court power to determine questions which need to be determined for the purposes of doing justice in an appeal. But the conferring of that power should not be confused with authorising the use of a wholly different procedure for the manner in which those questions are to be determined. This is particularly so when that different procedure was not in contemplation at the time the section was enacted.

119 It is significant that the subsection confers the power for the express purpose of doing justice in an appeal. The doing of justice is conventionally understood to mean that all parties to litigation will have equal access to material which is liable to influence the outcome of the dispute. This is echoed in section 45 of the Constitutional Reform Act—the provision which deals with rule making powers. Section 45(1) invests the President of the court with the power to make rules governing the practice and the procedure to be followed in the court. Subsection (3)(a) requires that the President must exercise that power with a view to securing that the court is accessible, fair and efficient. This mirrors section 1(3) of the Civil Procedure Act 1997. And rule 2 of the Supreme Court Rules 2009 sets out the overriding objective as being to secure that the court is accessible, fair and efficient, terms which are not dissimilar to the overall objective in CPR r 1.1. There has been no modification of this overall objective such as was introduced by Part 79 of the CPR, however. Indeed, nothing in the 2009 Rules intimates an intention to accommodate a closed material procedure in any way.

120 Rule 27(1) states that every contested appeal shall be heard in open court except where it is necessary in the interests of justice or the public interest to sit in private for part of an appeal hearing. Rule 27(2) provides:

> "Where the court considers it necessary for a party and that party's representative to be excluded from a hearing or part of a hearing in order to secure that information is not disclosed contrary to the public interest, the court must conduct the hearing, or that part of it from which the party and the representative are excluded, in private but the court may exclude a party and any representative only if a person who has been appointed as

A a special advocate to represent the interests of that party is present when the party and the representative are excluded."

121 In my view, it is clear that this rule was made to allow an ex parte application to be made for the withholding of material as part of a public interest immunity exercise. To suggest that it was designed to cover the holding of a closed material procedure would be far-fetched, given that there B is no mention in any other part of the Rules of such a procedure. Indeed, the very next rule, rule 28 states that a judgment of the court may be delivered in open court or, if the court directs, be promulgated by the registrar.

122 But for the circumstance that the 2008 Act introduced a closed material procedure for the High Court, the Court of Appeal and the Court of Session and that appeals lie from those courts to the Supreme Court, there C would be no argument that the Constitutional Reform Act and the Supreme Court Rules even address, much less contemplate, the possibility of such a hearing taking place before this court. It is only by a process of ex post facto rationalisation that section 40(5) is said to permit a closed material procedure in the Supreme Court. That cannot be said to have been its original purpose. In my view, the revised and expanded purpose which the respondent seeks to ascribe to it cannot be accepted. The contended for D modification of the court's powers and procedures involves simply too important, not to say too fundamental, a transformation to be countenanced.

123 It can be submitted that a steadfast refusal to allow some softening of the *Al Rawi* line in relation to appeals is unrealistic; that the failure to admit closed material in an appeal before the Supreme Court when the same E material had been before the courts against whose decisions the appeal is brought creates an asymmetrical anomaly. And indeed, it has been suggested by the advocate to the court, Mr Tam QC, that advantages in recognising at least the power of the Supreme Court to receive closed material can be detected. The primary advantage he identified was the assistance which such an exercise provided in enabling the court to arrive at the "correct" result. For the reasons that I gave in *Al Rawi* and the F associated case *Tariq v Home Office (JUSTICE intervening)* [2012] 1 AC 452, I consider that the assumption that a court, presented with all of what is claimed to be "relevant" material, will be in a better position to arrive at the right conclusion when some of that material is untested is, at least, misplaced and may prove in some cases to be palpably wrong. But I do not consider it profitable to renew the debate on that particular topic in the present case. G For the sake of examining the claim that this court should recognise a power to examine closed material, let us assume that there is force in the argument that a court is, as a matter of principle and common experience, better placed to reach a more correct result if it receives all the material which one of the parties says is relevant to its decision, even though the other party is denied knowledge of its content. Does that circumstance warrant recognition of the power? In my view it does not.

H **124** Pragmatic considerations can—and, where appropriate, should—play their part in influencing the correct interpretation to be placed on a particular statutory provision. But pragmatism has its limits in this context and we do well to recognise them. As a driver for the interpretation of section 40(5) for which the respondent contends, pragmatism might seem,

at first blush, to have much to commend it. After all, this is an appeal from courts where closed material procedures took place. How, it is asked, can justice be done to an appeal if the court hearing the appeal does not have equal access to a closed material procedure as was available to the courts whose decision is under challenge? And if one proceeds on the premise that the court will be more fully informed and better placed to make a more reliable decision, why should the Supreme Court not give a purposive interpretation to section 40(5)?

125 The answer to this deceptively attractive presentation is that this was never the purpose of section 40(5). It was not even a possible, theoretical purpose at the time that it was enacted. It was never considered that it would be put to this use. The plain fact is that Parliament introduced a closed material procedure for the High Court, the Court of Session and the Court of Appeal and did not introduce such a procedure for the Supreme Court. This court has said in *Al Rawi* that it does not have the inherent power to introduce a closed material procedure. Only Parliament could do that. Parliament has not done that. And to attempt to graft on to a statutory provision a purpose which Parliament plainly never had in order to achieve what is considered to be a satisfactory pragmatic outcome is as objectionable as expanding the concept of inherent power beyond its proper limits.

126 A majority of this court has held that it does have power to hold a closed material procedure, however, and it is therefore necessary for me to address the question of whether it was right to hold a closed material procedure on this appeal.

127 It was not in dispute between the parties, the interveners and the advocate to the court that, as Mr Chamberlain on behalf of the special advocates put it, if section 40(5) confers on the court power to consider closed material, it does so only if, and to the extent that, closed material is relevant to a question whose determination is *necessary* for the purposes of doing justice in the appeal. Equally, it was not disputed that the obligation to show that the closed material was relevant and the extent to which it was relevant rested with the party so asserting, in this instance the respondent.

128 But the circumstances of this case immediately exemplified the inherent difficulty in applying that principle. In seeking to persuade the court that it was necessary to look at the closed judgment, the respondent felt unable to state what the closed judgment contained. This is, of course, a problem which will beset every application for a closed material procedure. And, ultimately, counsel for the respondent was driven to utter warnings couched in the most general terms of the danger of this court reaching a conclusion on the appeal in the appellant's favour when it *might* have been influenced to a different view had it seen the closed material. If the principle that the closed material procedure has to be shown to be necessary is to be something more than an empty aspiration, then the party asking for a closed material procedure must surely do more than merely assert that this is necessary. Here, however, the respondent did not even do that. The Treasury's final position was that, in a certain eventuality (the appellant's appeal succeeding), the material *might* cause the court to take a different view. That seems to me to be an impossibly far cry from showing that it was necessary that we should look at the closed judgment.

A **129** The difficulty is enhanced where, as here, article 6 of the European Convention on Human Rights and Fundamental Freedoms governed the proceedings. Where that is the case, nothing in the closed material, or the judge's conclusion on it, may be determinative of the outcome unless the gist of the material has been relayed to the appellant. So one must start the examination of whether it is necessary to examine the closed judgment on the basis that nothing in that judgment can have been B determinative of the case against the Bank. The examination of whether the necessity test has been satisfied then must include acknowledgment of Mitting J's single reference to his closed judgment in para 16 of his open judgment to the effect that there were closed reasons as well as those expressed in his open judgment for his finding that one of the Bank's customers, Novin Energy Company, had imported materials which could C be used to produce or facilitate the production of nuclear weapons. In the first place, the fact that open reasons for that finding had been given certainly does not help the case that it was necessary to look at the closed judgment. But that case was weakened further by the judge's statement that this was common ground between the parties and, in my view, it was demolished by the fact that this finding was not challenged by Bank Mellat D before this court.

130 In truth, this court's decision to look at the closed judgment depended on nothing more than the plea of counsel for the Treasury that, against the possibility that we might be inclined to find for the appellant, we should look at the closed material just in case it might persuade us to a different view. That, in my opinion, comes nowhere near to showing that it was necessary to look at the closed judgment and sadly, but all too E predictably, when the closed judgment was considered in the course of a closed material procedure, it became abundantly clear that it was quite unnecessary for us to have done so.

LORD REED JSC (dissenting)

131 This appeal has raised several points of constitutional importance. F The present judgment is concerned with the questions whether this court can adopt a closed material procedure in a case of this nature, and, if so, whether it ought to do so in this particular case. I agree with the judgments of Lord Hope of Craighead DPSC and Lord Kerr of Tonaghmore JSC, and add some observations only in view of the importance of these issues and the division in the court.

G *The issue of principle*

132 The first question raised is whether this court has the power, when hearing an appeal relating to financial restrictions proceedings under Part 6 of the Counter-Terrorism Act 2008 ("the 2008 Act"), to exclude from the hearing the party challenging the Treasury's exercise of its powers, to consider a "closed judgment" which has not been disclosed to H that party, and to give a closed judgment, containing part or all of the reasons for its decision, which is not disclosed to that party or to the public. I was of the opinion, when the issue arose at the end of the first day of the hearing, that the court has no such power. I remain of that opinion.

133 It is a fundamental principle of justice under the common law that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party: see for example *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 615, per Lord Mustill, and the other authorities cited in *R (Roberts) v Parole Board* [2005] 2 AC 738, para 16, per Lord Bingham of Cornhill. That principle can only be qualified or overridden by statute. It is also a basic principle of justice that a party is entitled to be present during the hearing of his case by the court (subject to a number of established exceptions, none of which is germane to the present case), and to know the reasons for the court's decision.

134 Section 66 of the 2008 Act, read with section 73, makes special provision for rules of court regulating the practice and procedure to be followed in appeals relating to financial restrictions proceedings in the High Court, the Court of Appeal and the Court of Session. Section 66(4) permits such rules of court to make provision for a closed material procedure. Section 67 imposes specific duties in relation to disclosure on persons making rules of court in respect of those courts alone. The law relating to public interest immunity is by implication disapplied. It is plain beyond argument that Parliament did not apply those provisions to the court of last resort. If Parliament had intended the same procedures to be applied in this court, it would surely have said so.

135 The general powers conferred on this court by the Constitutional Reform Act 2005 ("the 2005 Act") are silent on the matter. It is argued that they are to be construed as conferring the necessary powers, since the court cannot decide an appeal in a case where a "closed judgment" has been issued without knowing, and hearing argument upon, all the reasons for the decisions of the courts below, and must therefore hear argument on the closed judgment, necessarily in a hearing from which the party challenging the Treasury's exercise of its powers is excluded. There is however a strong presumption that Parliament does not intend to interfere with the exercise of fundamental rights. It will be understood as doing so only if it does so expressly or by necessary implication: *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 574, per Lord Browne-Wilkinson; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, per Lord Hoffmann. The common law rights of a party to an appeal to be present throughout the hearing of the appeal, to see the material before the court, and to know the reasons for the court's decision of the appeal, are undoubtedly fundamental rights to which that principle applies. The argument advanced on behalf of the Treasury is directly contrary to that principle: reliance is placed on general words to override a fundamental right. I find it particularly difficult to accept the argument against the background of the specific provision made by Parliament in respect of other courts in the 2008 Act. In so far as the argument seeks to rely on the Supreme Court Rules 2009 made under the 2005 Act, it begs the anterior question as to the effect of the 2005 Act itself.

136 I accept of course, as a general proposition, that it is desirable that an appellate court should be able to consider all the reasoning of the courts below, and all the material which was before them. This court has not however in the past found it either necessary or appropriate to consider

closed judgments of the courts below: *MT (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110, para 3. I do not in any event regard these pragmatic considerations as conclusive.

137 It has to be borne in mind in the first place that it is a matter of great importance that proceedings in the highest court in the land should be conducted in accordance with the highest standards of justice: in particular, that the court should sit in public, and that all parties should be equally able to participate in the hearing. There is to my mind a very serious question whether secret justice at this level is acceptable. It also has to be borne in mind that there are other possible means of protecting national security in court proceedings besides the adoption of a closed material procedure, and that some of those means enable the court to sit in public and the parties to attend the whole of the hearing. One possibility, where a closed judgment has been issued by a lower court, is to determine the appeal on the basis of the material which that court, exercising its judgment, has set out in its open judgment. That was the procedure followed in *MT (Algeria)*. Another is to apply the law relating to public interest immunity, as the House of Lords did in the past. Another is to follow the approach adopted in a number of European courts, such as the German courts, where the court can examine the material for itself, without its being canvassed during the hearing. A comparative analysis might disclose other possibilities. That is not to say that the alternatives to closed material procedure are necessarily preferable: they may cause equal or greater concern for other reasons. The point of these considerations, however, is that there are choices to be made. Those choices are appropriately made by Parliament after full consideration and debate. They are too important to be left to judges.

138 The most serious difficulty with the Treasury's argument, however, is that for the court to conduct a closed hearing is contrary to a fundamental principle of the common law, and therefore requires clear statutory authority. Even interpreted as generously as possible, the 2005 Act cannot in my opinion be said to provide clear authority.

Whether this court should have adopted a closed material procedure in the present case

139 The second question raised is whether, given the view of the majority of the court that it did possess such a power, that power should have been exercised in the circumstances of the present case. I am emphatically of the opinion that it should not. The Treasury's argument, which I have already summarised, was one which would apply in every case in which a closed judgment had been given. In the present case, however, Mitting J had properly indicated in his open judgment ([2010] Lloyd's Rep FC 504, paras 16 and 18) the two specific findings that he had made for which his reasoning was set out in the closed judgment. Neither of those findings was challenged before this court. Counsel for the Treasury's assertion that it was nevertheless necessary for this court to hear submissions on the closed judgment, and for that purpose to sit in a closed session, was unsupported by any specific reasons why such an exceptional course should be adopted. No indication was given of the nature of the closed material, contrary to the requirement that a summary should be provided: *Secretary of State for the Home Department v AF (No 3)* [2010]

2 AC 269. The plea that, if there was any possibility that the court might otherwise allow the appeal, it ought to consider the closed judgment just in case anything in it might alter the court's view, falls far short of demonstrating that a departure from the fundamental principle of open justice was truly necessary.

140 When closed material procedure was first introduced in 1997, in proceedings before the Special Immigration Appeals Commission, it was said to be an exceptional measure justified by national security concerns. Having gained a foothold in the legal system, the procedure has spread progressively, initially to other specialist tribunals, and then to the courts. It has been used even where issues of national security are not involved (as, for example, in *R (Roberts) v Parole Board* [2005] 2 AC 738). Now that its use has been extended to proceedings before this court, it is of great importance, if a degradation of standards of justice at the highest level is to be avoided, that it should be resorted to only where it has been convincingly demonstrated to be genuinely necessary in the interests of justice.

LORD DYSON MR (dissenting in part)

141 I agree with Lord Neuberger of Abbotsbury PSC that, for the reasons that he has given, this court has the power to adopt a closed material procedure in an appeal under the Counter-Terrorism Act 2008.

142 For the reasons given by Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Reed JJSC, I did not favour exercising the power in this case. In my view, the power should only be exercised where it has been convincingly demonstrated that it is necessary to do so in the interests of justice. I agree with what Lord Neuberger PSC says about this at para 69 of his judgment.

143 The present case illustrates the danger of the court acceding too readily to an assertion by a party that a closed session could make a difference to the outcome of an appeal. That is what counsel for the Treasury asserted on instructions in the present case. He was unable to say more. As Lord Neuberger PSC says at para 64, the court "strongly suspected" that nothing in the closed judgment would affect the outcome of the appeal, but we "could not be sure in the absence of seeing the closed judgment and listening to submissions on it". Our strong suspicions were amply borne out. The closed judgment contained nothing that it could reasonably have been thought would or might affect the outcome of the appeal.

144 In my view, if the court strongly suspects that nothing in the closed material is likely to affect the outcome of the appeal, it should not order a closed hearing.

145 I remain of the view that the power should not have been exercised in the present case. A bare plea for a closed hearing should not suffice. I agree with Lord Hope DPSC that convincing reasons should be given as to why closed material should be looked at. Anything less is likely to lead to closed hearings becoming routine. In my view, they should be exceptional.

Application granted.

19 June 2013. The following judgments on the substantive appeal were handed down.

LORD SUMPTION JSC (with whom **BARONESS HALE OF RICHMOND**, **LORD KERR OF TONAGHMORE**, and **LORD CLARKE OF STONE-CUM-EBONY JJSC** agreed)

Introduction

1 This appeal is about measures taken by HM Treasury to restrict access to the United Kingdom's financial markets by a major Iranian commercial bank, Bank Mellat, on the account of its alleged connection with Iran's nuclear weapons and ballistic missile programmes.

2 The proliferation of nuclear weapons is an international issue of great importance to the security of the United Kingdom and the international community. For a number of years, Iran has had a major industrial programme which the United Kingdom, along with the rest of the international community, believes to be directed to the development of the technical capability to produce nuclear weapons and to the improvement of its ballistic missile capabilities. Between 2006 and 2008 the United Nations Security Council adopted a number of resolutions under article 41 of the United Nations Charter, which deals with threats to international peace and security. Security Council Resolution 1737 (2006) called on Iran to suspend various proliferation-sensitive nuclear activities, and called on states to take measures to control the trade in certain critical materials, components, equipment and services. Para 12 of this Resolution also required states to freeze the assets in their national territory of a number of persons or organisations identified in Annex I as being involved in Iran's nuclear and ballistic missile programmes. Resolution 1747 (2007) extended these provisions to a number of additional persons and organisations identified in Annex I to the new resolution. These included entities providing ancillary services to Iran's nuclear and armaments industries, among them two banks. Security Council Resolution 1803 (2008) strengthened the measures required by Resolutions 1737 and 1747. In relation to the provision of banking and other financial services to support Iran's weapons programmes, the new resolution, at para 10, called on all states to

> "exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems . . ."

3 There are two principal legislative instruments available to the United Kingdom government for the purpose of restricting the operations in the United Kingdom of Iranian financial institutions associated with the country's nuclear and ballistic missiles programmes. The first, which is not directly in point in these proceedings but is an important part of the background, is the Iran (Financial Sanctions) Order 2007 (SI 2007/281). This is an Order in Council made under section 1 of the United Nations Act 1946, which gives effect to the asset freeze provisions of Security Council Resolutions 1737 and 1747. Article 6 of the Order freezes the assets in the United Kingdom of the entities identified in Annex I of those resolutions.

4 The second, which is the instrument directly relevant to the present appeal, is section 62 of the Counter-Terrorism Act 2008, which gives effect to Schedule 7. Schedule 7 is not exclusively concerned with Iran or with nuclear proliferation. It empowers the Treasury to make a direction by statutory instrument in situations specified in paragraph 1, involving three categories of "risk" associated with a foreign country outside the European Economic Area. The relevant categories of risk are those arising from terrorist financing, money laundering and nuclear proliferation. The risk of nuclear proliferation is dealt with in paragraph 1(4), which imposes a statutory condition that

> "the Treasury reasonably believe—that (a) the development or production of nuclear, radiological, biological or chemical weapons in the country, or (b) the doing in the country of anything that facilitates the development or production of any such weapons, poses a significant risk to the national interests of the United Kingdom."

5 If the conditions in paragraph 1 as to the existence of a relevant risk are satisfied, the Treasury may give a direction to one or more persons "operating in the financial sector" (essentially credit and financial institutions) regulating their dealings with any "designated person". A "designated person" includes any person carrying on business in or resident or incorporated in the foreign country in question: see paragraph 9(1). The direction may require the financial institutions to whom it is addressed to exercise an enhanced customer due diligence so as to obtain information about the designated person and those of its activities which contribute to the risk: paragraph 10. It may require enhanced monitoring (paragraph 11) or systematic reporting (paragraph 12) to the same end. But the most draconian provision is paragraph 13, which provides that the direction may require those to whom it is addressed "not to enter into or continue to participate in . . . any transaction or business relationship with a designated person". Under paragraph 16(4), any direction made in the exercise of these powers expires a year after it is made. A direction made under Schedule 7 must be contained in an order: see paragraph 14(1). By section 96, any order under the Act must be made by statutory instrument.

6 It will be apparent that for designated persons with a substantial business in the United Kingdom, especially if they are banks, the exercise of the power conferred by paragraph 13 will have extremely serious and possibly irreversible consequences. The Act provides three relevant safeguards against the unwarranted use of this power. First, under Schedule 7, paragraph 14(2), if the direction contains requirements of a kind mentioned in paragraph 13 of Schedule 7 (limiting or ceasing business with a designated person) it must be laid before Parliament after being made and unless approved by affirmative resolution within 28 days will cease to have effect at the end of that period. Second, Schedule 7, paragraph 9(6) provides that the requirements imposed by a direction must be proportionate having regard, in the case within paragraph 1(4) to the risk referred to in that paragraph. This means the risk to the national interests of the United Kingdom presented by the development of nuclear weapons, radiological, biological or chemical weapons in the foreign country. Third, section 63 of the Act provides a special procedure by which a person affected by any

A "decision" of the Treasury, including a decision under Schedule 7, may apply to the High Court to set it aside, applying the principles applicable on an application for judicial review.

7 On 9 October 2009 the Treasury made an order, the Financial Restrictions (Iran) Order 2009, which came into force three days later on 12 October. It was made under Schedule 7, paragraph 13 of the Act and required all persons operating in the financial sector not to enter into or to B continue to participate in any transaction or business relationship with Bank Mellat or any of its branches or with a shipping line called IRISL. The direction was laid before Parliament on 12 October 2009. It was approved by the Delegated Legislation Committee of the House of Commons on 28 October and by the Grand Committee of the House of Lords on 2 November.

C 8 Under Schedule 7, paragraph 16(4), the direction expired automatically after a year, on 8 October 2010. By that time it had been effectively superseded by the extension to Bank Mellat of a general asset freeze under EU legislation, which occurred on 26 July 2010. On 29 January 2013, however, the application of the EU measures to Bank Mellat was annulled by the General Court, primarily on the ground of the insufficiency of the stated reasons for it. This decision is currently under appeal to the D Court of Justice of the European Union and is suspended pending that appeal. Subject to that, there are no restrictions on Bank Mellat's business currently in force.

9 The object of the direction, as the Treasury acknowledges, was to shut the Bank out of the UK financial sector, and that has been its effect. Before the direction, the bank had a substantial international business, much of it E international trade finance transacted through London. In the year to March 2009, it issued letters of credit with an aggregate value of about US$11bn, of which about a quarter represents letters of credit in respect of business transacted through the United Kingdom. The bank's own estimate of its revenue losses is about US$25m a year. In addition, the bank has been prevented from drawing on 183m euros of call and time deposits with its part-owned subsidiary in London. Important banking relationships have F been lost to other banks. The judge found that since the direction, the bank has been unable to make profitable use of the goodwill which it had established in the United Kingdom, which was a "possession" for the purpose of article 1 of the First Protocol to the European Convention on Human Rights. He held that "on any view the effect has been substantial, and suffices to require all of the bank's challenges to the Order to be G addressed and determined". This much is not in dispute.

The present proceedings

10 On 20 November 2009, Bank Mellat ("the Bank") applied in the High Court under section 63 of the Counter-Terrorism Act 2008 to have the direction set aside on grounds which fall under two heads. In the courts below, these were called the procedural and the substantive grounds. The H procedural ground is that the Treasury failed to give the Bank an opportunity to make representations before making the order. The Bank had no express statutory right to such an opportunity, but it contends that such an opportunity was required at common law and by article 6 of, and article 1 of the First Protocol to the European Convention for the Protection

of Human Rights and Fundamental Freedoms. The substantive grounds are that the decision was irrational, disproportionate and discriminatory, that the Treasury failed to give adequate reasons for making it, and that their reasons were vitiated by irrelevant considerations or mistakes of fact. In the High Court, Mitting J dismissed the Bank's application under both heads. The Court of Appeal (Maurice Kay, Elias and Pitchford LJJ) [2012] QB 101 dismissed the appeal, unanimously in the case of the substantive grounds, by a majority (Elias LJ dissenting) in the case of the procedural ground.

The Treasury's reasons

11 Bank Mellat is the only Iranian bank to have been designated under Schedule 7 of the Act. It is, however, only part of the Iranian banking sector. According to a staff report of the International Monetary Fund put before us by the Treasury, Iran has a comparatively large banking sector. It comprises 26 banks, including eight large general commercial banks, four of which are publicly owned and the other four (among them Bank Mellat) relatively recently privatised. The Treasury's evidence is that it is difficult for Iranian banks to access the United Kingdom's financial markets directly, because few banks in the United Kingdom are willing to deal with them or hold correspondent accounts for them in view of the risks involved. It is easier for Iranian banks to do business in the United Kingdom through UK incorporated subsidiaries, which do not present the same risks for their counterparties. Five of the eight general commercial banks in Iran have wholly or partly owned subsidiaries in the United Kingdom. They are Bank Mellat, Bank Melli, Bank Sepah, Bank Saderat and Bank Tejarat. Of these, Bank Melli, Bank Sepah and Bank Saderat had wholly owned banking subsidiaries in the United Kingdom. Bank Mellat and Bank Tejarat had a jointly owned banking subsidiary, Persia International Bank plc ("PIB"), through which they transacted most if not all of their United Kingdom business. At the time of the Treasury direction, some of the Iranian banks with banking subsidiaries in the United Kingdom were restricted under other legislation. Bank Sepah and its UK subsidiary Bank Sepah International plc were included in Annex I to Security Council Resolution 1747, and were accordingly covered by the asset freeze imposed under the Iran (Financial Sanctions) Order 2007 (SI 2007/281). Bank Melli and its UK subsidiary Bank Melli plc were subject to a similar asset freeze under EU legislation. On 27 July 2010, some time after the direction relating to Bank Mellat was made, the EU asset freeze was extended to Bank Mellat and PIB as well as to Bank Saderat and its UK subsidiary Bank Saderat plc which had previously been subject to reporting obligations only. At the same time the EU asset freeze was extended to three other Iranian banks which did not have UK branches or subsidiaries. That left, among banks with a UK presence, only Bank Tejarat, which was finally brought within the EU asset freeze on 24 January 2012.

12 It is abundantly clear from statements made to Parliament when the direction was laid before it that the reason for singling out Bank Mellat from other Iranian banks was that it had been identified as having assisted Iran's weapons programmes by providing banking and financial services to entities involved with them. The explanatory memorandum which accompanied the direction explained it as follows:

A "These restrictions are being imposed in respect of these entities because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's proliferation activities."

This was expanded in a written ministerial statement. After explaining why
B the Treasury considered that the Iranian nuclear programme posed significant risks for the national interests of the United Kingdom, the document continued:

"We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the
C potential to affect the UK' s interests.

"Of the particular entities in question . . . Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.

"The direction to cease business will therefore reduce the risk of the
D UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities."

In response to a request from the Bank's solicitors for further information about the contents of this statement, the Treasury wrote on 27 October 2009:

E "Iran's nuclear and ballistic missile programmes clearly require financing mechanisms to underpin them, and access to the international banking system remains essential for transactions with foreign suppliers. As set out in the written ministerial statement Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme. The direction
F prevents Bank Mellat from conducting transactions or business relationships with persons operating in the UK financial sector and therefore restricts the financing mechanisms available to entities involved in lran's nuclear programme and its missile programme. It also protects the UK financial sector from being unknowingly implicated in financing Iran's nuclear programme through transactions with Bank Mellat."

G Finally, on 17 December 2009, the Exchequer Secretary to the Treasury answered a number of questions relating to the order in the House of Commons. She said:

"The first question was on how the Government assess the impact on Iran's proliferation activities. International finance services underpin the actions of Bank Mellat and IRISL. Restricting their access to UK financial
H services will lock them out of a key financial centre, which will make their contribution to Iran's nuclear programme more difficult. Obviously, our action applies to the UK. The Hon Member for Fareham used the word 'sanction', but the order is not a sanction on Iran, but a direction for financial institutions in the UK."

And later in the same debate:

> "The restriction targets Bank Mellat and IRISL transactions. Other Iranian banks are not subject to the restrictions. As long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used, otherwise an application for a licence of exemption may be made to the Treasury."

13 In response to Bank Mellat's proceedings, Mr James Robertson, a senior civil servant at the Treasury, made a witness statement which in its original form was dated 18 December 2009. His statement was subsequently re-served with additional material, after Mitting J had required the Treasury to disclose certain material which they had initially sought to rely on as closed material. In his statement, Mr Robertson provided some of the detail behind the general allegations in the written ministerial statement about Bank Mellat's dealings with a "UN listed organisation connected to Iran's proliferation sensitive activities", and the "transactions related to financing Iran's nuclear and ballistic missile programme". It came down to three points:

(1) The "UN listed organisation" was Novin Energy Company, which had been identified in Annex I of Resolution 1747 as a company which "operates within AEOI and has transferred funds on behalf of AEOI to entities associated with Iran's nuclear programme". AEOI is the Atomic Energy Organisation of Iran. It is an umbrella organisation concerned with the co-ordination of the programme. It is listed in Annex I of Resolution 1737. Mr Robertson's evidence was that Bank Mellat had "serviced and maintained AEOI accounts mainly through AEOI's financial conduit Novin Energy."

(2) Bank Mellat was said to have provided banking services to senior officials of Iran's "Aerospace Industries Organisation" (or "AIO"), including a Mr Taghizadeh and a Mr Esbati. AIO is not an organisation listed in the Annexes to the Security Council resolutions, but it is the parent of four entities which are listed. Mr Robertson alleged that "senior AIO officials concerned with Iran's ballistic missile programme", by inference including Mr Taghizadeh and Mr Esbati, had in 2007 and 2008 "used Bank Mellat services to conduct business with companies associated with Iranian procurement attempts".

(3) Between autumn 2007 and spring 2009 the bank had a banking relationship with a company called Doostan International, which was said to be an intermediary company that had in the past been used by subsidiary organisations of AIO listed in the Security Council resolutions, and which was linked to Iran's nuclear programme.

14 In addition, Mr Robertson said that the Treasury had been influenced by two wider considerations not directly related to Bank Mellat's alleged role in providing banking services to entities involved in Iran's weapons programmes. One was that it might encourage the United Kingdom financial sector to wind down business with Iran more generally. The other was that it would increase pressure on the Iranian Government to comply with its international obligations, by restricting the financial services available to it for procuring material required for its weapons programmes. In this context, Mr Robertson said that it was important to note that

A although Bank Mellat had been privatised, the government of Iran still directly controlled 20% of its shares and indirectly controlled another 60%.

15 In his open judgment [2010] Lloyd's Rep FC 504 Mitting J made the following findings, which represent at best a very partial acceptance of the Treasury's case on the facts:

(1) Bank Mellat "has in place a mechanism, which it operates
B conscientiously, to ensure that it does not provide banking services to Security Council designated entities and individuals". This finding reflected the bank's evidence, which described its due diligence procedures.

(2) Novin Energy Company was a "financial conduit" for AEOI and did facilitate Iran's nuclear weapons programme. But once it was designated in Security Council Resolution 1747, the bank ran down and eventually terminated its relationship with it.

C (3) Doostan International had played a part in the Iranian nuclear weapons programme. The bank holds accounts for Doostan and for its managing director Mr Shabani, but the bank had investigated the position in good faith and found nothing unusual or suspicious. Mitting J considered that the position with regard to Doostan "does not greatly matter".

(4) Mitting J was not satisfied on the information available to him that the
D bank had provided banking services to the two individuals said to be senior officials of the AIO. Their names are very common in Iran and it had not proved possible to identify them in the bank's records.

(5) Bank Mellat is not controlled by the Iranian Government, which exercises voting rights only in respect of the 20% of the shares which it owns. None the less some pressure would be brought to bear on the Iranian Government by the direction.

E 16 In substance, therefore, Mitting J found that while the Bank had provided banking services to two entities, Novin and Doostan, which were involved in the Iranian nuclear weapons and ballistic missiles programmes, this had happened without their knowledge and in spite of their conscientiously operated procedures to avoid doing so. The judge nevertheless dismissed the Bank's substantive grounds of application
F because these very facts demonstrated the "risk that is, in any event, obvious: that, however careful the Bank may be, the Bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." The judge put the point in this way at para 16:

> "The Treasury's case is not that the bank has knowingly assisted Security Council designated entities after designation, or even that it has
G knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order is that, even as an unknowing and unwilling actor, the bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance.
H Concealment of the true nature of imported goods paid for by a letter of credit is straight forward: all that an issuing bank sees are documents. On presentation of compliant documents describing innocent goods, the bank must pay, whatever the nature of the goods in fact imported. Access to the international financial system is, as the Financial Action Task Force

reported on 18 June 2008, essential for what it describes as 'proliferators'. I accept Mr Robertson's conclusion, in para 57 of his statement, that Iran's banking system provides many of the financial services which underpin procurement of the raw materials and components needed for its nuclear and ballistic missile programmes."

17 In addition to his open judgment, Mitting J delivered a closed judgment, which we have read. It contains nothing which alters or supplements the findings in his open judgment in any respect relevant to the present appeal.

18 The judge's findings of fact were not challenged before the Court of Appeal, which endorsed his conclusions about them.

The Bank's substantive grounds

19 The Bank now accepts, at least for the purpose of this litigation, that the statutory prerequisites in Schedule 1, paragraph 1 of the Act for the making of the direction were satisfied. In other words, the Treasury reasonably believed that Iran's nuclear and ballistic missiles programmes posed a significant risk to the national interests of the United Kingdom. But that is not enough to justify the order. This is because unlike the Iran (Financial Sanctions) Order 2007, a Schedule 7 direction is not a sanctions regime. Its purpose is directly to restrict the availability of financial services which contribute to the relevant risk. Directions made under it are essentially preventative and remedial rather than punitive or deterrent. Thus Schedule 7 applies in the same way to the risk of terrorist financing and money-laundering associated with a foreign country as it does to the risk of nuclear proliferation. All of the specific directions for which Schedule 7 provides are addressed to the particular risks whose existence has given rise to the direction. They require things to be done by the financial institutions to whom they are addressed with a view to directly restricting the contribution which the designated person may make to that risk, whether it be by gathering or reporting of information relating to its activities or, as in the present case, by wholly ceasing business dealings with him. Critically, paragraph 9(6) of Schedule 7 posits a functional relationship between the conduct which may be required by the direction and the particular risk which justified the making of it in the first place. It follows that the essential question raised by the Bank's substantive objections to the direction is whether the interruption of commercial dealings with Bank Mellat in the United Kingdom's financial markets bore some rational and proportionate relationship to the statutory purpose of hindering the pursuit by Iran of its weapons programmes.

20 The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247, paras 57–59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167,

A para 19 (Lord Bingham of Cornhill) and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure B could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested C that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord D Reed JSC, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68–76) which I would disagree with.

21 None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. As Maurice Kay LJ E observed in the Court of Appeal, this case lies in the area of foreign policy and national security which would once have been regarded as unsuitable for judicial scrutiny. The measures have been opened up to judicial scrutiny by the express terms of the Act because they may engage the rights of designated persons or others under the European Convention on Human Rights. Even so, any assessment of the rationality and proportionality of a Schedule 7 direction must recognise that the nature of the issue requires the F Treasury to be allowed a large margin of judgment. It is difficult to think of a public interest as important as nuclear non-proliferation. The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach. In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international G implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive. For my part, I wholly endorse the view of Lord Reed JSC that "the making of government and legislative policy cannot be turned into a judicial process".

22 None the less there are, as it seems to me, two serious difficulties about the conclusion which both Mitting J and the Court of Appeal reached in the present case. The first is that it does not explain, let alone justify, the H singling out of Bank Mellat, if as both courts below agreed the problem is a general problem of international banking. The second is that the justification for the directive which they have found was not the one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it.

23 As I have pointed out, by reference to the various statements of Treasury ministers, the justification for the measure which was given to Parliament was that there was a particular problem about Bank Mellat which did not apply to the generality of Iranian banks. As the Exchequer Secretary pointed out on 17 December 2009, the direction was a targeted measure which did not apply to transactions with other banks. That must mean, and would certainly have conveyed to Parliament, either (i) that Bank Mellat was knowingly collaborating in transactions related to the Iranian programmes, or at least turning a blind eye to them, or else (ii) that Bank Mellat, even on the footing that it was acting in good faith had unacceptably low standards of customer due diligence, which made it especially liable to let through such transactions. The existence of special problems at Bank Mellat was also a substantial part of the justification put forward in the more detailed explanation given in Mr Robertson in his witness statement. Unfortunately, it was the part which the judge did not accept. The judge has found that Bank Mellat had a conscientiously applied policy of not providing banking facilities and banking services to entities identified in the United Nations list as being connected to the Iranian weapons programmes. He has found that it wound down and then terminated its relationship with Novin once it had been added to the list, and that an investigation into Doostan had thrown up nothing unusual or suspicious. When (after the hearing before Mitting J) Doostan was added to the list of entities connected with the Iranian weapons programmes by the United Nations Security Council, the relationship with them was terminated as it had been in Novin's case. The judge made no finding about the inadequacy of Bank Mellat's controls. Neither the Treasury ministers when justifying the measure to Parliament nor Mr Robertson when explaining it to the court suggested that they were particularly lax. Mr Robertson did say that in general Iranian standards of due diligence were low. This, he said, made them vulnerable to being used to channel illicit finance, and meant that UK financial institutions dealing with them could not assume that they would necessarily have procedures in place to screen out transactions of concern. Mr Robertson did not, however, suggest that Bank Mellat was especially deficient in this respect and the judge's finding about their procedures suggests that they were satisfactory, at any rate in relation to the weapons programmes. Against this background, the emphasis of the Treasury's argument underwent a radical shift after the order was challenged towards a justification based on the risk that Bank Mellat might be the "unwitting and unwilling" channel by which the entities directly involved in the Iranian weapons programmes financed their importation of materials, services and equipment.

24 Mitting J and the Court of Appeal accepted this argument. They considered that the justification for the directive was to be found not in any problem specific to Bank Mellat but in the general problem for the banking industry of preventing their facilities from being used for purposes connected with the Iranian weapons programmes. As the judge pointed out, concealment of the true nature of the imported goods paid for by letters of credit is straightforward. "However careful a bank may be," he said, "the bank's facilities are open to use by entities participating in Iran's nuclear weapons programme." For this reason, he thought that the direction represented the only "reasonably practicable means of ensuring reliably that

A the facilities of an Iranian bank with international reach will not be used for the purpose of facilitating the development of nuclear weapons by Iran." However, the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programmes, but only one of them. Indeed, by emphasising that it remained open to international traders to use other banks, the Exchequer Secretary apparently invited them to use instead channels of trade finance many, perhaps all of B which would be affected by precisely the same inherent problems as Bank Mellat.

25 A measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another C case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: D see in particular paras 31, 43–44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It E was nevertheless disproportionate, principally because it applied only to foreign nationals. That was relevant for two reasons. One was that the distinction was arbitrary, because the threat posed by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. F This was because if (as the committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, "the distinction . . . raises an issue of discrimination . . . But, as the distinction is irrational, it goes to the heart of the issue about proportionality also".

G **26** Every case turns on its own facts, and analogies with other decided cases can be misleading. The suppression of terrorism and the prevention of nuclear proliferation are comparable public interests, but the individual right to liberty engaged in *A v Secretary of State for the Home Department* can fairly be regarded as the most fundamental of all human rights other than the right to life and limb. The right to the peaceful enjoyment of business assets protected by article 1 of the First Protocol, is not in the same H category of human values. But the principle is not fundamentally different.

27 I would not go so far as to say that the Schedule 7 direction in this case had no rational connection with the objective of frustrating as far as possible Iran's weapons programmes. On the footing that a precautionary approach is justified, the elimination of any Iranian bank from the United

Kingdom's financial markets may well have added something to Iran's practical problem in financing transactions associated with those programmes, just as the incarceration of some potential terrorists under Part IV of the Anti-terrorism, Crime and Security Act 2001 may have made some difference to the reduction of terrorism. But I think that the distinction between Bank Mellat and other Iranian banks which was at the heart of the case put to Parliament by ministers was an arbitrary and irrational distinction and that the measure as a whole was disproportionate. This is because once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy. Moreover, the discriminatory character of the direction must drastically reduce its effectiveness as a means of impeding the Iranian weapons programmes. As the Exchequer Secretary herself pointed out, "as long as all financial sanctions and relevant risk warnings are complied with, alternative banks may be used". Nothing in the Treasury's case explains why we should accept that it is necessary to eliminate Bank Mellat's business in London in order to achieve the objective of the statute, if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions and relevant risk warnings. It may well be that other Iranian banks have not been found to number among their clients entities involved in Iran's nuclear and ballistic missile programmes. But it follows from the fact that this is a problem inherent in the conduct of international banking business that they are as likely to do so as Bank Mellat. The direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective. I conclude that that it was unlawful.

The Bank's procedural grounds

28 I also consider that the Bank is entitled to succeed on the ground that it received no notice of the Treasury's intention to make the direction, and therefore had no opportunity to make representations.

29 The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, the defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at p 190,

> "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

30 In *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the committee of the House of Lords, summarised the case law as follows:

> "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

A 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 B 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 C 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 D the gist of the case which he has to answer."

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. Some directives that might be made under Schedule 7 to the Act could not reasonably give rise to an obligation on the Treasury's part E to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the directive by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr Robertson that

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> "it would not have been appropriate to have notified Bank Mellat of the Treasury's intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions."

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The judge rejected this, pointing out that the Bank could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had "some force". This was the supposed practical difficulty of permitting representations in a situation H where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should

have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32 In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a m on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33 In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the 2008 Act, is enough to satisfy any duty of fairness, or at least must have been intended by

A Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

34 I shall deal first with the implications of the statutory right of recourse to the courts.

B **35** The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper v Wandsworth Board of Works* 14 CBNS 180, C 194, "the justice of the common law will supply the omission of the legislature." In *Lloyd v McMahon* [1987] AC 625, 702–703, Lord Bridge of Harwich regarded it as

> "well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will D readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Like Lord Bingham in *R (West) v Parole Board* [2005] 1 WLR 350, para 29, I find it hard to envisage cases in which the maximum expressio unius exclusio alterius could suffice to exclude so basic a right as that of fairness.

36 It does not of course follow that a duty of prior consultation will E arise in every case. The basic principle was stated by Lord Reid 40 years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of F hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation." Cf Lord Morris of Borth-y-Gest, at p 309B–C.

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37 Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to parliamentary approval, it is not in my view implicit in section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a H person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of

recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66–72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to parliamentary scrutiny, will remain in effect unless and until it is set aside by the court. An application under section 63 is likely to require evidence on both sides. With the best will in the world it is unlikely to be determined in less than three months and may take considerably longer even without allowing for appeals. In this case, some seven months elapsed before Mitting J gave judgment. This may not matter much in the case of a direction to exercise heightened customer due diligence or to monitor or report. But it matters a great deal when the direction is in the draconian terms permitted by paragraph 13. A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible. In some cases, where the decision impugned infringed the applicants' Convention rights, damages will be recoverable after the event. Claims for damages are, however, far from straightforward, and loss can be difficult to prove to the standard which the courts have traditionally required. Third, the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation. Schedule 7 directions made in circumstances like these are not the kind of directions whose effectiveness depends on the ability to strike without warning. As the judge pointed out, the kind of avoiding action which a designated person might be minded to take could equally be taken after the direction had been made.

38 I turn, therefore, to the implications of the fact that the direction is required to be made in subordinate legislation, subject to parliamentary approval.

39 The Treasury submit that the legislative form of a Schedule 7 direction takes it out of the area in which the courts can imply a duty of fairness or prior consultation. This is self-evident in the case of primary legislation. There is not yet a statute into which such a duty of consultation can be implied. Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin) at [49]; *R (UNISON) v Secretary of State for Health* [2010] EWHC 2655 (Admin).

40 The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In *R v Electricity Comrs Ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 208, Atkin LJ observed at a very early stage in the development of public law that he knew of

> "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament."

It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord Jauncey and affirmed by the Inner House in *Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the vires) of a statutory instrument, it was not open to the courts to review their rationality or their procedural fairness.

41 I do not think that this distinction is sustainable. In *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, the applicants objected to a statutory instrument under the Monopolies and Mergers Act 1965 regulating the prices of their medicines, which had been approved by Parliament under the affirmative resolution procedure. The relevant power was to make orders giving effect to a report of the Monopolies Commission, which the applicants alleged was vitiated by a failure to observe the rules of natural justice. The issue was about the availability of an injunction enforcing the order in circumstances where the Secretary of State was not prepared to give an undertaking in damages. Moreover, it is fair to say that the applicants' case was that the Commission's report was invalid for procedural reasons, and therefore that there was no report on which the Secretary of State could found any power to make the order. But Lord Diplock considered the status of the order generally, at p 365:

> "in constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order purported to be made, and this is so whether the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

42 In *R (Asif Javed) v Secretary of State for the Home Department (AIRE Centre intervening)* [2002] QB 129, the Court of Appeal held that it was entitled to review the rationality of a minister's exercise of a statutory

power to designate Pakistan by order as a country in which there was "in general no serious risk of persecution", notwithstanding that the order had been laid before Parliament in draft under the affirmative resolution procedure and the position in Pakistan to some extent discussed. Lord Phillips of Worth Matravers MR, echoing the language of Atkin LJ, said at para 51 that there was no "principle of law which circumscribes the extent to which the court can review an order that has been approved by both Houses of Parliament under the affirmative resolution procedure". The order was declared to be unlawful.

43 These statements seem to me to be correct in principle. If a statutory power to make delegated legislation is subject to limitations, the question whether those limitations have been observed goes to the lawfulness of the exercise of the power. It is therefore reviewable by the courts. In principle, this applies as much to an implied limitation as to an express one, and as much to a limitation on the manner in which the power may be exercised as it does to a limitation on the matters which are within the scope of the power. The reason why this does not intrude on the constitutional primacy of Parliament is not simply that delegated legislation, however approved, does not have the status of primary legislation. It is that a statutory instrument is the instrument of the minister (or other decision-maker) who is empowered by the enabling Act to make it. The fact that it requires the approval of Parliament does not alter that. The focus of the court is therefore on his decision to make it, and not on Parliament's decision to approve it. If that is true (as I think it is) as a matter of general principle, it is particularly true of the statutory judicial review for which section 63 of the Counter-Terrorism Act 2008 provides. Under section 63(5) the application is to set aside a "decision of the Treasury". The relevant decision of the Treasury is the decision under Schedule 7, paragraph 1 to "give a direction". If the court sets aside that decision, it is then required by section 63(5) to quash the resulting order.

44 Where the courts have declined to review the procedural fairness of statutory orders on the ground that they have been subject to parliamentary scrutiny, they have not generally done so on the ground that parliamentary scrutiny excludes the duty of fairness in general or the duty of prior consultation in particular. These decisions have generally been justified by reference to three closely related concepts which for my part I would not wish to challenge or undermine in any way. First, when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy. Second, there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. *Cooper v Wandsworth Board of Works* 14 CBNS 180 was a case of this kind, and when Willes J, at p 190, described the duty to give the subject an opportunity to be heard as

A a rule of "universal application", he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, B generally based on a promise or established practice. Third, a court may conclude in the case of some statutory powers that parliamentary review was enough to satisfy the requirement of fairness, or that in the circumstances Parliament must have intended that it should be. It is particularly likely to take this view where the measure impugned is a general legislative measure. The reason is that when we speak of a duty of fairness, we are speaking not of the substantive fairness of the measure itself but of C the fairness of the procedure by which it was adopted. Parliamentary scrutiny of general legislative measures made by ministers under statutory powers will often be enough to satisfy any requirement of procedural fairness. The same does not necessarily apply to targeted measures against individuals.

45 These considerations lie behind the judgments in the Court of Appeal D in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, which both Mitting J and Maurice Kay LJ in the Court of Appeal placed at the forefront of their reasoning. *BAPIO* was a judicial review of the decision of the Home Secretary to amend the Immigration Rules without prior consultation so as to abolish permit-free training for doctors without a right of abode in the United Kingdom. There were transitional provisions for those who had already begun their training E under the old rules, which protected almost all those who might have claimed to have a legitimate expectation based on the old rules. Sedley LJ, who delivered the leading judgment, began by referring to a dictum of Lord Scarman in *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240. This was a judicial review of the Secretary of State's assessment of the proper level of F expenditure by a local authority. It was a classic issue of general policy, involving decisions about the use of resources and the level of taxation, potentially affecting every householder in Britain, and quite obviously exceptionally difficult to challenge on rationality grounds. Lord Scarman said, at p 250, in a passage that is not always quoted in full:

> "To sum it up, the levels of public expenditure and the incidence and G distribution of taxation are matters for Parliament, and, within Parliament, especially for the House of Commons . . . if a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute . . . it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had H notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to

declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained . . ." A

Sedley LJ rightly pointed out in *BAPIO* that this reasoning was

"predicated on the inapt nature of the subject matter—public finance—for judicial scrutiny, not on a quasi-immunity from judicial review of delegated legislation or rules which have been laid before Parliament." B

He pointed out that there was no such immunity, and that the Immigration Rules would be reviewable for want of power to make them or for irrationality. Turning to the question whether they were reviewable for procedural unfairness he said this, at para 43:

"The real obstacle which I think stands in the appellants' way is the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration that are also part of the common law. These are not based on administrative convenience or potential embarrassment. They arise from the separation of powers and the entitlement of executive government to formulate and reformulate policy, albeit subject to such constraints as the law places on the process and the product. One set of such constraints in modern public law are the doctrines of legitimate expectation, both procedural and substantive." C D

I agree with this in the cases to which Sedley LJ was referring, namely those in which delegated legislation was an expression of legislative policy. I think that it represents a more nuanced and accurate statement of the law than the more hard-edged formulations of Maurice Kay and Rimer LJJ in the same case. E

46 The present case, however, is entirely different. In point of form, a statutory instrument embodying a Schedule 7 direction is legislation. But, as Megarry J observed in *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373, 1378 the fact that an order takes the form of a statutory instrument is not decisive: "what is important is not its form but its nature, which is plainly legislative". The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his *Treatise of Human Nature* (Book III, Part ii, sec 2–6), F G

"all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations, and connexions of the person concerned."

The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction, although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out H

Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its "characteristics, situations and connexions". It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take.

47 With a measure such as this one, targeted against "designated persons", it is not possible to say that procedural fairness is sufficiently guaranteed by parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act 2008 ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.

48 In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament. But this was hardly a realistic alternative to prior consultation in the present case. In the first place, the Bank was not in a position to defend itself against the Treasury's allegation that they had had dealings with entities involved in the Iranian weapons programmes until the Treasury identified the entities that they were referring to. They did not identify them in the course of justifying the order in Parliament. They were first identified in correspondence with the Bank's solicitors on 3 December 2009, after the present proceedings had been begun and a month after the parliamentary processes were complete. Second, unlike other statutory instruments made under the Counter-Terrorism Act, an order giving effect to a Schedule 7 direction is not laid before Parliament in draft before taking effect. It may and in this case did take effect on being made and was capable of continuing in effect for up to 28 days in advance of an affirmative resolution. This is quite long enough to achieve substantial damage to the interests of the designated person. Third, Schedule 7, paragraph 14(5), expressly excludes the application of the hybrid instrument procedure to such an order. The hybrid instrument procedure is a procedure under the standing orders of the House of Lords which applies to certain instruments directly affecting private or local interests in a manner different from other persons or interests in the same category. Its effect is to allow the House to receive petitions from parties affected. The result is to exclude any right which a designated person might otherwise have had to make representations by petition as part of the formal parliamentary process. In my view, these factors underline the value and the importance in the interests of fairness of the Treasury giving the Bank an opportunity to be heard before the order was made.

49 I conclude that the Treasury's direction designating Bank Mellat was unlawful for want of prior notice to them or any procedure enabling them to be heard in advance of the order being made. This makes it unnecessary to consider the more difficult question whether a duty of prior consultation arose by virtue of article 6 of the European Convention on Human Rights or article 1 of the First Protocol.

Conclusion

50 I would allow the appeal, set aside the decision of the Treasury to make the direction and quash the order giving effect to it.

LORD REED JSC (dissenting)

Introduction

51 These proceedings are brought by Bank Mellat under section 63(2) of the Counter-Terrorism Act 2008 ("the 2008 Act"). In terms of section 63(1)(c), the section applies to any decision of the Treasury in connection with the exercise of any of their functions under Schedule 7 to the 2008 Act. Section 63(3) provides that in determining whether the decision should be set aside the court is to apply the principles applicable on an application for judicial review. In terms of section 63(5), if the court sets aside the decision of the Treasury to make an order under Schedule 7, it must quash the order.

52 Bank Mellat seeks to have a decision of the Treasury to make an order under Schedule 7 set aside, and the order quashed. Bank Mellat relies on a number of common law grounds of judicial review, including procedural unfairness and unreasonableness, and maintains that the order is also ultra vires since it fails to comply with paragraph 9(6) of Schedule 7, which stipulates that the requirements imposed by a direction under that schedule must be proportionate. Bank Mellat further contends that the making of the order was in any event unlawful by virtue of section 6 of the Human Rights Act 1998. The latter contention is based on the argument that there has been a breach of the procedural standards imposed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 1 of the First Protocol to the Convention ("A1P1"), and in addition that the order constitutes a disproportionate interference with Bank Mellat's enjoyment of its possessions, contrary to A1P1.

Procedural fairness

53 In relation to the issues of procedural fairness arising under the common law, there is much in Lord Sumption JSC's judgment with which I respectfully agree. In particular, I agree that the fact that the decision challenged in these proceedings concerned the giving of a direction in the form of a statutory instrument, which had to be approved by Parliament within 28 days in order to remain in force, does not in itself necessarily exclude the application of common law standards of procedural fairness. I also agree that there is no fundamental distinction in principle between the jurisdiction of the court to review the legality of a statutory instrument on procedural and other grounds: see in particular *F Hoffmann-La Roche & Co*

A *AG v Secretary of State for Trade and Industry* [1975] AC 295, 365, per Lord Diplock.

54 I also agree with Lord Sumption JSC that the reason why a statutory instrument lies within the scope of the courts' supervisory jurisdiction, whereas an Act of Parliament does not, is that the making of a statutory instrument is an act of the executive, exercising limited powers. This point was explained by Donaldson MR in *R v Her Majesty's Treasury, Ex p Smedley* [1985] QB 657, 666–667:

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> "Furthermore, whilst Parliament is entirely independent of the courts in its freedom to enact whatever legislation it sees fit, legislation by Order in Council, statutory instrument or other subordinate means is in a quite different category, not being parliamentary legislation. This subordinate legislation is subject to some degree of judicial control in the sense that it is within the province and authority of the courts to hold that particular examples are not authorised by statute, or, as the case may be by the common law, and so are without legal force or effect."

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A similar explanation was given by Lord Phillips of Worth Matravers MR in *R (Asif Javed) v Secretary of State for the Home Department (AIRE Centre intervening)* [2002] QB 129, para 33. Since the executive is acting under powers conferred by Parliament when it makes a statutory instrument, it can only act within the scope of those powers as determined by the courts. The subject matter of the court's supervision is the lawfulness of the decision taken by the executive: there is no question of judicial supervision of the exercise by Parliament of its power to approve the instrument or to withhold its approval. That distinction is reflected in section 63 of the 2008 Act, which, as I have mentioned, permits an application to be made to set aside the decision of the Treasury. If the court sets aside that decision, it then quashes the resulting order, but it does not review anything done by Parliament.

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55 Where I part company with Lord Sumption JSC and the majority of the court is in relation to the application of the common law principles of procedural fairness in the context of Schedule 7 to the 2008 Act. In relation to that matter, I agree with the judgment of Lord Hope of Craighead DPSC, and wish to make only a few additional observations in view of the implications of the contrary approach. I also agree with Lord Hope DPSC's judgment in relation to the issues of procedural fairness arising under the Human Rights Act.

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56 Lord Hope DPSC has described the provisions of Part 4 of Schedule 7 to the 2008 Act. Parliament has laid down in those provisions a detailed scheme for the making of orders such as the order with which this appeal is concerned. That scheme contains no provision entitling the person designated in the order to be given a hearing before the order is made by the Treasury or approved by Parliament. The absence of such provision does not in itself automatically entail that Parliament intended that there should be no such entitlement, but in the context of such detailed procedural provisions it is a pointer towards such an intention: if Parliament had intended that there should be consultation prior to the making of an order, one would expect that also to have been specified in the provisions. The inference that Parliament did not intend that there should be such an entitlement derives support from a number of other considerations.

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57 First, it is readily understandable that no such entitlement should be provided, given the subject matter and the context in which the decision-making function is exercised. Part 1 of Schedule 7 lays down in paragraph 1 the conditions which must be met in relation to a country before the Treasury may give a direction under that schedule. Put shortly, they are that the Financial Action Task Force ("FATF": an inter-governmental body founded by the G7 countries which sets standards for controls to prevent money-laundering and the financing of terrorism) has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried on there or by its government or persons resident or incorporated there (paragraph 1(2)), or the Treasury reasonably believe that there is such a risk (paragraph 1(3)), or the Treasury reasonably believe that the development or production of nuclear, radiological, biological or chemical weapons in the country poses a significant risk to the national interests of the United Kingdom: paragraph 1(4). In the present case, it is paragraph 1(4) which is relevant. Given the nature of those conditions, prior consultation with the persons who may be affected by a direction, including for example the persons believed to be involved in terrorism, is liable to be inappropriate or impossible: it may, for example, be excluded by a need for action to be taken urgently in the national interest. That factor is reflected in the provision for the order to have effect in advance of parliamentary approval: paragraph 14(2)(b).

58 The scope for meaningful representations by the designated person is also liable to be limited by the impossibility of disclosing, other than in broad outline, the basis on which the conditions laid down in paragraphs 1(3) or (4) are considered to be satisfied. That factor is reflected in the provisions of sections 66 to 68 in respect of proceedings under section 63, which allow for closed material procedure. Parliament has made no provision for any analogous procedure before the order has been made or approved.

59 In some circumstances, prior consultation could in addition reduce the practical effectiveness of the requirements imposed under paragraph 13 of Schedule 7, by affording the designated person an opportunity to take avoidance action. This risk is discounted by Lord Sumption JSC, as it was by Mitting J, but I am less confident that it can be entirely disregarded. Part of Bank Mellat's complaint in the present case, for example, is that the effect of the order was to freeze accounts held by it with its UK subsidiary, in which assets of €183m were deposited. Court orders which have the effect of freezing assets are generally granted on an ex parte basis, precisely because they are liable to be ineffective if prior notice is given.

60 Lord Sumption JSC's response to these points is that whether there is a duty of consultation depends on the particular circumstances in which a direction is made. I can see, in principle, that since the requirements of fairness vary from case to case, the need for a particular procedural step can in principle be assessed on a case by case basis. The problem with applying that approach to a statutory scheme however is that it can make it difficult in practice for decision-makers (and individuals affected by decisions) to predict what is required by way of procedure in particular cases. In a context in which vital national interests are engaged, such as that in which the powers under Schedule 7 have to be exercised, it is of great importance

A that the Treasury should be in no doubt as to what is required. Lord Sumption JSC addresses that point by distinguishing between targeted and other measures. That distinction draws attention to a factor of undoubted importance, but it is not the only factor relevant to an assessment of what fairness requires: as Lord Sumption JSC acknowledges, other matters, such as the risk of disclosing intelligence material or jeopardising the effectiveness of the measure, are also relevant. I do not consider that Parliament is likely B to have intended that the Treasury should have to undertake such an uncertain assessment of what fairness might require in each individual case before they could act, particularly when it would do so at the risk of judicial review (prior to the making of the order) if their conclusion, for example as to the extent of necessary disclosure, were to be challenged. In practice, that approach would leave the Treasury in an impossible position. As Taylor LJ C observed in *R v Birmingham City Council, Ex p Ferrero Ltd* [1993] 1 All ER 530, 542, when rejecting a similar argument in relation to consumer protection legislation, if the supposed duty to consult were to depend on the facts and urgency of each case, enforcement authorities would be faced with a serious dilemma.

61 The direction in paragraph 14(5) that the order is not to proceed in D Parliament as a hybrid instrument seems to me, in agreement with Lord Hope DPSC, to be a further indication of Parliament's intention, since, as Lord Hope DPSC has explained, the practical effect of that direction is to exclude the potential application of procedures under which the designated person can participate in the parliamentary proceedings. I appreciate that the parliamentary procedure is distinct from the antecedent procedure under which the order is made. It nevertheless appears to me to have some bearing E on the point in issue, in that, if it was intended that the designated person should be entitled to participate in the procedure leading to the making of the order, it would make little sense to enact a provision specifically preventing him from participating in the procedure leading to its approval by Parliament.

62 Finally, the provisions of sections 63 and 65–68 create a statutory F procedure under which any person affected by a decision taken by the Treasury under Schedule 7 is entitled as of right to apply to the courts to have that decision set aside. Those provisions give such persons greater rights than those enjoyed by the ordinary applicant for judicial review (except in Scotland), in so far as the ordinary applicant has to apply for permission to make such an application. The provisions indicate that G Parliament intended to ensure judicial protection of the interests of such persons after the decision had been made.

63 In these circumstances, it appears to me that Parliament has by implication excluded any duty to consult the designated person or to allow an opportunity for representations to be submitted before the order is made. There is therefore no room for the application of common law requirements of procedural fairness. No doubt, as Lord Sumption JSC points out, a H procedure involving consultation could contribute to good administration by making additional information available to the Treasury. It is however apparent that Parliament has given priority to other competing considerations. It is not the function of the courts to re-write the scheme intended by Parliament.

The substantive grounds of challenge

64 I also have the misfortune to differ from the majority of the court in relation to the substantive grounds on which the decision is challenged. I set out the reasons for my dissent more fully than I might otherwise have done in view of the importance of the issues, and the fact that my conclusion on this aspect of the case was also reached by all the judges of the lower courts.

The relevant legal principles

65 I am largely in agreement with Lord Sumption JSC as to the relevant legal principles: other than in relation to the ratio of *A v Secretary of State for the Home Department* [2005] 2 AC 68, and the issue discussed in paras 123–124, we differ only in relation to the application of the law to the facts. I wish first however to consider two issues which appear to me to be important and which affect the structure of the analysis to be carried out.

66 The first issue, which caused difficulty in the courts below and remains in dispute before this court, is what the principle of proportionality involves: in particular, whether it is aptly expressed in the well known dictum of Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69, 80. It is evident from the difficulties experienced by the lower courts in the present case, and from the differing approaches which they adopted, that some clarification is desirable.

67 The second issue concerns the meaning of paragraph 9(6) of Schedule 7 to the 2008 Act. This issue also caused difficulty in the courts below and was in dispute before this court. The provision stipulates that the requirements imposed by a direction under Schedule 7 must be proportionate having regard to the advice received from the FATF under paragraph 1(2) of Schedule 7 or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national interests of the United Kingdom. The question is whether the requirement imposed by paragraph 9(6) is the same as the principle of proportionality as understood in the context of Convention rights. The latter principle is of course relevant to the question whether the decision of the Treasury was incompatible with A1P1 and therefore unlawful by virtue of section 6(1) of the Human Rights Act 1998.

The concept of proportionality

68 The idea that proportionality is an aspect of justice can be traced back via Aquinas to the *Nicomachean Ethics* and beyond. The development of the concept in modern times as a standard in public law derives from the Enlightenment, when the relationship between citizens and their rulers came to be considered in a new way, reflected in the concepts of the social contract and of natural rights. As Blackstone wrote in his *Commentaries on the Laws of England,* 9th ed (1783), vol 1, p 125, the concept of civil liberty comprises "natural liberty so far restrained by human laws (and not farther) as is necessary and expedient for the general advantage of the public". The idea that the state should limit natural rights only to the minimum extent necessary developed in Germany into a public law standard known as *Verhältnismäßigkeit,* or proportionality. From its origins in German administrative law, where it forms the basis of a rigorously structured analysis of the validity of legislative and administrative acts, the concept of

proportionality came to be adopted in the case law of the European Court of Justice and the European Court of Human Rights. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada it spread to a number of other common law jurisdictions.

69 Proportionality has become one of the general principles of EU law, and appears in article 5(4) of the EU Treaty. The test is expressed in more compressed and general terms than in German or Canadian law, and the relevant jurisprudence is not always clear, at least to a reader from a common law tradition. In *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023, the European Court of Justice stated, at para 13:

> "The court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The intensity with which the test is applied—that is to say, the degree of weight or respect given to the assessment of the primary decision-maker—depends on the context.

70 As I have mentioned, proportionality is also a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: see eg *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35, para 69. The court has described its approach to striking such a balance in different ways in different contexts, and in practice often approaches the matter in a relatively broad-brush way. In cases concerned with A1P1, for example, the court has often asked whether the person concerned had to bear an individual and excessive burden: see eg *James v United Kingdom* (1986) 8 EHRR 123, para 50. The intensity of review varies considerably according to the right in issue and the context in which the question arises. Unsurprisingly, given that it is an international court, its approach to proportionality does not correspond precisely to the various approaches adopted in contracting states.

71 An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon. The principle does not however entitle the courts simply to substitute their own assessment for that of the decision-maker. As I have noted, the intensity of review under EU law and the Convention varies according to the nature of the right at stake and the context in which the interference occurs. Those are not however the only relevant factors. One important factor in relation to the Convention is that the Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly

linked to the concept of the margin of appreciation. That concept does not apply in the same way at the national level, where the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend on the context, and will in part reflect national traditions and institutional culture. For these reasons, the approach adopted to proportionality at the national level cannot simply mirror that of the Strasbourg court.

72 The approach to proportionality adopted in our domestic case law under the Human Rights Act 1998 has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

de Freitas was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8–11 that an interference with the protected right should be necessary in a democratic society (e g *Jersild v Denmark* (1994) 19 EHRR 1, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected.

73 The *de Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson JSC, with whom Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, para 45.

74 The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be

summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *de Freitas,* and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75 In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781–782 that the limitation of the protected right must be one that "it was reasonable for the legislature to impose", and that the courts were "not called on to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173, 188–189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.

76 In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

Paragraph 9(6) of Schedule 7

77 A direction under Schedule 7 may only be given to a credit or financial institution that is a United Kingdom person or is acting in the course of a business carried on by it in the United Kingdom: paragraphs 3 and 4. The effect of the direction is to impose requirements on such an institution or institutions. Under paragraph 9(1), the requirements may apply in relation to transactions or business relationships with

> "(a) a person carrying on business in the country [in respect of which the conditions mentioned in paragraph 1 are satisfied]; (b) the

government of the country; (c) a person resident or incorporated in the country." A

Under paragraph 9(2), the requirements may be imposed in relation to

"(a) a particular person within sub-paragraph (1) [known as a 'designated person': paragraph 9(3)], (b) any description of persons within that sub-paragraph, or (c) all persons within that sub-paragraph." B

Under paragraph 9(4), different types of requirement may be imposed on the institution or institutions: enhanced customer due diligence in relation to transactions or business relationships with a designated person, ongoing monitoring of such relationships, systematic reporting in respect of such transactions or relationships, or limiting or ceasing such transactions or relationships. Under paragraph 9(5), a direction may make different C provision in relation to different descriptions of designated person and in relation to different descriptions of transaction or relationship. It is in that context that paragraph 9(6) provides:

"The requirements imposed by a direction must be proportionate having regard to the advice mentioned in paragraph 1(2) or, as the case may be, the risk mentioned in paragraph 1(3) or (4) to the national D interests of the United Kingdom."

78 In the present case, Mitting J proceeded on the basis that the word "proportionate" was used in paragraph 9(6) "in the sense in which it is used in Strasbourg and Luxembourg". He formed that view on the basis that proportionality had been introduced into English law mainly via Luxembourg and Strasbourg, and the 2008 Act would have been intended to E be compliant with Convention rights. The Court of Appeal proceeded on the same basis. Lord Sumption JSC proceeds, as I understand his judgment, on the basis that paragraph 9(6) requires there to be a relationship between the requirements imposed by the direction and the risk which justifies the making of the direction which is "rational and proportionate", the latter term importing the test of proportionality set out in *de Freitas,* as subsequently developed in *Huang*. I agree with that interpretation, but think F it worth spending a moment to explain why.

79 Paragraph 9(6) does not appear to me to be concerned with either EU law or the Convention. There is no necessity for Parliament to have replicated the requirements of EU law in so far as they might be relevant, bearing in mind that the power to give a direction is not exercisable in relation to an EEA state: paragraph 1(5). To the extent that the G requirements of a direction might interfere with the exercise of a freedom protected by EU law, the EU rights of the person affected would in any event be directly effective. Nor is there any reason for Parliament to have singled out and replicated the proportionality element of the test of compatibility with Convention rights. That element would in any event apply along with the other elements of the test, in the event that a direction interfered with H Convention rights, by virtue of the Human Rights Act 1998.

80 As Lord Sumption JSC has explained, paragraph 9(6) appears from its terms to be concerned with the relationship between the requirements imposed by a direction, on the one hand, and the risk to the national interests of the United Kingdom, on the other hand. The issue is whether the

requirements are proportionate to the risk. That is consistent with the context in which the provision appears: the remainder of paragraph 9 sets out the various types of requirement which can be imposed on the person to whom a direction is given, some more onerous than others. The focus of paragraph 9(6) is therefore not on the relationship between the requirements and their effect on the designated person's Convention rights. So, in the present case, the central question arising under paragraph 9(6) is whether the requirements imposed on the United Kingdom financial sector are proportionate having regard to the risk posed to the United Kingdom's national interests by nuclear proliferation in Iran.

81 If there were otherwise any doubt about the problem which paragraph 9(6) was intended to address, the parliamentary history appears to me to resolve it. When the provisions in Schedule 7 were introduced, at Report Stage in the House of Lords, there was no provision in the form of paragraph 9(6). Concern was expressed about the financial cost of compliance with requirements which would be incurred by United Kingdom businesses to which directions were given: Hansard (HL Debates), 11 November 2008, col 585. The Financial Secretary to the Treasury responded to that concern at the end of the debate by stating that Ministers would seek to balance the need to take effective action against the potential impact on United Kingdom business, and gave an undertaking that the Government would table an amendment at Third Reading to include a provision giving effect to that approach: col 593. Paragraph 9(6) was subsequently tabled in accordance with that undertaking: Hansard (HL Debates), 17 November 2008, col 933. The potential problem that paragraph 9(6) was intended to guard against therefore had nothing to do with European law.

82 In stipulating that the requirements must be proportionate having regard to the risk, paragraph 9(6) reflects a principle which has roots in the common law: there are a number of cases where administrative acts of an oppressive or penal character have been quashed as being disproportionate, a well known example being *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. In the context of legislation enacted in 2008, however, it seems to me that Parliament can be taken to have been aware of the development of a more structured approach to proportionality by United Kingdom courts, in particular following *de Freitas,* and to have intended that that approach should be applied. I would therefore interpret paragraph 9(6) as stipulating that the requirements must be proportionate to the risk in the sense that they meet the second, third and fourth criteria listed in para 74 (it being implicit in the legislation itself that the first criterion is met).

Applying the proportionality test

83 There is no doubt that the objective of the order—to reduce access by entities involved in Iran's nuclear weapons programme to the UK financial sector, and thereby inhibit the development of nuclear weapons by Iran and the consequent risk to the national interests of this country—is sufficiently important to justify an interference with Bank Mellat's enjoyment of its possessions. The question under paragraph 9(6) of Schedule 7, and under the Human Rights Act 1998, is whether the remaining three criteria of proportionality are satisfied. Lord Sumption JSC identifies the central issue

as being whether the singling out of Bank Mellat has been justified, and considers that issue in the context of the second and, more briefly, the third and fourth criteria: whether the measure is rationally connected to its objective, whether a less intrusive measure would have been equally effective, and whether the measure is proportionate having regard to its effects on Bank Mellat's rights. I shall proceed on the same basis. Before considering these issues, it may however be helpful to recall some aspects of the relevant background.

The background

84 On 23 December 2006 the UN Security Council adopted Resolution 1737, which imposed a range of sanctions targeted at Iran's nuclear and ballistic missile programmes. These included, in paragraph 12, a requirement that all states should freeze the funds owned or controlled by designated persons and entities and of other persons and entities subsequently designated as being involved in Iran's nuclear or ballistic missile activities, and ensure that funds and financial assets were prevented from being made available by persons or entities within their territories to or for the benefit of those persons or entities. The UK gave effect to the resolution by the Iran (Financial Sanctions) Order 2007 and directions made under that order.

85 On 24 March 2007 the Security Council adopted Resolution 1747, which designated Novin Energy Company ("Novin"), Bank Sepah and its subsidiary Bank Sepah International plc as such entities. The resolution stated in particular that Novin operated within the Atomic Energy Organisation of Iran ("AEOI") and had transferred funds on its behalf to entities associated with Iran's nuclear programme. Bank Sepah and Bank Sepah International were said to provide support for Iran's Aerospace Industries Organisation ("AIO") and its subordinates, two of which had been designated under Resolution 1737.

86 On 19 April 2007 the EC Council adopted Regulation 423/2007/EC (OJ 2007 L103, p 1) concerning restrictive measures against Iran. Article 7(1) required all funds and economic resources held or controlled by persons designated under Resolution 1737 to be frozen. Those persons were listed in Annex IV. Article 7(2) imposed a similar requirement in respect of persons listed in Annex V to the Regulation. The Regulation was amended the following day, by Regulation 441/2007/EC (OJ 2007 L104, p 28) to add a number of entities, including Novin, Bank Sepah and Bank Sepah International, to those listed in Annex IV.

87 On 25 October 2007 the assets of Bank Mellat and its subsidiaries in the United States were frozen, and US persons were prohibited from engaging in transactions with them, as the result of a designation by the US Treasury Department's Office of Foreign Assets Control. The designation was made on the basis that Bank Mellat provided banking services in support of Iran's nuclear programme.

88 On 3 March 2008 the Security Council adopted Resolution 1803, paragraph 10 of which called on all states to exercise vigilance over the activities of financial institutions in their territories with banks domiciled in Iran, and in particular with Bank Melli and Bank Saderat and their subsidiaries.

A **89** On 23 June 2008 the EC Council adopted Decision 2008/475/EC (OJ 2008 L163, p 29), which added a number of persons to those listed in Annex V of Regulation 423/2007. They included Bank Melli and its subsidiaries, including Melli Bank plc. The reason given was that these entities had been providing or attempting to provide financial support for companies which were involved in, or procured goods for, Iran's nuclear and missile programmes, including Novin. In particular, Bank Melli was said to B have provided a range of financial services to such companies, including opening letters of credit and maintaining accounts.

90 On 10 November 2008 the EC Council adopted Regulation 1110/2008/EC (OJ 2008 L300, p 1), which imposed obligations, including requirements of vigilance and reporting requirements, on financial institutions in the EC in relation to their activities with financial institutions C domiciled in Iran, and in particular with Bank Saderat. Similar obligations, backed by criminal penalties, were also imposed on Bank Saderat branches and subsidiaries in the EC.

91 The provisions of the 2008 Act concerned with financial restrictions, including Schedule 7, were introduced during the passage of the Bill following a statement issued by the FATF on 16 October 2008, which called on its members, and urged all jurisdictions, to strengthen preventive D measures to protect their financial sectors from risks posed by Iran, as a result of its failure to introduce measures to address the risk of terrorist financing. As I have explained, Regulation 1110/2008/EC was adopted at about the same time.

Rational connection

E **92** In *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, 291 Wilson J observed:

> "The *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt."

F The words "furthered by" point towards a causal test: a measure is rationally connected to its objective if its implementation can reasonably be expected to contribute towards the achievement of that objective. The manner in which the courts should determine whether that test is satisfied requires careful consideration.

93 Legislation may be based on an evaluation of complex facts, or G considerations (for example, of economic or social policy, or national security) which are contestable and may be controversial. In such situations, the court has to allow room for the exercise of judgment by the executive and legislative branches of government, which bear democratic responsibility for these decisions. The making of government and legislative policy cannot be turned into a judicial process. In the Canadian case *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199, for H example, concerned with a legislative ban on tobacco advertising, expert evidence was led at a lengthy trial, following which the trial judge concluded that there was no reliable evidence to support the policy of banning advertising, and that there was therefore no rational connection between the ban and its objective. That conclusion was however overturned by the

Supreme Court. McLachlin J, giving the judgment of the majority, stated (at para 153) that in order to establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic". She added (at para 154) that, where legislation was directed at changing human behaviour, the court had been prepared to find a causal connection on the basis of reason or logic, without insisting on proof of a relationship between the infringing measure and the legislative objective. La Forest J, giving the other principal judgment, considered that a common sense connection was sufficient to satisfy the requirement that there be a rational connection: para 86.

94 These observations found an echo, in a not dissimilar context, in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394, concerned with a ban on the sale of tobacco from vending machines. It was argued, in the context of the proportionality of the restriction on the free movement of goods under EU law, that the ban was not suitable to achieve the objective of reducing tobacco consumption, since tobacco products could still be bought over the counter. All the members of the Court of Appeal emphasised the responsibility of elected government for the protection of public health, and the consequent need to allow a broad margin of appreciation to the decision-maker. Lord Neuberger of Abbotsbury MR observed that, in considering whether the aim of the ban was achieved, "at least arguably and at least to some extent", the court should be careful to avoid substituting itself for the decision-maker or being over-particular about the reasoning or evidence relied on by the decision-maker: paras 232–233. He commented that the evidence and analysis in the explanatory memorandum and impact assessment which had been laid before Parliament with the draft Regulations were neither very convincing nor very telling, not least because of the absence of any evidence to suggest that the ban would have any effect: para 236. Nevertheless, at para 239, the Secretary of State's assessment or belief that the ban would lead to some reduction in smoking did not seem unreasonable:

> "The unsatisfactory basis for the figures and analysis in the [impact assessment] does not, in the absence of any other factor, justify concluding that the ban is disproportionate, given the wide margin of appreciation to be accorded. If one takes away one source of cigarettes, particularly one that involves no control over the identity of the purchaser, it is scarcely unreasonable to conclude that it will reduce consumption of cigarettes to some extent, although . . . that conclusion is not one which necessarily follows ineluctably."

Like La Forest and McLachlin JJ in the *RJR-MacDonald* case, Lord Neuberger MR treated "common sense" and "logic" (paras 238, 242 and 244) as a sufficient basis for finding that the ban was rational. In the parallel litigation in the Court of Session, the court also referred to common sense as a basis for concluding that the legislation was apt to achieve its objective: *Sinclair Collis v Lord Advocate* 2013 SLT 100, para 62.

95 A more problematical case is that of *A v Secretary of State for the Home Department* [2005] 2 AC 68: a case which is particularly relevant to the decision of the majority in the present case, as appears from Lord Sumption JSC's judgment. The issue was whether a derogation from article 5.1 of the Convention, so as to permit legislation providing for the

A indefinite detention without trial of foreign terrorist suspects, was "strictly required" by the public emergency represented by the threat of terrorist attacks in the United Kingdom. A majority of the House of Lords found that the derogation was not strictly required, since the legislation was disproportionate and was in addition discriminatory, contrary to article 14 of the Convention. The latter finding need not be considered in the present context, but the finding in relation to proportionality is of importance.

B **96** Lord Bingham of Cornhill identified the central problem, at para 43, as being:

> "that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom."

C

Lord Bingham did not explicitly apply the three *de Freitas* criteria or the fuller *Oakes* analysis (to which he referred at para 30), but in the passage cited appears to balance the severity of the effects on the rights of the persons

D detained against the importance of the objective: that is to say, step four in the analysis. Lord Hope of Craighead focused on the question whether there was some other way of dealing with the emergency which would not be incompatible with the Convention rights (para 124): in other words, a test of necessity. Lord Scott of Foscote also considered that the legislation failed to meet the necessity test, since it had not been shown that monitoring

E arrangements or movement restrictions would not suffice: para 155. That was also the approach adopted by Lord Rodger of Earlsferry, who stated that, proceeding on the same basis as the Government and Parliament, that detention of the British suspects was not strictly required to meet the threat that they posed to the life of the nation, the detention of the foreign suspects could not be strictly required either to meet the comparable threat that they

F posed: para 189. Baroness Hale of Richmond also focused on the question of necessity, observing that if it was not necessary to lock up the nationals it could not be necessary to lock up the foreigners: para 231. Lord Carswell agreed with Lord Bingham.

97 I have spent some time considering the basis of the decision in *A v Secretary of State for the Home Department* in order to clarify what the case did not decide. First, it did not decide that the legislation lacked a rational

G connection to its objective because it would be only partially effective. As in *Sinclair Collis,* the legislation would have made a contribution to the achievement of its objective. Secondly, the case did not decide that the legislation lacked a rational connection to its objective because it was discriminatory. The difference in treatment of British and foreign suspects was relevant to proportionality because it bore on the question whether the

H interference with the rights of the foreign suspects had been shown to be necessary.

98 In the present case, it is apparent that any judicial assessment of the rationality of a direction under Schedule 7 must recognise the need to allow the Treasury a wide margin of appreciation, for the reasons explained by Lord Sumption JSC at para 21.

99 Lord Sumption JSC identifies two flaws in the reasoning which led the courts below to conclude that the requirements imposed by the direction were rational and proportionate: first, their conclusion did not explain, let alone justify, the singling out of Bank Mellat; and secondly, the justification which they found was not the one which Ministers advanced before Parliament, and was in some respects inconsistent with it.

The justification for making the order

100 Subject to one qualification, Mitting J accepted the Treasury's explanation of why the order had been made, as set out in paras 73–75 of a witness statement made by Mr James Robertson, who had been since December 2008 the head of the Financial Crime Team in the International Finance Directorate of the Treasury.

101 In his statement, Mr Robertson explained that, in exercising their functions under Schedule 7 of the 2008 Act, the Treasury worked in close collaboration with a number of government departments and agencies, including in particular those concerned with intelligence. He explained the serious risk to UK national interests which would result from Iran's development of nuclear weapons: the consequent destabilising effect on a region where the UK has personnel and installations, the potential disruption of global oil and gas supplies, the economic consequences of such disruption, the possibility of an attack on Iran, and the potential implications of such an attack.

102 Mr Robertson also explained that it was considered that Iran's banking system provided many of the financial services which underpinned its nuclear and ballistic missile programmes. Iran's banking system lacked the controls which existed in most other countries to prevent money-laundering and the financing of terrorism, and which would also serve to identify transactions related to Iran's nuclear and ballistic missile programmes. As a consequence, Iranian financial institutions were vulnerable to being used to channel illicit finance. This had been highlighted in several reports by the FATF. As a result, UK financial institutions dealing with Iranian entities could not rely on such checks having taken place in Iran. This problem was reflected in the targeting of Iranian banks in the Security Council resolutions and in the EU legislation.

103 In relation to the decision to make the order in question, Mr Robertson explained that, following the coming into force of the 2008 Act, the Treasury commissioned work on the role of Iranian banks in financing Iran's nuclear and ballistic missile programmes. That work highlighted concerns about the role of Bank Mellat, and identified three particular areas of concern. First, it had provided banking services to Novin, and had maintained accounts for the AEOI, mainly through Novin, since 2003. It had managed accounts and facilitated money transfers for Novin after Novin had been designated under Resolution 1747. Secondly, senior officials of the AIO, the parent of entities which were involved in Iran's ballistic missile sector and designated under Security Council Resolution 1737, had used Bank Mellat's services during 2007 and 2008 to conduct business connected with Iran's ballistic missile programme. Thirdly, between 2007 and 2009 Bank Mellat had provided banking services for Doostan International ("Doostan"), a company linked to the ballistic missile programme.

A **104** Mr Robertson summarised the case for making the order as follows (para 73):

> "The Treasury was satisfied that Bank Mellat has provided financial services to companies engaged in Iran's nuclear and ballistic missile programmes. A direction to cease business with Bank Mellat would restrict the financial services available to entities involved in Iran's
B nuclear and ballistic missile programmes by denying them access to the UK financial sector through Bank Mellat. This would have the maximum possible adverse impact on the nuclear and ballistic missile programmes of the measures available under Schedule 7 in relation to Bank Mellat. If Bank Mellat wished to continue its activities in support of those programmes it would need to seek other sources of financial services, assuming such alternatives were actually available to it. There was also
C the possibility that as a bank subject to restrictions in the United Kingdom, Bank Mellat would not be in a position to access the global financial system as effectively in order to seek substitute arrangements for those no longer available to it in the UK. At the very least, this would impede the Iranian nuclear and ballistic missile programmes by imposing additional costs and delays on the programmes."

D **105** Mr Robertson explained at para 74 that it had been recognised that entities connected with the nuclear and missile programmes which wished to route transactions through the UK could do so by using another Iranian bank. A potential effect of the order was however that the UK financial sector would decide to wind down business with Iran more generally, which would reduce the risk of business being routed through another Iranian
E bank. Even if that did not occur, the order would make transactions involving the UK more difficult. Iranian banks generally experienced difficulties in dealing with UK banks as a result of the international sanctions. A small number of Iranian banks had access to the UK via their British subsidiaries. The action taken against Bank Mellat, which had a British subsidiary, narrowed access to the UK financial sector and further restricted the options available to Iranian banks.

F **106** Finally, Mr Robertson said at para 75 that the order would also increase pressure on the Iranian Government to comply with its international obligations. Applying such a restriction to one of Iran's largest banks would reduce the financial services available to the Iranian Government. In relation to that aspect, Mr Robertson stated that the Iranian Government still controlled a significant amount of the shares in
G Bank Mellat, following its privatisation in February 2009: 20% of the shares were officially owned by the Government, another 20% were held by Government social security organisations for the benefit of their employees, and a further 40% were allocated to low-income shareholders whose voting rights were exercised by the Government.

107 Mitting J accepted the Treasury's reasons for making the order as
H stated at paras 73–75 of Mr Robertson's statement. The only qualification was that, in relation to para 75, Mitting J accepted evidence that the Iranian Government only exercised voting rights over its 20% shareholding in Bank Mellat. That qualification was not considered to be of any materiality.

108 Lord Sumption JSC states that Mitting J did not accept the part of Mr Robertson's statement which described the problems relating to Bank

Mellat, which I have summarised at para 103. It appears to me however that what was said in that connection by Mr Robertson was substantially accepted, other than the allegation relating to senior officials of AIO, which Bank Mellat said it was unable to investigate without additional information. Mitting J stated that it was common ground that Bank Mellat had provided trade finance or banking facilities for an importer of materials used in the production of nuclear weapons, namely Novin. He accepted that Novin was an AEOI financial conduit and had facilitated Iran's nuclear programme. He also accepted that Bank Mellat had provided banking facilities to Doostan and its managing director, Mr Shabani, who had each played a part in Iran's nuclear weapons programme.

109 It is true that Mitting J accepted that, once Novin had been designated by the Security Council under Resolution 1747, Bank Mellat ran down and "eventually" ceased its relationship with Novin, and that it had in place a mechanism, which it operated conscientiously, to ensure that it did not provide banking facilities to entities or persons designated by the Security Council. Mitting J also accepted that Bank Mellat had investigated the accounts held by Doostan and Mr Shabani, in response to the Treasury's allegations in these proceedings, and had found nothing unusual or suspicious. Mitting J nevertheless found that Doostan and Mr Shabani had played a part in Iran's nuclear programme, and rejected Mr Shabani's evidence to the contrary.

110 Lord Sumption JSC's statement that Mitting J found that Bank Mellat's provision of banking services to entities involved in the Iranian nuclear weapons and ballistic missile programmes, namely Novin and Doostan, had happened "in spite of their conscientiously operated procedures to avoid doing so", appears to me, with respect, to convey a different impression from Mitting J's judgment. It was no answer to the Treasury's concerns in relation to Novin that procedures were initiated after it had been designated by the Security Council: procedures triggered by a Security Council Resolution did not sufficiently address the risk, since they operated long after objectionable banking activities had already taken place. In relation to Doostan, it was only in the course of the proceedings that Bank Mellat carried out the investigations referred to. The value of those investigations can be judged from the fact that on 9 June 2010, after the hearing before Mitting J, Doostan was designated by Security Council Resolution 1929 as an entity involved in Iranian ballistic missile activities, and was subjected to the asset freezing regime established by Resolution 1737. It was only following that designation that Bank Mellat's procedures would have been applicable. In the circumstances, I am unable to agree with Lord Sumption JSC's statement that Mitting J's finding about Bank Mellat's procedures "suggests that they were satisfactory, at any rate in relation to the weapons programmes".

111 Far from regarding the foregoing matters as undermining the Treasury's case, Mitting J [2010] Lloyd's Rep FC 504, para 16 treated them as being essentially beside the point:

> "The Treasury's case is not that the Bank has knowingly assisted Security Council designated entities after designation, or even that it has knowingly assisted entities liable to be designated, but which have not yet been, by providing banking facilities to them, but that it has the capacity

to do so, has in one instance done so and is likely to do so in the future. The fundamental justification for the Order is that, even as an unknowing and unwilling actor, the Bank is, by reason of its international reach, well placed to assist entities to facilitate the development of nuclear weapons, by providing them with banking facilities, in particular trade finance."

It was on that basis that Mitting J commented that Bank Mellat's dealings with Doostan and Mr Shabani did not greatly matter.

112 Lord Sumption JSC's criticism of the rationality of the connection between the direction and its objective is that "the direction made no attempt to prevent every Iranian bank with an international reach from facilitating Iran's weapons programme, but only one of them". It is said that "the distinction [drawn] between Bank Mellat and other Iranian banks . . . was an arbitrary and irrational distinction".

113 I am unable to agree with this criticism. It is true that the problems in relation to the lack of adequate controls within Iran's banking system, identified by the FATF and mentioned by Mr Robertson in his statement, were not unique to Bank Mellat. It followed that UK financial institutions were at risk when dealing with Iranian entities in general, as Mr Robertson explained. The response of the UN Security Council and the EC Council had not however been to impose restrictions in respect of all Iranian banks, but in respect of particular banks where there was evidence of their involvement in the financing of Iran's nuclear weapons programme: notably Bank Sepah, Bank Sepah International, Bank Melli, Bank Saderat and their subsidiaries. The Treasury followed the same approach when it obtained evidence of Bank Mellat's involvement.

114 Lord Sumption JSC states that other Iranian banks were as likely as Bank Mellat to number entities involved in Iran's nuclear and ballistic missile programmes amongst their clients. As I have explained, Mr Robertson acknowledged at para 74 of his statement that entities involved in Iran's nuclear weapons programme could in principle use other Iranian banks. He pointed out however that the order might lead the UK banking sector to wind down business with Iran generally, and that the order would in any event make transactions involving the UK more difficult. That was because it was difficult for Iranian banks to access UK financial markets directly, since UK banks were reluctant to deal with them. The exceptions were the small number of Iranian banks which had UK subsidiaries. Those were Bank Melli, Bank Sepah, Bank Saderat and Bank Mellat. As I have explained, the UK subsidiaries of Bank Melli and Bank Sepah were already subject to asset freezing orders. The order under challenge applied to Persia International Bank plc ("PIB"), which was the UK subsidiary of Bank Mellat. The UK subsidiary of the remaining Iranian bank with such a subsidiary, Bank Saderat, was subject at the time to systematic reporting requirements under Regulation 1110/2008/EC, as I have explained. Subsequent to the making of the order under challenge, it was subjected to an asset freeze.

115 In these circumstances, an order directed specifically against Bank Mellat and its UK subsidiary was far from being pointless or arbitrary. One effect of the order was to prevent the only UK subsidiary of an Iranian bank which was not already subject to controls, namely PIB, from dealing with its parent, Bank Mellat. Lord Sumption JSC notes that PIB was not prevented from dealing with its minority shareholder, Bank Tejarat. There is however

nothing to indicate that Bank Tejarat had any involvement with entities involved in the Iranian nuclear weapons programme. If information indicating such involvement were to emerge, no doubt action would be taken. In the event, PIB's assets were subsequently frozen by Council Regulation (EU) 668/2010, made on 26 July 2010. Although Iranian banks, or Iranian entities involved in the nuclear weapons programme, could in principle seek to use non-Iranian international banks, those could be expected to have compliance mechanisms in place: it was only in relation to Iran that the absence of such mechanisms had caused the FATF to call for preventive measures.

116 It is of course true that the direction would not of itself prevent the development of nuclear weapons in Iran. It could however reasonably be expected to realise the objective of hindering their development at least to some extent (to adopt the phrase used by Lord Neuberger MR in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394). That is sufficient to establish a rational connection between the direction and its objective.

117 In the light of the foregoing, Mitting J was entitled to accept that there was a rational connection between the requirements imposed by the order and its objective, on the basis that, as he found,

> "a direction to cease business with Bank Mellat would restrict the financial services available to entities involved in [Iran's nuclear and ballistic missile] programme by denying them access to the UK financial sector through the bank";

"suspect entities would find it difficult to replace existing arrangements through the bank"; and "some pressure would be brought to bear on the Iranian Government" to comply with its international obligations. Mitting J was therefore entitled to hold that he was

> "satisfied that the requirements imposed by the order are rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and, so, the risk to the national interests of the United Kingdom."

Those findings were affirmed by the Court of Appeal, which commented that "a contrary conclusion would resonate with naïveté".

A different justification from that given to Parliament

118 A separate point made by Lord Sumption JSC is that the justification for the making of the order which was accepted by Mitting J was not the one which Ministers advanced when laying the order before Parliament, and was in some respects inconsistent with it: indeed, it is said that the Treasury's argument underwent a radical shift.

119 This point does not appear to me to be well founded in fact. It does not in any event appear to me to affect the question whether the requirements imposed by the order were rationally connected to its objective.

120 Considering first the factual position, a written Ministerial statement was made on 12 October 2009, three days after the order had been made. It stated:

> "Iran continues to pursue its proliferation sensitive nuclear and ballistic missile activities in defiance of five UN Security Council

A Resolutions. We cannot and will not ignore specific activities undertaken by Iranian companies which we know to be facilitating activity identified by the UN as being of concern, particularly where such activities have the potential to affect the UK's interests.

"On the particular entities in question, vessels of the Islamic Republic of Iran Shipping Lines (IRISL) have transported goods for both Iran's
B ballistic missile and nuclear programmes.

"Similarly, Bank Mellat has provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities, and been involved in transactions related to financing Iran's nuclear and ballistic missile programme.

"The direction to cease business will therefore reduce the risk of the UK financial sector being used, knowingly or otherwise, to facilitate
C Iran's nuclear proliferation sensitive activities."

121 An explanatory memorandum to the order was also laid before Parliament the same day. Under the heading "What is being done and why", the memorandum stated:

"These restrictions are being imposed in respect of these two entities
D because of their provision of services for Iran's ballistic missile and nuclear programmes. It is considered that a direction to cease business with these entities will contribute to addressing the risk to the UK national interests posed by Iran's nuclear proliferation sensitive activities."

Similar explanations of the thinking behind the order were also provided by
E Ministers during the parliamentary proceedings leading to the approval of the order.

122 The Treasury did not in these documents and statements accuse Bank Mellat of being knowingly involved in Iran's nuclear and ballistic missile programme: what was said was that it had provided banking services to a UN listed organisation, and that it had been involved in transactions
F related to financing that programme. Those were statements of objective fact. The objective of the order was explained as being to reduce the risk of the UK financial sector being used, unknowingly or otherwise, to facilitate Iran's proliferation sensitive activities. That explanation appears to me to be consistent with the more detailed account of the Treasury's reasoning provided by Mr Robertson. As Mitting J found, the statements made to
G Parliament gave an adequate summary.

123 Proceeding however on the hypothesis that the reasons given to Parliament were inconsistent with the reasons put forward by Mr Robertson in his statement, that difference has no evident bearing on the answer to the question whether the measure is rationally connected to its objective. As I have explained at paras 92–94, that question poses an objective test concerned with the capacity of the measure to realise its objective, based on
H common sense or logic. If Parliament approved the measure on the basis of a given justification, that might affect the credibility of evidence subsequently putting forward a different justification; but that is not an issue which arises on this appeal. It could also affect the weight which the court might give to parliamentary approval of the measure when considering its

proportionality; but that is not a factor which has been taken into account in considering the question of rational connection.

124 This objective approach to the criterion of rational connection is consistent with what was said, in relation to proportionality more generally, in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11:

> "the task . . . on an appeal on a Convention ground against a decision of the primary decision-maker . . . is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety."

To similar effect, Lord Hoffmann noted in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, para 68:

> "article 9 of the Convention is concerned with substance, not procedure. It confers no right to have the decision made in any particular way. What matters is the result . . ."

In this respect, there is no difference between article 9 and other Convention rights.

Less intrusive means

125 Lord Sumption JSC concludes that the direction also fails the proportionality test at the third stage of the analysis, on the basis that it cannot be necessary to require UK financial institutions to cease dealing with Bank Mellat if less drastic measures are considered to provide sufficient protection in relation to other Iranian banks. For the reasons I have given, I do not consider that the Iranian banks in question (that is to say, the smaller banks without UK subsidiaries) are truly in a comparable position to Bank Mellat. Like the Court of Appeal, I attach importance to the evidence of Mr Robertson that the Treasury considered but rejected less intrusive measures, for reasons which he explained. In a matter of this kind, great weight must be given to the considered judgment of the Treasury. Against that background, I accept Mitting J's conclusion that there is no other reasonably practicable means of ensuring that the facilities of an Iranian bank with international reach will not be used in the UK for the purpose of facilitating the development of nuclear weapons by Iran.

Proportionate effect

126 If, as I would hold, (1) the Government's objective was sufficiently important to justify limiting the rights of Bank Mellat, (2) the requirements imposed by the direction were rationally connected to that objective and (3) no less intrusive measure would have been equally effective in achieving the objective, the question remains whether (4) having regard to the severity of its effect on Bank Mellat's rights, the direction was justified by the importance of the objective. Lord Sumption JSC concludes that it was not, given that, in his view, the direction would make little if any contribution to the achievement of its objective. For the reasons I have explained, I do not agree with that assessment. On the basis that the direction would make a

worthwhile contribution to the achievement of the Government's objective, I agree with Mitting J that its impact on the rights of Bank Mellat is proportionate.

127 In that connection, I would make three observations. The first is that the effects on Bank Mellat's business cannot in my opinion be considered disproportionate to a significant reduction in the risk of very great harm to the UK's vital national interests. The Bank claims that it has suffered a revenue loss of US$25m a year, that it was prevented for the duration of the order from drawing on deposits of €183m, and that its reputation and goodwill have been damaged. The severity of those effects has however to be considered in the context of the very substantial scale of the business conducted by the Bank, illustrated by its evidence that it holds some 33 million accounts for over 19 million customers, has almost 2000 branches, and issued letters of credit in 2009 to the value of $11 billion. If the contribution made by the direction towards the achievement of the Government's objective was limited, the impact on the Bank was also limited.

128 The second is that the right in issue, under A1P1, is not of the most sensitive character; the person affected, a major international bank, does not fall into a vulnerable or marginalised category; and the order is temporary in nature.

129 The third is that the court does not possess expertise or experience in international relations, national security or financial Regulation. The risks to our national interests, if the wrong judgment is made in relation to nuclear proliferation, could hardly be more serious. Democratic responsibility and accountability for protecting the citizens of this country from those risks rest on the Government, not on the courts. In a complex situation of this kind, where the stakes are so high, the court has to attach considerable weight to the Government's assessment that the requirements are necessary and proportionate to the risk.

Conclusion

130 For these reasons, and those given by Lord Hope DPSC in relation to procedural fairness, I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD DPSC (dissenting)

131 I find myself unable, with respect, to agree with the conclusions that the majority have reached on both the substantive and the procedural issues in this case. I, for my part, would dismiss the appeal.

The substantive issues

132 I agree with Lord Reed and Lord Sumption JJSC about the formulation of the test that should be applied to the question raised by Bank Mellat's objections to the direction. The more difficult issue is as to the result when that test is applied to the facts. I was inclined at the end of the argument to think that the making of the Financial Restrictions (Iran) Order 2009 ("the Order") was disproportionate because the Bank had been singled out for special treatment, and because the distinction that was drawn between it and other Iranian banks in that respect appeared to be arbitrary and irrational. There seemed to me to be force in the arguments that Lord

Sumption JSC has given for thinking that the effect of the Order on the commercial dealings of the Bank was out of proportion to any contribution that the directions were likely to make to the statutory purpose that it was designed to serve.

133 I have however been persuaded by Lord Reed JSC's careful analysis of the explanation that was given on the Treasury's behalf by Mr Robertson that the reasons that Mitting J and the Court of Appeal gave for coming to the contrary conclusion were sound. In matters of this kind a wide margin of appreciation must be given to the Treasury, and I am satisfied that sufficient grounds were shown for finding that an order directed only against the Bank and its UK subsidiary was rationally connected to the objective of inhibiting the development of nuclear weapons in Iran and that it was proportionate. There were good reasons for not involving all the other Iranian banks, and the facts as a whole show that the choice that was made was not arbitrary. The problem that the Order was designed to address was restricted to a small number of Iranian banks with UK subsidiaries, and the Bank was not being "singled out" in the pejorative sense that those words convey. I also agree with Lord Reed JSC that the question whether the directions in the Order were rationally connected to its purpose does not depend on whether the justification that the courts below found established was the same as that which was given in the statement when the Order was laid before Parliament. Like him I would hold that the objective was sufficiently important to justify restricting the Bank's activities, that the requirements imposed by the direction were rationally connected to that objective and that Mitting J was entitled to hold that there were no other reasonably practicable means of achieving it.

The procedural issues

134 The question to which these issues are directed is whether there was a duty to consult the Bank before the Order was made under section 62 of the Counter-Terrorism Act 2008. The powers conferred on the Treasury for the making of such a direction are set out in Schedule 7 to the Act. The procedures that are to be followed are in Part 4 of that Schedule. Paragraphs 14(1) and (2) provide that a direction is to be contained in an order made by the Treasury, that the order must be laid before Parliament after being made and that it ceases to have effect if not approved by a resolution of both Houses of Parliament within 28 days. Paragraph 14(5) states that, if apart from that sub-paragraph an order under paragraph 14 would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument. Hybrid instruments are subject to a special procedure in the House of Lords which gives those who are specially and directly affected by the instrument to present their arguments to a select committee for consideration on their merits before the instrument can be approved by either House.

135 Paragraph 15 of Schedule 7 provides that, where a direction is given to a particular person, the Treasury must give notice of the direction to that person. The direction in this case was given not to the Bank or to any other particular person, but to a description of persons operating in the financial sector in the United Kingdom: see paragraph 14(1)(a). They were directed by the Order not to enter into, or to continue to participate in, any

A transaction or business relationship with the Bank. The sequence in which these paragraphs appear in Part 4, as in the case of paragraph 16 which deals with publication, indicates that the direction will have already have been made by the time when notice is given under paragraph 15. Its purpose is to alert the person concerned so that steps can be taken at once to comply with the direction.

B **136** Here, then, is a provision which excludes the procedure which allows those directly affected to ask for an examination of the direction on its merits before the instrument is approved under paragraph 14(2). And there is another provision which provides for notice to be given, but only to a particular person to whom the direction is given and only after the making of the direction. Is it nevertheless open to the court to require the Treasury to consult with a body which will be affected by a direction which is to be given C to others before the order is made, as the Bank maintains? This is a step which finds no place in the procedure which has been provided for by Parliament. Is a procedure for delegated legislation which has been approved by Parliament open to scrutiny by the courts with a view to the imposition of additional procedural safeguards?

137 The Bank submits that the Treasury were required both by D domestic law and by the procedural requirements of article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 1 of the First Protocol to give the Bank an opportunity to make representations before they made the direction. It points to the fact that the direction imposed the most extreme form of sanction that was available to the Treasury in the exercise of these powers. It bound the entirety of the United Kingdom's financial sector and the Bank, and all its E branches were designated persons with whom the financial sector was directed to cease doing business. Yet the procedure in the 2008 Act under which the Order which contained the direction was made gave no opportunity for affected persons to make representations before it was made and then laid before Parliament.

138 This challenge was dismissed by Mitting J [2010] Lloyd's Rep FC F 504. He said that it was readily understandable why no provision was made for affected persons to be given such an opportunity: para 5:

> "Although in this case, I am only concerned with a direction made in the circumstances set out in paragraph 1(4) of Schedule 7 in respect of a bank, there are many other circumstances in which directions could be made when Parliament cannot have intended that there should be an G opportunity for affected persons to make representations. They include individuals engaged in terrorist financing or money laundering activities (paragraphs 1(3)(c) and 9(1)(c)); and governments reasonably believed to be engaged in the development or production of nuclear etc weapons (paragraphs 1(4)(a) and 9(1)(b); and the manifold persons in the UK financial sector to whom the direction is given (paragraph 3(1))."

H He also pointed out that a duty to permit prior representations where there was no reason to believe that avoiding action would be taken by an affected person would be judge-made. Where Parliament had conferred a rule-making power on the executive subject to parliamentary control, it was not generally for the courts to superimpose additional procedural

safeguards: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

139 In paras 6–8 the judge rejected the challenge under A1P1 on the ground that section 63 was the means by which the Bank was afforded a reasonable opportunity of effectively challenging the measures contained in the Order: *Jokela v Finland* (2002) 37 EHRR 581, para 45. He also rejected the challenge under article 6(1) on the ground that there was no dispute over a civil right at the time when the Order was made: *Micallef v Malta* (2009) 50 EHRR 920, para 74. In any event a hybrid procedure, consisting of an executive decision affirmed by Parliament which was subject to a later challenge before a court, was compatible with the article. He added that there was no claim for a declaration of incompatibility under section 4 of the Human Rights Act 1998.

140 In the Court of Appeal [2012] QB 101 Maurice Kay and Pitchford LJJ rejected the Bank's procedural challenge on similar grounds. But Elias LJ held that the Treasury had failed to comply with the common law principles of fairness and that it was also in breach of A1P1 and article 6.1. He said that the Order was of a qualitatively different character to that with which the court was concerned in the *BAPIO* case. It was not laying down rules which affected a broad and amorphous class or classes of person. It was specifically directed at the Bank and the Treasury knew that the action of implementing the Order would damage its rights, as was its purpose. He was not persuaded that Parliament in formulating the procedures in Schedule 7 must have intended to exclude any rights to natural justice. The judge's analysis of the challenge under article 6.1 that there was no dispute when the Order was made was inconsistent with the decision in *R (Wright) v Secretary of State for Health* [2009] AC 739. As the Treasury had conceded that there was insufficient urgency to justify a failure to allow the Bank to seek to answer the allegations against it before the Order was made, the only proper conclusion was that the failure to give a hearing infringed article 6.1. It followed that the subsequent procedure was not sufficient to comply with A1P1.

(a) The common law challenge

141 The Order which the Treasury made under Schedule 7 to the 2008 Act was a statutory instrument within the meaning of section 1(1) of the Statutory Instruments Act 1946. It was made in the exercise of a power to make a direction under paragraph 1(1) of the Schedule which was required by paragraph 14(1) to be given by means of an order that was to be laid before Parliament. Section 96(1) of the 2008 Act provides that orders under the Act must be made by statutory instrument. For the purposes of the definition in section 1 of the 1946 Act, a power to make, confirm or approve orders that is conferred on the Treasury is deemed to be conferred on the Minister of the Crown in charge of that department: 1946 Act, section 11(1).

142 The procedure that is laid down for parliamentary approval of an order under Part 4 of Schedule 7 which contains a direction of the kind that was given in this case provides that the order is to be laid before Parliament before it is made, and that it ceases to have effect if not approved by a resolution of each House within 28 days: paragraph 14(2). *Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th

ed (2011), states at p 676 that this type of affirmative procedure is frequently resorted to when delegated legislation must come into force immediately on being made without any prior consultation. It appears from that comment that it is standard practice for orders to be made under this procedure without prior consultation with those who are likely to be affected by them. Paragraph 14(5) states that, if apart from that sub-paragraph it would be treated for the purposes of the standing orders of either House as a hybrid instrument, it is to proceed in that House as if it were not such an instrument.

143 Under the hybrid instrument procedure the instrument is subject to a procedure which enables those who are affected by the instrument to present arguments against it to a select committee which reports on its merits and recommends whether or not it should be approved *Erskine May,* p 684. The disapplication of this procedure by an express provision of this kind is said to be relatively common in recent times: *Craies on Legislation*, 10th ed (2012), para 6.2.23. Nevertheless it is feature of the procedure under Part 4 of the Schedule that it has expressly excluded the possibility of consultation before the order is made. It excludes the possibility of presenting arguments against the order prior to its receiving approval in either House.

144 Part 4 of Schedule 7 must be read together with sections 63 and 65–68 of the Act. These sections provide for the making of an application to set aside any decision of the Treasury in connection with the exercise of their functions under Schedule 7 to the Act, with the same relief as may be made or given in proceedings for judicial review. Permission is not required for the making of an application under section 63, and there is no time limit. Provisions of the kind that appear in this group of sections are unusual. They must be taken to have been included in the Act as a counterweight to the absence of any procedure for prior consultation with affected persons or the making of representations by them at any earlier stage. The provision for a closed material procedure indicates that Parliament was aware that some at least of the reasoning for the making of a direction would be likely to require to be withheld from affected persons.

145 These provisions reinforce the impression conveyed by the provisions of paragraph 14 of Schedule 7 that Parliament cannot have intended that there should be an opportunity for representations before the decision was made or as part of the parliamentary process. A ministerial statement was issued on the making of the order on 12 October 2012 in accordance with a prior commitment to do so by the Minister when the Bill was passing through Parliament. By this means the Treasury's reasons for making the Order were placed before each House before it was approved.

146 The question then is whether the Bank had a common law right to be consulted before the making of the decision contained in the Order that was laid before Parliament. I readily acknowledge that the duty to give advance notice before a statutory power that may affect the subject adversely is exercised, whether by statutory instrument or otherwise, is deeply rooted in the common law. But, as Lord Sumption JSC says in para 31 above, whether there is such a duty where the enabling statute does not deal with the point expressly must depend on the circumstances. The Bank accepts there is no authority that is on all fours with this case. Cases such as *R v Secretary of State for Health, Ex p United States Tobacco International Inc* [1992] QB 353, where it was held that the Secretary of

State had a duty to give the applicants an opportunity to make representations on the expert advice he had received before making Regulations banning oral snuff in view of the history of his dealings with them as well as the effect on their business, are far removed from the facts of this case.

147 The closest analogy is the *BAPIO* case, where the provisions in question were alterations by the Home Secretary to the Immigration Rules and advice given to NHS employers by the Department of Health. Elias LJ was right to draw attention to the fact that the Order in this case was of a different character as it was specifically directed at the Bank. But the reasons given by the Court of Appeal for rejecting the proposition that there was duty to consult in that case seems to me to be capable of being applied more widely and to be just as much in point here as in *BAPIO*.

148 First, there is the point made by Sedley LJ in para 44 that, if the Bank is right, its argument raises serious and very troublesome questions as to its implications. What limits, if any are to be placed on those to whom the duty is owed? As Mitting J pointed out in para 5 of his judgment, the conditions for the making of a direction in paragraph 1 of Schedule 7 and the requirements that may be imposed under paragraph 9 include various circumstances in which Parliament cannot have intended that there should be an opportunity to make prior representations. They include, for example, cases falling within the second condition described in paragraph 1(3) of Schedule 7, which applies where terrorist financing or money-laundering activities "are being carried on" by persons resident or incorporated in the country which pose a significant risk to the national interests of the United Kingdom. Is the duty to notify the persons affected to apply in those cases too? The urgency that the Treasury saw in the Bank's case was not as extreme as it might be in that situation, but its case must not be considered in isolation. A decision in its favour on this point will have far reaching consequences for the application of Schedule 7 generally. It will also call into question the practice referred to by *Erskine May* for the affirmative resolution procedure to be resorted to when delegated legislation must come into force immediately on being made without any prior consultation: see para 142. Are the majority to be understood as saying that this must never happen?

149 If an opportunity to make prior representations is to be given, how is the exercise to be carried out, and under what conditions and subject what safeguards to ensure that any responses are properly taken into account? What information must be given to the affected party to ensure that its representations are effective? How is material that it would not be in the public interest to disclose to the affected party to be dealt with? There is also the possibility that the affected party may seek a judicial review of the way the process is being conducted before the direction is given: see *R v Secretary of State for the Environment, Ex p Brent London Borough Council* [1982] QB 593. This too would raise issues about the disclosure of material that in the public interest ought not to be disclosed. It could also significantly delay the whole process if, as Lord Sumption JSC acknowledges in para 37 above, an application of the kind envisaged by section 63 would be unlikely to be determined within three months. I do not think that these questions can be ignored or left unanswered. Clear and precise guidance is needed if the

A procedure that the majority say must be implied into Schedule 7 is to be workable. I do not know where that guidance is to be found.

150 Then there are the points made by Maurice Kay LJ [2012] QB 101, in para 58, with whose reasons Pitchford LJ agreed in para 65. He doubted whether, as a matter of principle, a duty to consult can generally be superimposed on a statutory rule-making procedure which required the
B intended rules to be laid before Parliament and subjected to the negative resolution procedure. And he attached some significance to the fact that the primary legislation had not provided an express duty of prior consultation as it had on many other occasions. Those points have added force in this case in view of the point made by *Erskine May*, at p 676, as the paragraph 14 procedure requires the order to be made before it is laid and
C that it be approved by an affirmative resolution of each House of Parliament.

151 The disapplication of the hybrid instrument procedure is a further factor, as is the provision in paragraph 15 for the giving of notice of the direction to a particular person after the order has been laid and the opportunity that sections 63 and 65–68 give for an application to be made to set it aside, subject to rules designed to secure that disclosures of information
D are not made when they would be contrary to the public interest. The structure of the legislation, the scope for its application and the sensitive nature of the information on which decisions in this area of activity are likely to have been based all point in the same direction. They indicate that there was here a deliberate decision by Parliament not to subject the Treasury to a duty to consult before making the direction. This is readily understandable,
E in view of the nature of the risks to the national interest that the legislation was intended to deal with.

152 I would hold therefore that the Bank did not have a common law right to be consulted before the direction was given. Elias LJ said [2012] QB 101, in para 97 that in his judgment the preconditions for supplementing the procedure to secure a right to natural justice that were identified by Lord
F Reid in *Wiseman v Borneman* [1971] AC 297, 308 were met in this case, as the statutory procedure was insufficient to achieve justice and it was not contended that complying with the basic elements of natural justice would frustrate the purpose of the legislation. But Lord Reid did not go so far as to say that the court must always intervene whenever those preconditions were satisfied. Whether it would be right for the court to do this must always
G depend on the circumstances.

153 I would, for my part, respect the evident intention of Parliament that the Treasury should have power to make orders of the kind contemplated by paragraphs 1 and 9 of Schedule 7 without prior consultation, and that the basic elements of natural justice were to be met in the manner prescribed by sections 63 and 65–68. For the court to insist on a prior duty to consult at common law would be inconsistent with the purpose
H of the legislation, which is to protect the national interests of the United Kingdom in circumstances where there is a significant risk to those interests, and it would contradict what I would understand to have been the will of Parliament. I do not think that it is open to this court to take that course. I would reject the challenge that is made at common law.

(b) The Convention rights challenge

154 The gravamen of this challenge is that, as the making of the direction was incompatible with the Convention rights on which the Bank founds, it was unlawful for the Treasury to make the direction: Human Rights Act 1998, section 6(1). Counsel for the Treasury did not seek to argue that this was a case to which section 6(1) did not apply because the primary legislation could not be read or given effect in a way which was compatible with the Convention rights and it was acting so as to give effect to those provisions: section 6(2)(b).

155 It is convenient to examine the argument that was directed to article 6.1 first, as the A1P1 argument too is about the absence of a procedural protection for the Bank's rights. In *Jokela v Finland* 37 EHRR 581, para 45 the Strasbourg court said that, in considering whether a person was afforded a reasonable opportunity of putting his case to the responsible authorities for the purposes of A1P1, a comprehensive view must be taken of the applicable procedures. The procedural challenge in both cases rests on essentially the same grounds.

156 The Bank submitted that the Treasury's decision to make the Order was a determination of the Bank's civil rights within the meaning of article 6.1, and that their failure to allow the Bank any opportunity to make representations was a plain breach of that article. It was also submitted that its case is indistinguishable from *R (Wright) v Secretary of State for Health* [2009] AC 739, where the provisional listing of persons considered to be unsuitable to work with vulnerable adults was held to be unlawful because the workers were denied an opportunity to answer the allegations that were made against them before they were listed.

157 As Baroness Hale of Richmond said in *Wright* at para 19, the article 6.1 issue raises two questions. The first is whether the case is concerned with a civil right at all. The second is whether the making of the direction amounted to a "determination" of a civil right. The first question is easily answered. It is not disputed that the Bank's right to carry on its business was a civil right and that the effect of the direction was greatly to impede the exercise of that right. The difficult issue is whether the making of a direction amounted to a determination of the Bank's civil right, given that an opportunity for the determination by an independent and impartial tribunal of its right to carry on its business unimpeded by the direction was afforded by the right to make an application to the court under section 63 after the direction was made.

158 It is well established that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which is in a position to exercise full jurisdiction as to the issues involved: *Bryan v United Kingdom* (1995) 21 EHRR 342; *Wright*, para 23. For the provisions of article 6.1 about the determination of a civil right to be applicable there must be a dispute over a civil right which can be said, at least on arguable grounds, to be recognised under domestic law: *Micallef v Malta* 50 EHRR 920, para 74. The Strasbourg court also concluded that for article 6.1 to apply the result of the proceedings must be directly decisive for the right in question. As Baroness Hale said in *Wright*, para 21:

A "It is one thing temporarily to freeze a person's assets, so that he cannot divest himself of them before an issue is tried; it is another thing to deprive someone of their employment by operation of law."

159 The Order in this case was not simply an asset-freezing order, but I agree with Maurice Kay LJ, para 76, that there are similarities. It can be seen, as Pitchford LJ said in para 136, as an interim preventive measure B taken in a situation which, on the Treasury's view of the matter, was of some urgency. At the stage when the decision was taken there was, in my view, no directly decisive determination of the Bank's civil rights. The Treasury were in no position to carry out an article 6.1 compliant determination at that stage, and they could not do so anyway as they were not an independent or impartial tribunal. But the procedure for the making of an application under section 63 was available as soon as the person could claim to be affected by C the decision: section 63(2). There was then an issue about the Bank's civil rights which could be determined in a manner that was compatible with article 6.1. It was, no doubt, for this purpose, that section 63 was enacted. As there was then an opportunity for the Order to be set aside without delay on an application of judicial review principles, I think that it was unnecessary for an opportunity to be provided for the Bank to be consulted D before the Order was made in order to satisfy the requirements of the article.

160 For these reasons, together with the further reasons given by Lord Reed JSC, I would reject the Bank's contention that the way in which the Order was made was incompatible with article 6.1 because it was not given an opportunity to make representations. On a comprehensive view of the applicable procedures, I would for the same reasons reject the Bank's challenge to the making of the Order under A1P1. E

LORD NEUBERGER OF ABBOTSBURY PSC (dissenting in part)

Introductory

161 Bank Mellat seeks to challenge the Financial Restrictions (Iran) Order 2009 (SI 2009/2725) ("the Order") on two grounds. The first is F substantive, namely that the reasons for which Her Majesty's Treasury ("the Treasury") decided to give the direction ("the Direction"), which resulted in the Order, were fundamentally flawed. The second ground of challenge is procedural, namely that, before giving the Direction, the Treasury should have given the Bank an opportunity to make representations.

162 I have reached the conclusion that (i) in agreement with Lord G Reed JSC, the substantive challenge fails, but (ii) in agreement with Lord Sumption JSC, the procedural challenge succeeds.

The substantive ground of challenge

163 The prevention of nuclear proliferation ("proliferation"), including impairing its funding, is an issue which is not just very important. It is an issue which has diplomatic, national security, and financial market H dimensions, and which presents the executive with enormous technical and practical difficulties. Further, any attempts to prevent proliferation will almost inevitably have substantial repercussions for third parties, innocent as well as guilty. It should therefore cause no surprise that decisions and actions which are aimed by the executive at preventing proliferation throw

into sharp focus the delicacy of the balance between the court's duty to uphold the rule of law and the court's duty not to trespass into areas which are properly left to the executive.

164 Judges have no more important function than that of protecting individuals and organisations from abuse or misuse by the executive of its considerable and extensive powers—even, as is almost always the case, when such abuse or misuse does not involve bad faith. The substantial adverse financial consequences for Bank Mellat of the giving of the Direction in this case provide a good example of the importance of this function. On the other hand, the judiciary's power to review decisions of the executive must be exercised bearing in mind that responsibility for the decision lies with the executive, not the judiciary, and judges do not have the relevant expertise or experience of those responsible for the decision. In the present case, the importance and relevance of expertise and experience in international relations, national security and financial Regulation, is self-evident.

165 Accordingly, while the court has to apply well-established legal principles when deciding whether the Direction can be substantively justified, I agree with Lord Sumption JSC when he says in para 21 that the Treasury must be allowed "a large margin of judgment", or, as Lord Reed JSC puts it in para 94, "a wide margin of appreciation", when taking steps to prevent proliferation internationally, through the means of giving a direction under Schedule 7 to the Counter-Terrorism Act 2008 ("the 2008 Act").

166 Indeed, there is very little between Lord Sumption and Lord Reed JJSC as to the principles to be applied when addressing a challenge to such a direction, or to an order made pursuant to it. I agree with Lord Reed JSC's general and far-ranging observations about proportionality in his paras 69–78, and what he says in paras 79–84 about the word "proportionate" in paragraph 9(6) of Schedule 7 to the 2008 Act ("Schedule 7"). I also agree with his observations about "rational connection" in paras 86–90.

167 As Lord Reed JSC implies in para 65, there is very little difference between what he says in those 21 paragraphs and what Lord Sumption JSC says in paras 20, 21, 25 and 26. The only real difference arises from their interpretation of the grounds on which the House of Lords decided *A v Secretary of State for the Home Department* [2005] 2 AC 68. On that issue, while there are passages in some of the opinions which support the rather wider ratio suggested by Lord Sumption JSC in para 25, I agree with what Lord Reed JSC says in para 95–97.

168 The explanation for the fact that Lord Sumption and Lord Reed JJSC have reached opposing conclusions on Bank Mellat's substantive challenge to the Direction largely lies in the difference between their respective analyses of the facts. Essentially, Lord Sumption JSC concludes that the Treasury's decision to make the Direction was legally flawed for two main reasons, which he summarises in para 22. First, that there was no reason to single out Bank Mellat, as "the problem [which the Treasury relies on] is a general problem of international banking"; secondly, that the ground now advanced by the Treasury for the Direction is different from that advanced by Government ministers when the Order was placed before Parliament.

A **169** I have concluded that, while those two points each have some force in a qualified form, neither of them amounts to a sufficiently justified criticism of the Direction to justify quashing the Order. I agree with Lord Reed JSC's analysis in relation to the first point in paras 105–117, and, in relation to the second point, paras 119–124. However, because the issue is finely balanced, as evidenced by the division of opinion in this Court, I will briefly summarise my reasons.

B **170** As to the first point, it seems to me that the Treasury considered that it was appropriate to make a direction under Schedule 7 against Bank Mellat for a combination of grounds. In summary, those grounds were (i) Bank Mellat was an Iranian bank, and Iran's banking system lacked the controls to prevent the funding of proliferation, which most other countries had, (ii) Bank Mellat had, as a matter of fact, provided banking services to C businesses connected with Iran's nuclear weapons programme ("the programme"), (iii) other Iranian banks with branches or subsidiaries in London, who had helped finance the programme, were subject to asset-freezing orders or to a systematic reporting requirement, and (iv) although other Iranian banks could be used for the purpose, the Order would represent a severe constraint on Iran's ability to obtain banking services for the purpose of funding the programme. Ground (iii) and, to some extent, D ground (iv) are defensive rather than inherently justificatory.

171 Ground (i) is, I accept, weakened by the fact that it is very difficult for any bank or national banking system to identify the ultimate purpose for which facilities are being provided, especially where the customer wishes to conceal that purpose. None the less, that does not wholly undermine ground (i), especially in relation to an Iranian bank which has supported entities E connected with the programme. As to ground (ii), it is true that Bank Mellat conscientiously took steps to sever its relationship with the entities which had been involved with the programme, but that was only after UN Security Council resolution 1747 in 2007, and, even then, facilities were being provided to one such entity even after these proceedings had been initiated. Despite ground (iii), there may have been some Iranian banks which had access to the London market, but they were few and small, and there was no F evidence that they were funding entities which supported the programme. Ground (iv) on its own would not be impressive, but it is, in my view, a reasonable additional factor which helps underpin the decision to give the Direction.

172 I do not find it easy to resolve the question of whether Bank Mellat's substantive challenge to the Direction should succeed. As the brief G summary in the preceding two paragraphs suggests, and as is also apparent from the much fuller analysis proffered by Lord Reed JSC, the arguments raised by the Treasury to justify the Direction are not particularly strong, and the financial consequences of the Direction and subsequent Order against the Bank, which is not suggested to have intentionally supported the programme, are very grave. The Treasury's case is further weakened by the fact that, when it gave the Direction and promulgated the Order, it believed H that the great majority of the shares in Bank Mellat were owned by the Iranian Government, which is, and at all material times, was not the case. It is not a major point, but it does have a little traction, given that the grounds for the Direction are not particularly strong, and that this mistake does have some bearing on the Treasury's ground (iv) in para 10.

173 All in all, while the four grounds summarised in para 170 above, even when taken together, are not overwhelming, I have reached the conclusion that they are strong enough to justify the Treasury's contention that, despite the very serious financial consequences for Bank Mellat, the Direction was given on grounds which were unassailable as a matter of law. The Direction was in an area, and related to an issue, in respect of which the courts should accord the executive a wide margin of appreciation, and, while the grounds advanced by the Treasury for giving the Direction do not appear very strong on examination, they are rational and they have some force. In those circumstances, were it not for the grave effect of the Direction on the Bank, I would fairly readily have concluded that the Treasury had acted lawfully in giving it.

174 However, I entertain real doubt as to whether the Direction was justifiable once one weighs the benefits it was likely to achieve, in the light of the relative weakness of the grounds, against the inevitable and substantial harm it would cause to Bank Mellat. However, in the end, I am not persuaded that a court can properly conclude that the benefit of the Direction must have been so slight that the Treasury could not reasonably have concluded that it was right to give it, notwithstanding the harm the Bank would thereby suffer.

175 On my view of the facts on the second reason identified in para 168 above, it is unnecessary to decide the further question of principle which divides Lord Sumption and Lord Reed JJSC, which the latter discusses in paras 123–24. I prefer to leave that question open.

176 If the Treasury's justification for giving the Direction, and Ministers' explanation for it to Parliament, had been that Bank Mellat knew that it was funding entities which supported the programme, which the Treasury now accepts would not have been right, a not unfamiliar question would arise. That question is the extent to which the court should uphold a decision of the executive which was justified by one reason when it was made, but when the matter comes to court, the reason is abandoned and the decision is sought to be justified by a different reason. It is an issue on which there are a number of judicial observations in a domestic judicial review context, most famously perhaps that of Megarry J in an oft-quoted passage in *John v Rees* [1970] Ch 345, 402, cited with qualified approval on a number of occasions, e g in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, paras 61–62 and 73.

177 I would have thought that there was room for argument as to how such a question should be approached in the present context, following the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms into UK law, especially as this is a case where the Convention is engaged (through article 1 of the First Protocol), where proportionality is referred to in the empowering statute, and where the decision has been put before, and approved by, Parliament.

The procedural ground of challenge

178 As Lord Sumption JSC says in paras 29–30, where the executive intends to exercise a statutory power to a person's substantial detriment, it is well established that, in the absence of special facts, the common law imposes a duty on the executive to give notice to that person of its intention, and to give that person an opportunity to be heard before the power is so

A exercised. While this has been described as a "rule of universal application . . . founded on the plainest principles of justice" (per Willes J in *Cooper v Wandsworth Board of Works* 14 CBNS 180, 190), it has more recently been expressed in somewhat more measured terms. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill said that "fairness" will

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> "very often require that a person who may be adversely affected by the decision will have an opportunity to make representations . . . either before the decision is taken . . . or after it is taken, with a view to procuring its modification . . ."

179 In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by C 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 D the opportunity, when such an obligation is not dispensed with in the relevant statute.

180 For the reasons given by Lord Sumption JSC in paras 28–49, I consider that the Direction in this case was invalid owing to the failure of the Treasury to afford Bank Mellat the opportunity of making representations prior to its being made. Because of the division of opinion E on this issue, I will attempt to summarise my reasons

181 On the face of it at least, this was a paradigm case for the giving of prior notice. (i) The Direction was targeted at just two entities, one of which was the Bank; (ii) the consequences of giving the Direction and the making of the Order would clearly be drastic so far as the Bank was concerned; (iii) there was no need for secrecy or great haste in giving the Direction; (iv) the Direction would come into effect virtually at once; (v) the reasons for F the Direction and Order were all based on the Bank's dealings and ownership, so there could have been little doubt but that the Bank would have had relevant things to say about the proposed direction. On this last point, the Bank's knowledge of its customers' activities, the Bank's ability to deal with the problem of unknowingly assisting the programme, and the ownership of the Bank are all points on which the Bank would have made G strong and relevant representations if it had been given the chance to do so.

182 Despite this, Bank Mellat was given no notice of the Treasury's intention to give the Direction against it or to put the Order before Parliament, and therefore it had no opportunity to put its case as to why such a direction should not be made. The Treasury raised a number of arguments as to why it was entitled not to give notice to the Bank of its intention to give H the Direction. Some of those arguments were based on provisions of the 2008 Act; others were based on impracticality.

183 I have no hesitation in rejecting the arguments based on impracticality, namely that (i) notice would have given the Bank the opportunity to re-arrange its relationships, (ii) notice would have been ineffective or difficult because of the Treasury's reliance on secret material,

(iii) notice would have to have been given to all those who dealt with the Bank, which would not have been realistic. As to those arguments, I have nothing to add to what Lord Sumption JSC says at paras 31–32.

184 I turn then to the Treasury's arguments based on the terms of the 2008 Act. There is nothing in the express terms of the statute which assists the Treasury, and it therefore has to rely on implication. In that connection, two arguments are raised as to why no consultation was required, namely (i) the fact that the Order had to be approved by affirmative resolution in both Houses of Parliament, and (ii) section 63 of the 2008 Act ("section 63") entitled Bank Mellat to challenge any direction, and thus any consequential order, after it was made, and, when taken together with other provisions of Schedule 7, it is clear that there was no duty to have prior consultation.

185 I would reject the contention that the fact that the Direction is enshrined in, or approved by, the Order means that its validity cannot be considered by the court. I agree with what is said by Lord Sumption JSC in paras 40–45 and by Lord Reed JSC in para 54. The fact that the Order in the present case was confirmed by Parliament does not detract from the applicability of the rule, in so far as it applies to the actions of the executive, i e the Treasury decision to make the Direction, as opposed to the legislative decision to confirm the consequent Order. Consequently, if the administrative decision to make the Direction was legally flawed for failure to consult the Bank, then the consequential Order should be quashed. There is no question of such a decision of this court in any way impinging on the sovereignty of Parliament.

186 Lord Reed JSC, however, relies in para 61 on paragraph 14(5) of Schedule 7, which provides that if an order under Schedule 7

> "would be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it is to proceed in that House as if it were not such an instrument."

In my view, the provision takes the matter no further, as it relates to the characterisation of, and parliamentary processes relating to the making of, an order. I do not, with respect, see how it can impinge on the lawfulness of the Treasury's processes when deciding to make the antecedent direction. If anything, the exclusion of Bank Mellat from the parliamentary process, as illuminatingly explained by Lord Hope of Craighead DPSC, seems to me to support the argument that the Bank ought to have been consulted earlier.

187 As to the Treasury's second argument, it may be that, in some cases, the fact that the statute granting the power in question gives a specific right of challenge subsequent to its exercise can be enough to dispense with any prior obligation to consult. However, in my view, it is by no means a sufficient answer in many cases. As a matter of logic, the two rights are a long way away from being mutually inconsistent or even duplicative. Indeed, if it were otherwise, the right to be consulted would be very rare, because, as Lord Sumption JSC points out in para 37, there is almost always a right to challenge a decision of the executive as a matter of public law.

188 A right to be consulted before a power is exercised is very different in its nature and in its potential effect from a right to challenge it after it has been exercised. The former involves representations to the intending exerciser of the power in relatively informal and flexible circumstances with a variety of possible outcomes, whereas the latter involves arguing against

the exerciser in a formal, forensic context, where the court's powers are relatively constrained. In an era where mediation is increasingly supported, not least by the executive, the desirability of prior consultation, even where subsequent challenge through the courts is possible, is at least as great as it ever was.

189 As between the two rights, the present case provides a very good demonstration of the difference between them in terms of their effect. The right to challenge a direction under Schedule 7 has many drawbacks compared with a right to be consulted before the direction is given. Particularly as the Direction has virtually immediate effect, the time it may take to challenge any subsequent order, coupled with the uncertainty while such challenge is under way, and the costs involved in such a challenge, mean that a subsequent right of challenge would be much less valuable than a right to make representations in advance. Further, there must be a real risk of a significant adverse effect on a bank's reputation if a direction is made, even if it is subsequently quashed. Ignoring the subsequent appeals, well over seven months elapsed between the giving of the Direction in this case and Mitting J's decision as to its validity. Seven months is a very long time from the Bank's perspective, and, even viewed objectively, it is a long time given that the Direction was only to last for twelve months.

190 I am unimpressed by the Treasury's reliance on section 63. It purports to grant little, if anything, more than a specific statutory right to persons against whom a direction is made than they would be accorded by public law. That is clear from subsection (3) which provides that, on any challenge to a direction "the court shall apply the principles applicable on an application for judicial review". Unlike Lord Reed JSC in para 62, I do not see section 63 as giving greater rights to a person against whom a direction is made than they would enjoy under public law; nor do I consider that sections 65–68 of the 2008 Act suggest otherwise. Those sections were included, in my view, to deal with the need to protect confidential material in any proceedings under section 63. Indeed, I suspect that section 63 was included in the Act because it was more sensible in drafting terms to link those procedures to proceedings specified in the 2008 Act.

191 Lord Reed JSC identifies a number of other factors in paras 58–62 of his judgment which, when taken together with sections 63, and 65–68, of the 2008 Act, persuade him that the normal duty to consult has been abrogated. I do not agree. At a high level, I consider that, while the right to be consulted in advance about the exercise of a statutory power which will cause significant harm can be abrogated by implication in the statute, the right is so important that the implication must be very clear. More specifically, I am unimpressed with the various other factors which weigh with Lord Reed JSC. The difficulty of consulting because of the need for confidentiality does not impress me for the reason given by Lord Sumption JSC in para 31. It may be that, where the Treasury was proposing to make a direction against another bank or banks in different circumstances, it may not be practicable to give it or them to give an opportunity to comment, but such a point must be assessed on a case by case basis and in this case it fails for the reasons given by Lord Sumption JSC in paras 31–33.

192 As already explained, I do not consider that paragraph 14(5) of Schedule 7 assists. Nor do I find paragrah 15 of Schedule 7 of much help.

The 2008 Act clearly had to specify the date from which a direction took effect, and where the direction concerned a specific person, as in this case, it was obviously sensible to provide that it took effect on the date on which it was served on that person. I find it impossible to think of any other way of ensuring both clarity and fairness.

Conclusion

193 In my view, therefore, Bank Mellat's appeal should be allowed, the direction made by the Treasury should be set aside, and the Order quashed.

194 I end by pointing out that the two grounds of challenge to the Direction in this case are not entirely unrelated either in principle or in fact. The uniting principle which applies both to the Bank's substantive challenge and to its procedural challenge is the fundamental public law rule that the executive must exercise a statutorily conferred power fairly. When it comes to giving a direction under Schedule 7 which will foreseeably and substantially harm an entity, fairness requires the Treasury to have good enough reasons for giving the direction. It equally requires the Treasury to give the entity notice of the intention to give the direction, so that the entity can make representations about it in advance.

195 So far as the facts are concerned, I have explained in paras 170–174 above why there is in my view considerable force in the Bank's substantive challenge to the giving of the Direction, The fact that the justification for the Direction was not very strong, coupled with the more specific facts that the Treasury was wrong about the ownership of Bank Mellat and could usefully have discovered what steps the Bank was taking to avoid inadvertently supporting the programme, provide specific and practical support for the conclusion that the Bank should have been given an opportunity to make representations before the Direction was given.

LORD DYSON MR (dissenting in part)

196 I agree, for the reasons given by Lord Sumption JSC, that the appeal should be allowed on the procedural issue.

197 I was at first persuaded by Lord Sumption JSC's judgment that the appeal should also be allowed on the substantive issue. But, like Lord Hope of Craighead DPSC and Lord Neuberger of Abbotsbury PSC, I find Lord Reed JSC's analysis at paras 102–117 and 118–122 more convincing. Like Lord Neuberger PSC, I express no view on paras 123 and 124 of Lord Reed JSC's judgment.

198 The Treasury has explained why Bank Mellat was singled out. The explanation is summarised at paras 103–106 and 113 of Lord Reed JSC's judgment. Lord Sumption JSC accepts (para 27) that the Schedule 7 direction may well have added something to Iran's practical problem in financing transactions associated with its weapons programmes. But he concludes that the direction was irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective.

199 This conclusion is based on (i) making an assessment of what effect the direction would have on Iran's ability to finance the weapons programme and (ii) conducting a proportionality exercise by balancing that effect against the undoubtedly grave consequences that the direction would have for Bank Mellat.

A 200 As Lord Sumption JSC acknowledges at para 21, any assessment of the rationality and proportionality of the direction must recognise that the nature of the issue requires that the Treasury be allowed a large area of judgment or margin of appreciation. The court is in a poor position to weigh the effectiveness of a measure whose object is to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This is not an area in which the court has any expertise. Accordingly, it should only hold that such a B measure is irrational or disproportionate if it is confident that this has been clearly demonstrated. For the reasons given by Lord Reed JSC, I am not confident that this has been done in the present case.

201 I would therefore dismiss the appeal on the substantive issue.

LORD CARNWATH JSC (dissenting in part)

C 202 Like the other partial dissentients my views on the substantive issue have wavered. In the end however I am persuaded by Lord Sumption JSC that the appeal should succeed on that issue for the reasons he gives: his paras 19–27. Notwithstanding the force of Lord Reed JSC's alternative analysis, and the other judgments in support, I do not propose to add anything of my own. It seems better that Lord Sumption JSC's reasoning should stand as the single majority judgment on this crucial issue. On the D procedural point, by contrast, I find myself clearly on the side of the minority, agreeing wholly with the reasoning of Lord Hope of Craighead DPSC on what I regard as a point of considerable general importance: paras 134–159.

Appeal allowed.

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DIANA PROCTER, Barrister

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