Neutral Citation Number: [2025] EWCA Civ 1528

Case No: CA-2025-000090

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs Justice Farbey
[2024] EWHC 2963 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2025

Before:

LORD JUSTICE SINGH
LORD JUSTICE MALES
and
LORD JUSTICE POPPLEWELL

- -

Between:

THE KING (on the application of L1T FM HOLDINGS LIMITED and LETTERONE CORE INVESTMENTS SÀRL)	**Claimants/ Appellants**
- and -	
CHANCELLOR OF THE DUCHY OF LANCASTER IN THE CABINET OFFICE (formerly SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY)	**Respondent**
- and –	
UPP CORPORATION LIMITED	**Interested Party**

- -
- -

Tom Hickman KC and Paul Luckhurst (instructed by **Akin Gump LLP**) for the **Appellants**
Sir James Eadie KC, Rory Phillips KC, Georgina Wolfe, Emmanuel Sheppard and Karl Laird (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 22 October 2025

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Approved Judgment

This judgment was handed down remotely at 10 am on 28 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. This appeal arises from a "final order" made by the Secretary of State on 19 December 2022 ("the Order") under section 26(3) of the National Security and Investment Act 2021 ("the NSIA"). As its long title indicates, the NSIA makes provision for the Secretary of State to make orders "in connection with national security risks arising from the acquisition of control over certain types of entities and assets". The Secretary of State has now been replaced by the Chancellor of the Duchy of Lancaster but nothing in this appeal turns on this change.

2. The Order required the First Appellant to divest itself of its 100% shareholding in the Interested Party, Upp Corporation Limited ("Upp"), a fibre broadband start-up company.

3. The Appellants are companies within the LetterOne Group, which was formed for the purpose of making long-term investments in other companies in the energy, technology, health and retail sectors. The Order was made because the Secretary of State found that the ultimate beneficial ownership of the LetterOne Group by certain Russian nationals created a risk to national security because of its vulnerability to leverage by the Russian State.

4. Pursuant to the Order, Upp was sold to Virgin Media O2 on 5 September 2023. The Appellants received the sale price but no further financial compensation for the sale.

5. In an order made on 4 December 2024, Farbey J (or "the Judge") dismissed the Appellants' claim for judicial review of the Order, for reasons given in a judgment handed down on 20 November 2024.

6. In the Administrative Court, the Order was challenged on several grounds. However, permission to appeal to this Court was granted by Andrews LJ (on 3 March 2025) on one ground only. The Appellants contend that they suffered financial loss because Upp was sold in circumstances where prospective buyers were aware that the sale had been compelled by the Government and so they could not obtain the fair market value for the sale of their property. They appeal on the ground that the Judge erred in holding that Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR") does not require the Appellants to be compensated for the deprivation of their possessions beyond what they obtained from the forced sale. A1P1 is one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998 ("HRA").

7. In the Administrative Court the Respondent relied on CLOSED material. The Judge reached her conclusions on the basis of the OPEN evidence but said this was supported by CLOSED material, which was dealt with in a CLOSED judgment. Neither party has asked us to consider the CLOSED judgment or any CLOSED material to determine this appeal and we make it clear that we have not done so.

The NSIA

8. The focus of this appeal is on whether the Appellants should have been awarded compensation because the forced sale of Upp required by the Order caused them financial loss but, in order to place that issue in context, it is necessary to outline the process for making a "final order" under the NSIA.

9. Section 1(1)(a) empowers the Secretary of State to give a "call-in notice" if "a trigger event has taken place in relation to a qualifying entity or qualifying asset, and the event has given rise to or may give rise to a risk to national security". "Trigger event" is defined in the Act and includes where a person gains control of a qualifying entity or asset (section 5(1)).

10. Once a call-in notice is given, the Secretary of State must then consider a called-in acquisition within an assessment period. Section 26(1) of the NSIA empowers the Secretary of State to make a "final order" before the end of the assessment period. Under section 26(3), the Secretary of State may make a final order if he is satisfied on the balance of probabilities that:

> "(i) a trigger event has taken place […] and
>
> (ii) a risk to national security has arisen from the trigger event […]"

11. Under section 26(3)(b), the Secretary of State must reasonably consider that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk. Section 26(5) sets out a range of steps that a final order may require, including "provision requiring a person to do, or not to do, particular things".

Financial assistance

12. Section 30 of the NSIA provides for the Secretary of State to give financial assistance following the making of a final order. "Financial assistance" means loans, guarantees or indemnities, or any other kind of financial assistance (actual or contingent) (section 30(2)). If the amount totals £100 million or more, the Secretary of State must as soon as practicable lay a report of the amount before the House of Commons (section 30(3)).

Retrospective application of the NSIA and the notification procedure

13. The NSIA received royal assent on 29 April 2021. For material purposes, its provisions came into force on 4 January 2022.

14. The NSIA allows the Secretary of State to make a call-in notice with regard to a trigger event that took place prior to the commencement of the NSIA, provided that (i) the

trigger event took place on or after 12 November 2020 (section 2(4)(a) NSIA); and (ii) the call-in notice is given within six months of the Act's commencement day or within six months of the Secretary of State finding out about the trigger event if he did not know about it on commencement day (section 2(4)(b) NSIA). The date of 12 November 2020 was selected because that is the date following that on which the Bill which became the NSIA was introduced in Parliament and so, in accordance with common constitutional practice (as in the field of tax law), the view was taken that fair notice had been given to the public of a forthcoming change in the law, although it is acknowledged that Parliament may in fact choose not to enact a Bill which it is invited to enact by the Government.

15. Sections 6 and 14 of the NSIA set out a mandatory notification procedure for certain transactions taking place after the NSIA came into force, described as "notifiable acquisitions". Section 18 of the NSIA provides for a voluntary notification procedure where a trigger event has taken place in relation to a qualifying entity or asset (section 18(2)). If the Secretary of State accepts the voluntary notice, he must either give a call-in notice or notify each relevant party that no further action will be taken under the Act in relation to the trigger event (section 18(8)).

Factual background

16. On 21 January 2021, the First Appellant acquired the entire share capital in a non-operating UK company called FibreMe for a purchase price of £100. FibreMe was renamed "Upp" on 1 June 2021. This was prior to the commencement of the NSIA but after the date when the Bill was introduced in Parliament.

17. On this appeal there is no dispute that:

(1) when the First Appellant purchased a 100% shareholding in Upp, a "trigger event" took place;

(2) a risk to national security arose from that trigger event.

18. The ownership structure of the LetterOne Group was summarised by the Judge at paras 36-37 of her judgment:

> "36. The root cause of the Secretary of State's decision to call in the First Claimant's acquisition of shares is the ultimate ownership of the Group. In the context of the public law issues raised by the present claim, it is not necessary to set out the Group structure in detail. It suffices to note that the Second Claimant indirectly owns the First Claimant. The Second Claimant is owned by LetterOne Investment Holdings S.A., which is one of the Group's two holding companies. Both the holding companies are registered in Luxembourg and they each share the same directors on their respective Boards.
>
> 37. At the time of the FibreMe acquisition, the shares in LetterOne Investment Holdings S.A. were held by bodies

> corporate, each of which was owned by a trust or foundation. The ultimate beneficial owners ('UBOs') of LetterOne Investment Holdings S.A. – and of all the companies beneath it in the Group, including the Claimants – were the founders of the Group. The founders were Mr Petr Aven, Mr Mikhail Fridman, Mr German Khan, Mr Andrei Kosogov and Mr Alexey Kuzmichev. It follows from the Group structure that the founders became the UBOs of FibreMe and then of Upp."

19. At paras 40-41, the Judge continued:

> "41. On 10 April 2024, the Court of Justice of the European Union annulled Mr Aven's and Mr Fridman's inclusion on the EU sanctions lists between February 2022 and March 2023. I was told that they remain sanctioned as a result of other sanctioning decisions by the EU and by the United Kingdom. For completeness, I note that Mr Aven and Mr Fridman have described the basis for sanctions as 'spurious and unfounded' ('Mikhail Fridman loses control of LetterOne after sanctions', Financial Times, 2 March 2022).
>
> 42. The Group's ownership of Upp is reflected at Board level. Upp has a seven-member Board comprising three Investor Directors nominated and appointed by the Group (formally, by the Second Claimant) and four others. The Chairman of the Upp Board is Dr Robert Easton who is also the Group's Technology Advisory Board Chairman. Dr Easton has had an eminent career in technology-driven investment, university administration and philanthropy. He is an Investor Director. The two other Investor Directors on the Upp Board work for the Group."

20. The Appellants emphasise that they are distinct from the UBOs. They are corporate entities with a board comprising European and American nationals.

Process of making the Order

21. On 9 December 2020, prior to the FibreMe acquisition, officials within the Department for Business, Energy and Industrial Strategy ("BEIS") met representatives of the Group to discuss the Group's proposals for the FibreMe acquisition. In that meeting, the Deputy Director of National Security and Investment in BEIS stated that she "could not imagine" the Secretary of State calling in the investment under the NSIA. For the purposes of this appeal, it is not in dispute that this did not give rise to any legitimate expectation that the Secretary of State would not use the powers given to him by the NSIA in relation to the Appellants.

22. On 21 January 2021, the First Appellant acquired FibreMe.

23. The NSIA came into force on 4 January 2022.

24. On 24 March 2022, the National Cyber Security Centre produced a technical comment paper describing the ways the influence of the remaining UBOs could present a risk to national security.

25. The Secretary of State issued a call-in notice on 5 May 2022.

26. The assessment of risk to national security under the NSIA is carried out and co-ordinated by the Investment Security Unit ("ISU"), located within BEIS at the time of the Order, and now within the Cabinet Office. Before a final order is made, three assessments are completed: (i) the "Investment Security Risk Assessment", setting out the ISU's assessment of the national security risks from the trigger event; (ii) the "Remedies Assessment", recommending actions to mitigate the risks; and (iii) the "Representations Assessment", summarising representations received from those affected.

27. Part of the Appellants' complaint arises from the fact that, because the Appellants purchased the company before the NSIA came into force, they were not able to rely on the voluntary notification procedure under the Act to check whether government action would be taken in respect of the acquisition. The Appellants submit that the purchase of FibreMe would not have been a mandatory notifiable acquisition but that they could have used the voluntary approval process under section 18 of the NSIA.

The terms of the Order

28. Under the Order made on 19 December 2022, the First Appellant was required to divest 100% of its shareholding in Upp, in accordance with the process and deadlines set out in the Order.

29. Under the Order, the First Appellant was required to prepare a plan for the disposal of Upp, to be approved by the Secretary of State. The Order also set out criteria that potential purchasers of Upp were required to meet. The Appellants were required to use all reasonable endeavours to ensure that the sale of Upp took place within nine months of approval of the disposal plan.

30. The Order did not make provision for any financial provision to the Appellants (beyond receiving the price for the sale of Upp).

The assessment of the national security risk

31. The national security risk, as set out in the final order, was as follows:

> "3. DECISION
>
> a) …

> b) The national security risks in this case relate to:
>
> i. the ownership of Upp Corporation Ltd. by the Ultimate Beneficial Owners of LetterOne Core lnvestments S.à.r.l (parent company of L1T FM Holdings UK Ltd.), the Ultimate Beneficial Owners' vulnerability to leverage by the Russian State, and Upp's full fibre broadband network rolling out in the East of England.
>
> …"

32. The Remedies Assessment said the following about the national security risk summary:

> "The ownership of Upp Corporation Ltd by the Ultimate Beneficial Owners of LetterOne Core Investments S.a.r.l (parent company of L1T FM Holdings UL Ltd) and the Ultimate Beneficial Owners' vulnerability to leverage by the Russian State means that certain national security risks could arise in relation to the roll out of Upp's full fibre broadband network. These risks include:
>
> 1. the risk of access to customer data which could be used for espionage and other activities which undermine national security;
>
> 2. the risk of disruption to. the operation of the broadband network;
>
> 3. the risk of influencing strategic decisions of the company in a way that undermines national security.
>
> While LetterOne's submissions to HMG have set out the steps taken to remove the four sanctioned Ultimate Beneficial Owners from positions of control or influence, HMG must also consider the future, when sanctions may be lifted. At that point, LetterOne would be free to return shares and control to those entities."

33. The recommendation in the Assessment was that the Secretary of State should impose what was called "Remedy A" (i.e. divestment), rather than Remedy B, (a series of alternative measures) because the ISU deemed it to be the most effective at mitigating or preventing the national security risks in this case. It was said that, despite "the high expected cost to the parties of this remedy", it was still judged to be necessary and proportionate to the risks in the case.

34. At para 112 of her judgment, the Judge said:

> "Mr Phillips [counsel for the Respondent] described the Claimants' analysis of the national security risk as reliant on an

> impermissibly narrow view. He is correct. The Secretary of State does not have to point to anyone within Upp or within the Group (including the UBOs) breaching company law or regulatory rules. The Secretary of State is entitled to consider the influence of malign actors exerting influence on the UBOs in any manner of ways, such as deceit, manipulation or other forms of pressure. The Claimants' framing of a chain of influence exerted through formal company structures amounts to a reframing of the national security risk set out in the Order and elsewhere. It fails to encapsulate the breadth of the risk on which the Secretary of State is entitled to rely. The Claimants have no real answer to this concern and their submissions on the national security risk are accordingly weakened."

Request for financial assistance and review of the Order

35. On 6 July 2023, the Secretary of State refused the Appellants' request for financial assistance under section 30 of the NSIA.

36. On 8 August 2023, the Secretary of State reviewed the Order under section 27(2) NSIA and concluded that no action was required.

Evidence for the Appellants

37. In evidence filed on behalf of the Appellants there was a description of the investment which had been made by them, their future plans for Upp, and the financial consequences for them of having to sell the company under compulsion and at a time which was much earlier than they would otherwise have sold it.

38. In his second witness statement, dated 30 April 2024, Benjamin Babcock said, at paras 11-12:

> "11. LetterOne expected Upp to grow significantly over the course of the proposed 8-year investment period. In the base case, Upp's total revenue was expected to grow from £0 in 2021, to £8m in 2023, to £93m in 2028. … Accordingly, LetterOne reasonably expected, based on its initial investment case analysis and Upp's business plan, to receive a significant return on its investment after executing its plan to hold Upp until at least 2028. Selling before the business had achieved its full potential would not have been advisable from a financial and value creation perspective.
>
> 12. By the date of the Sale, by which point Upp was less than 3 years into its business plan, LetterOne had invested £143.7m in Upp. …"

39. At paras 18-19, Mr Babcock said:

> "18. The only remaining viable offer was updated and resubmitted on 22 August 2023, namely the offer from Virgin Media O2.
>
> 19. It was clear, in light of the limited interest, in addition to the nature and level of offers being received for Upp, that LetterOne was in a disadvantageous position during the Sale process as a result of the effects of the Final Order. In particular, potential bidders' knowledge of the requirement imposed on LetterOne to sell Upp incentivised them to offer less than what they or LetterOne assessed to be the true economic value of Upp. Moreover, … in the context of the very limited competition to acquire Upp, an interested party could have been perversely incentivised by the Final Order to withdraw or lower its offer in the expectation that LetterOne would stop funding, potentially allowing it the opportunity to acquire Upp's assets for a lower price in an administration. This possibility added to the uncertainty that LetterOne faced as to whether it would receive any final offers at all for Upp, which in turn contributed to LetterOne being forced to accept an offer far below what it assessed to be Upp's true value."

The judgment of the Administrative Court

40. The hearing before the Judge was a "rolled-up" one, so that she was considering an application for permission to bring the claim for judicial review, followed immediately by that claim if permission were granted. She refused permission to advance some of the grounds. Where she granted permission, she proceeded to reject them on the substantive claim for judicial review.

41. In the Administrative Court the Appellants pleaded three grounds of judicial review, with Grounds 1 and 2 split into two parts. Only what was Ground 1B is now pursued on this appeal. Ground 2 concerned the reasonableness of the procedure used by the Respondent and Ground 3 alleged procedural unfairness. It is unnecessary to say more about them for present purposes but it is necessary to say a little about Ground 1A, to place Ground 1B in its context.

42. Ground 1A concerned proportionality, in which it was contended that Remedy A was disproportionate because Remedy B was sufficient to meet the identified risk. The Judge concluded that the Order was proportionate. Giving weight to the Respondent's view of the balance between national security and the Appellants' interests, she concluded that less intrusive measures would not have achieved the aim of protecting national security: para 212. Permission to advance this ground was refused. In assessing this ground, the Judge said that she had "a great deal of sympathy" with the Appellants' submission that the forced sale of the shares amounted to a *de facto* expropriation; however, she did not consider it necessary to decide whether the Order

amounted to a "deprivation" of property or a "control of use" because the central issue was whether the Order was proportionate: para 193.

43. Ground 1B was that the First Appellant's rights under A1P1 had been breached by the failure to ensure that the First Appellant received full compensation for the *de facto* expropriation of its property.

44. The Judge addressed the compensation issue at paras 213-230 of her judgment. Having summarised the legal framework, including the principles and the main authorities at paras 217-221, the Judge set out her discussion at paras 222-229. She noted the existence of the possibility of financial assistance being provided under section 30 of the Act and that it was not contended that section 30 is incompatible with A1P1. At para 224, the Judge said that she could discern no reason to conclude that it is incompatible insofar as it does not compel the award of full compensation. She also said:

> "I see no dearth of procedural mechanisms for the overall assessment of either the award of financial assistance or its amount."

45. The crucial part of the Judge's reasoning appears at para 225:

> "I have already elucidated the principles that the court should apply in determining whether the deprivation of a possession under A1P1 is proportionate. I do not repeat them. *Taking the decision for myself*, as the law requires me to do, I have reached the conclusion that a fair balance means that the interests of national security must prevail over the Claimants' financial interests. It is implausible to suppose that the loss of Upp destroyed the livelihood of anyone in the Group (in contradistinction to the facts of *Osmanyan*) or that the Group cannot reinvest the proceeds of sale into profitable investments. Nor can large-scale investors be surprised that they may lose money on investments that threaten national security: the risk of such losses is ultimately part of the economic landscape for those operating in the alt-net sector or other parts of national infrastructure. That geopolitical crises may affect the viability of investments in a way that cannot be recouped should not come as a surprise to sophisticated economic actors, such as the Claimants. It was not disproportionate – or otherwise in breach of A1P1 – for the financial burden of the sale of Upp to fall on the Claimants' shoulders and not on the public purse." (Emphasis added)

As we shall see, on this appeal, that passage was subjected to a close and critical analysis by Mr Tom Hickman KC on behalf of the Appellants.

46. At para 229, the Judge said the following:

> "As Mr Phillips submitted, the court is not confronted with a claim for judicial review under section 30. It would have been open to the Claimants to file a claim but they have decided not to do so. I was not referred to the decision letter refusing financial assistance and heard no submissions about it, albeit that a copy of the letter was included in the Supplementary Bundle. In the absence of any argument about the decision letter, it would not be appropriate for me to analyse its content or reach a view about its lawfulness."

The Appellants' submissions on this appeal

47. Permission to appeal was granted by Andrews LJ on the following ground:

> "In dismissing [the] Appellants' claim for compensation under section 8 of the Human Rights Act 1998 ("HRA") and for an order transferring the claim to the King's Bench Division for an assessment of quantum of loss, the Judge erred in holding that A1P1 did not require the Appellants to be fully compensated for the deprivation of their possessions and that the Final Order ought to have included a procedure for ensuring that such compensation was provided if the sale proceeds were not sufficient."

48. On behalf of the Appellants Mr Hickman makes the following main submissions:

(1) The Order constituted a "deprivation" of property within the meaning of A1P1, not merely a "control of use."

(2) In many cases of lawful expropriation, only "full compensation" will meet the requirement for payment to be "reasonably related to the value of the property".

(3) Where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property.

(4) There is a distinction between (a) cases where full compensation is not required under ECHR case law because public interest considerations underpinning a deprivation measure are inconsistent with the provision of full (or any) compensation; and (b) cases where the public interest in deprivation can be consistent with full compensation. The present case falls into the second category. Examples of the first category are where the purpose of a deprivation is to redistribute wealth or to deprive someone of property acquired through a criminal enterprise. In the present case, the national security risk was not related to any alleged wrongdoing on the part of the Appellants, and so for them to receive full compensation would not be inconsistent with the aim of protecting national security.

49. Mr Hickman criticises specific parts of the Judge's reasoning, in particular at para 225, which I have quoted in full above:

(1) The Judge's reasoning that "the interests of national security must prevail over the Claimants' financial interests" sets up a false dichotomy between compensation and national security. Moreover, as this appeal has been conducted entirely in OPEN, there is no national security evidence to justify reducing the compensation that would otherwise be due to the Appellants for the loss of their property.

(2) The Judge's reasoning that large-scale investors cannot "be surprised that they may lose money on investments that threaten national security" is ill-founded; there is no principle that investments subsequently regarded as contrary to national security are inherently vulnerable to deprivation without compensation. Investors cannot always know whether their investments may threaten national security; in the instant case the national security risk post-dated the acquisition in a way the Appellants could not have been expected to anticipate. Additionally, the retrospective operation of the NSIA, and the Appellants' inability to use the section 18 voluntary notification procedure, should have been taken into account by the Judge when assessing the proportionality of the interference.

(3) In assessing whether compensation was required, the Judge took into account that the loss of Upp cannot be supposed to have destroyed the Appellants' livelihoods and that the proceeds of sale could be reinvested. These factors are said to be irrelevant.

(4) The Judge placed weight on the "large-scale" and "sophisticated" nature of the investors when these factors are not relevant to the proportionality assessment.

(5) At para 228 of her judgment, the Judge erred in finding that the court was not acting as primary decision-maker in carrying out the proportionality assessment, holding that the Respondent should be afforded a wide margin of discretion "in relation to whether a party operating an entity in a way that is contrary to national security ought to be reimbursed…".

(6) Additionally, in the Final Order, the Secretary of State did not make any judgement as to whether compensation should be afforded, so there is no reasoning of the Secretary of State to be given weight.

50. Mr Hickman also submits that the Judge's statement at para 227 of her judgment, that the amount of compensation reflects what the market is willing to pay, not the value as assessed by the Appellants, was misplaced. First, the Respondent recognised in the Remedies Assessment that the Appellants were likely to suffer financially. Mr Hickman submits that there is Strasbourg authority for the proposition that A1P1 compensates losses even if these exceed the market value of the asset: I will consider the authorities below.

51. Additionally, he submits, the approach to compensation for forced divestment should be the same as for compensation for compulsory purchase of land or assets, where value would not be assessed by considering what the owner would obtain from a distressed sale. It is well established in business valuation that assessing the fair

market value requires the assumption of a hypothetical willing buyer and willing seller.

52. The Judge noted, at para 224 of her judgment, that there was "no dearth of procedural mechanisms for the overall assessment of either the award of financial assistance or its amount" but, Mr Hickman submits, the real question is whether such a procedure was used in this case, which it was not.

53. At para 229, Mr Hickman submits, the Judge erroneously placed weight on the fact that the First Appellant had unsuccessfully requested financial assistance under section 30 for ongoing funding of Upp until the conclusion of the sale process, and that the refusal of this request was not the subject of judicial review. Mr Hickman submits that that was an application about an unrelated matter and does not go to the heart of the financial consequences which the Appellants have suffered as the result of a forced sale.

54. Finally, Mr Hickman submits that there should be no concern about opening the floodgates to compensation claims if this appeal is allowed: the Appellants are in a unique situation because they were unable to avail themselves of pre-approval mechanisms under the NSIA.

The role of a first-instance court in assessing proportionality

55. In *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30; [2025] 3 WLR 346, at paras 120-125, the Supreme Court (Lord Sales and Lady Rose JJSC) has confirmed and clarified what the approach of a first-instance court must be when assessing proportionality. It is well-established that the court has to make its own assessment whether a measure is proportionate to a legitimate aim. The court's function is not the conventional one in public law of reviewing the process by which a public authority reached its decision. Nor is it to ask only whether the assessment by the public authority concerned was rational.

56. Nevertheless, the Supreme Court explained that the court does not thereby become the primary decision-maker. Furthermore, the court is required to attach special weight to the judgements and assessments of a primary decision-maker with special institutional competence, for example in the area of national security. The court must also respect the respective constitutional responsibilities of the court and the public authority concerned.

57. Although the Judge in the present case did not have the benefit of that "recapitulation" of the fundamental principles, she did apply them correctly. In particular, the Judge was well aware that she had to form her own assessment of proportionality: she expressly said so at para 225 of her judgment. She was not wrong, as Mr Hickman contends, to say that the court is not the primary decision-maker.

The role of this Court on the issue of proportionality

58. In *Shvidler* the Supreme Court has also given guidance on the proper approach which should be taken by an appellate court when considering an assessment of proportionality under the ECHR: see paras 144-165. Since this is, so far as I am aware, the first case under the NSIA to reach this Court, and since the issues which arise in the present appeal have not been considered by this Court previously, it seems to me that, consistent with the guidance given by the Supreme Court, in particular at para 148, this Court should make the assessment of proportionality for itself rather than confine itself to considering whether the Judge was "wrong" in her assessment. Before this Court Sir James Eadie KC did not contend otherwise on behalf of the Respondent.

A1P1: the main principles

59. A1P1 provides as follows:

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

60. The principles to be derived from the case law of the European Court of Human Rights on A1P1 were summarised as follows by Lord Reed JSC in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] AC 868, at paras 107-108:

> "107. A1P1 in substance guarantees the right of property. In its judgment in *Sporrong and Lönnroth* v Sweden (1982) 5 EHRR 35, para 61, the European Court of Human Rights analysed A1P1 as comprising three distinct rules. The first is a rule of a general nature, set out in the first sentence of the first paragraph, which enunciates the principle of the peaceful enjoyment of property ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions'). The second is the rule contained in the second sentence of the first paragraph, which covers deprivation of possessions and subjects it to certain conditions ('No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'). The third rule,

> stated in the second paragraph, is an explicit recognition that states are entitled, amongst other things, to control the use of property in accordance with the general interest. The Strasbourg court also observed in its *Sporrong and Lönnroth* judgment that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable. Those observations were repeated by the court in its judgment in *James v United Kingdom* (1986) 8 EHRR 123, para 37, where it added that the three rules are not distinct in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property, and should therefore be construed in the light of the general principle enunciated in the first rule. These statements have been reiterated many times in the subsequent case law of the court.
>
> 108. Assessment of whether there has been a violation of A1P1 thus involves consideration of whether a 'possession' exists, whether there has been an interference with the possession, and, if so, the nature of the interference: whether, in particular, it constitutes a deprivation of the possession falling within the second rule, or a control on use falling within the third rule, or falls within the more general principle enunciated in the first rule. Given that the second and third rules are only particular instances of interference with the right guaranteed by the first rule, however, the importance of classification should not be exaggerated. Although, where an interference is categorised as falling under the second or third rule, the Strasbourg court will usually consider the question of justification under reference to the language of those specific provisions of A1P1, the test is in substance the same, however the interference has been classified. If an interference has been established, it is then necessary to consider whether it constitutes a violation. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focuses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: *Sporrong and Lönnroth*, para 69. In that regard, the Strasbourg court accepts that a margin of appreciation must be left to the national authorities."

61. A similar summary can be found in *R (Mott) v Environment Agency* [2018] UKSC 10; [2018] 1 WLR 1022, at para 18 (Lord Carnwath JSC). At paras 19-20, Lord Carnwath referred to the judgment of Neuberger LJ in *R (Trailer and Marine (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580; [2005] 1 WLR 1267. Neuberger LJ had reviewed the authorities dealing with

the distinction between the taking or deprivation of property and mere control of use. Lord Carnwath said:

> "As he noted, the former normally requires payment of compensation to avoid a breach of the article; the latter does not, even if the control results in serious financial loss. He noted that the division drawn by the Strasbourg jurisprudence is not clear-cut."

62. There can be situations in which what appears, on one view, to be a deprivation of property is nevertheless regarded by the European Court of Human Rights, in its proper context, to constitute a control of use of property. An example is provided by *AGOSI v United Kingdom* (1987) 9 EHRR 1, which concerned forfeiture of Krügerrands, in other words coins, which had been imported in breach of a criminal law prohibiting such importation. At para 51, the Court said that the prohibition clearly constituted a control of the use of property. The seizure and forfeiture of the coins were measures taken for the enforcement of that prohibition. The Court acknowledged that the forfeiture of the coins did involve a deprivation of property but said that "in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins …"

63. In *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123, at para 56 Lord Bingham CJ (giving the judgment of this Court) said that the court must look behind the appearances and investigate the realities of the situation complained of. In that case the Court was doubtful whether it was one in which the effect of the order was to deprive the claimants of their possessions: there was no transfer of ownership from them to the State or any other party. The Court also noted that, in a deprivation case, the availability of compensation is a relevant consideration. It cited the judgment of the European Court in *Holy Monasteries v Greece* (1995) 20 EHRR 1, at para 71:

> "… The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances."

64. *James v United Kingdom* (1986) 8 EHRR 123 concerned the compatibility with A1P1 of the Leasehold Reform Act 1967, which involved the compulsory transfer of long leases to their tenants and the calculation of the price received for that transfer.

65. At para 38, the Court noted that it was not disputed in that case that the applicants had been deprived of their possessions by the legislation. This is despite the fact that title was not vested in the State; rather, a transfer was required by the legislation from landlords to tenants.

66. At para 54, the Court said the following about the standard of compensation:

> "… The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of *an amount reasonably related to its value* would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. *Article 1 does not, however, guarantee a right to full compensation in all circumstances*. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain." (Emphasis added)

67. In *R (SRM Global Master Fund LP) v Treasury Commissioners* [2009] EWCA Civ 788; [2010] BCC 558, this Court considered the basis on which compensation should be payable following the nationalisation of Northern Rock plc. At paras 43-54, Laws LJ considered the three principles established by the European authorities on this subject: (1) the need for a fair balance to be struck between public interest and private right; (2) the principle of proportionality; and (3) the doctrine of the margin of appreciation.

68. At para 48, Laws LJ said:

> "But the requirement of proportionality by no means implies that the erstwhile owner of property taken by the State must always be compensated at full value if a violation of A1P1 is to be avoided. Such a rule would frustrate, not fulfil, the search for the fair balance. In *Holy Monasteries v Greece* (A/301-A) (1995) 20 E.H.R.R. 1 the court said this:
>
> > '71. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under [A1P1] only in exceptional circumstances. [A1P1] does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see the *Lithgow and Others v. the United Kingdom* judgment of 8 July 1986, Series A no. 102, pp. 50-51, para. 121).'"

69. At paras 55-56, Laws LJ summarised the relationship between the three principles he had identified in the authorities as follows:

> "55. The importance of these authorities lies in what they tell us about the constellation (as I have put it) between the three first rank principles. I would express it in this way. The overarching principle is the first, the need to strike a balance between public interest and private right. The other two, proportionality and the margin of appreciation, provide the means by which the balance is struck. In the context of A1P1 the application of proportionality to a confiscation will ordinarily mean payment of an amount reasonably related to the value of the property taken, so as not to impose a disproportionate burden on the person deprived. However the relation between proportionality and the first principle is qualified by the third, the margin of appreciation. Its effect is that that relation is not rigid or constant. It must acknowledge the claims of government policy on democratic grounds, albeit within the frame of the Convention rights. As no doubt one might expect, the balance between public interest and private right will be struck, now more in favour of one, now more in favour of the other: depending in each case on the nature of the interest and the right.
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> 56. For the purpose of A1P1 this process takes concrete form as follows. The paradigm case of a reasonable relationship between compensation and the property's value arises, no doubt, where full market value is paid. In that case the relationship between the two is one of identity. That or something not far off is likely to apply in what may be called a 'micro-economic' setting, where for example a single property is taken to achieve a specific and limited local objective. In such a case proportionality is likely to require market value or something close to it, and the margin of appreciation may offer little or no scope to justify the deprivation of property for less. But there will be other cases in which the objective of the deprivation is much broader: perhaps a matter of high politics. In such instances the policy aim of the measure in question may be diminished or undermined or even contradicted by a requirement of full market value. The measure's intention may be to re-distribute wealth, or to achieve a necessary social reform, goals which are or may be perceived to be inconsistent with full compensation payable to the previous owner. In these cases, the margin of appreciation allows a flexible approach to the right protected by A1P1 which may give place to those aspects of the policy which override the case for payment of full value."

70. Mr Hickman places particular reliance on the judgment of the European Court in *Vistiņš v Latvia* (2014) 58 EHRR 4. That case concerned the Free Commercial Port of Riga Act 1996, which provided that the privately owned land within the port was subject to a servitude for the benefit of the public corporation responsible for managing the port

and that the corporation had to pay annual compensation equivalent to a percentage of the value of that land. At paras 110-111, the Court said:

> "110. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. The Court has already held that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference. In many cases of lawful expropriation, such as a distinct taking of land for road construction or other 'public interest' purposes, only full compensation may be regarded as reasonably related to the value of the property. On this point, the Court cannot equate a lawful expropriation, complying with domestic law requirements, with a constructive expropriation that seeks to confirm a factual situation arising from unlawful acts committed by the authorities.
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> 111. Moreover, the Court reiterates that, where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation. As to the amount of the compensation, it must normally be calculated based on the value of the property at the date on which ownership thereof was lost. Any other approach could open the door to a degree of uncertainty or even arbitrariness."

71. I would also note that, at para 118, the Court said:

> "The Court takes the view that the Latvian authorities were justified in deciding not to compensate the applicants for the full market value of the expropriated property and that much lower amounts could suffice to fulfil the requirements of art.1 of Protocol No.1 for three reasons: first, because the actual market value of the land could not objectively be determined, in particular because of the exclusive right of purchase introduced for the benefit of the state and local authorities by the Ports Act; secondly, because the land at issue was subject to a statutory servitude for the benefit of the port; and lastly, because the applicants had not invested in the development of their land and had not paid any land tax, the tax reassessment procedure subsequently initiated against them by Riga City Council having been unsuccessful."

72. In my view, there is nothing in that judgment that is inconsistent with the general principles I have already set out above, by reference to earlier authority.

73. The high point of Mr Hickman's submissions was his reliance on the judgment of the European Court in *Osmanyan and Amiraghyan v Armenia* (Application No. 71306/11, judgment of 11 October 2018) but, in my view, that was a case decided on its own particular facts.

74. In that case the applicants were a family who jointly owned a plot of arable land measuring 0.383 hectares, from which they made their living from agriculture. In 2001 a private company was granted a mining licence for the exploitation of a copper-molybdenum deposit known as "Teghout" for a period of 25 years. In 2007 the Government adopted a decree approving the expropriation zones of territories. The plot of land belonging to the applicants was listed among the units of land falling within the expropriation zones. In 2008 an evaluation report concluded that the "cadastral" value of that plot was approximately EUR 545 and the market value was estimated at approximately EUR 409. The applicants were offered a price of that latter figure plus an additional 15% as required by law, making a final offer of approximately EUR 470.

75. At para 49, the Court noted that it was not in dispute that there had been a "deprivation of possessions" within the meaning of A1P1. This is despite the fact that the State was not itself acquiring title to the applicants' land but it was being transferred to a third party, a private company. Before us Sir James Eadie did not submit that any material distinction is to be drawn in the present case depending on whether title is vested in the State itself or the State compulsorily requires a private entity to divest itself of its shareholding.

76. In *Osmanyan and Amiraghyan*, at paras 69-71, the Court said the following in relation to compensation in that case:

> "69. Without prejudice to the relevant provisions of the Law and the margin of appreciation of the State in these matters, the Court considers that there may be situations where compensation representing the market price of the real estate in question even with the addition of the statutory surplus, would not constitute adequate compensation for deprivation of property. In the Court's opinion, such a situation may arise in particular if the property the person was deprived of constituted his main, if not only source of income and the offered compensation did not reflect that loss (see *Lallement v. France*, no. 46044/99, § 18, 11 April 2002).
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> 70. In the present case the applicants submitted that as a family unit they had depended economically on the land in question. This argument has not been refuted by the respondent Government (see paragraphs 47-48 above). It is to be noted that this particular aspect, namely that in consequence of the expropriation the applicants had lost their main source of income, was not taken into account by the domestic courts in their decisions on the amount of the compensation due. The courts decided that, despite the circumstances, the applicants

> should be provided with compensation which was determined in relation to the prices of real estate situated in the area subject to expropriation. They did not address the issue whether the compensation granted would cover the applicants' actual loss involved in *deprivation of means of subsistence* or was at least sufficient for them to acquire equivalent land within the area in which they lived.
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> 71. In view of the foregoing, the Court finds that *the applicants had to bear an excessive individual burden*. Accordingly, the impugned expropriation was in violation of Article 1 of Protocol No. 1 to the Convention." (Emphasis added)

77. In my view, that decision is readily understandable on its particular facts, since the applicants were deprived not only of a piece of land but of their means of subsistence and so had to bear an excessive individual burden. Indeed, the case shows that there may be circumstances in which even the payment of the market value of property, together with an enhanced payment on top, may not be sufficient to satisfy the principle of proportionality. But that decision does not assist the Appellants on the facts of the present case.

78. As is well-known, in this jurisdiction, the courts have adopted a four-stage approach to assessing proportionality. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, at para 74, Lord Reed JSC explained that this involves asking the following questions:

> "(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."

79. Before this Court Mr Hickman placed some reliance on the judgment of Lord Mance JSC in *In Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, in particular at para 51, in relation to where in that four-stage test of proportionality it is appropriate to consider whether a measure is "manifestly without reasonable justification".

80. I accept the submission of Sir James Eadie that the authorities have moved on since that judgment. The effect of more recent judgments of the Supreme Court was summarised by Newey LJ in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856, at paras 100-115, in particular at para 104, where the *Asbestos Diseases (Wales) Bill* case is mentioned.

81. At para 114, Newey LJ summarised the principles as follows:

> "Having regard, however, to *SC*, it seems to me that the correct question to ask is what margin of discretion (or 'judgment') should be afforded given the nature of the legislation, not as such whether the MWRF (manifestly without reasonable foundation) test is applicable as regards the fourth *Bank Mellat* stage. What matters is 'whether a wide margin of judgment is appropriate in the light of the circumstances of the case'. Where a particularly wide margin is appropriate (because perhaps a measure relates to economic and social policy, national security or penal policy, or raises sensitive moral or ethical issues), 'the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation'. In cases of that kind, indeed, there may be 'no legal standards by which a court can decide where the balance should be struck' and democratically elected institutions may be 'in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies'."

Analysis

82. This appeal concerns only what was called Ground 1B in the High Court and relates to the issue of compensation under A1P1. As the pleadings for the Appellant, as confirmed by Mr Hickman at the hearing before us, made clear, if this ground had succeeded, or were to succeed before this Court, the only remedy sought by the Appellant is a declaration that in principle it is entitled to compensation under A1P1. This would have no impact on the validity of the Order, since the other grounds for judicial review challenging that order have failed and there has been no appeal against those aspects of the decision below. Further, it is common ground before us that, if this ground succeeds, the appropriate course would be for this Court to remit the case to the High Court, both so that any issue of the appropriate principle as to compensation can be decided and the quantum of compensation. The parties suggested that the appropriate forum would be the King's Bench Division.

83. I accept that there is some force in some of the criticisms made by Mr Hickman of the Judge's reasoning on this issue, in particular at para 225 of her judgment. Nevertheless, as I have said, the issue for this Court is whether the principle of proportionality is satisfied in the present case, and the focus cannot be on the Judge's reasoning as such. I would accept the essence of the submissions made by Sir James Eadie on behalf of the Respondent.

84. First, it does not seem to me to be determinative whether the measure in this case is characterised as a deprivation of property or a control of use of it. I see force in Sir James Eadie's submission that, when viewed as a whole rather than taking particular elements of the process in isolation, this scheme is properly to be viewed as a control of use case. Essentially the scheme is one for regulating who can be the shareholders of a company where there is a risk to national security in the assessment of the

Respondent. This is unlike, for example, classic cases of nationalisation of a company or an entire industry, or cases in which there has been redistribution of property within society, for example as between landlords and tenants. The requirement to divest oneself of an interest in a company is not an end in itself but the means by which the Government seeks to protect national security by controlling who can be the ultimate beneficial owner of it. Nevertheless, I am prepared to proceed on the footing that the Order in the present case did amount to a deprivation of property. The crucial question is then whether that measure satisfies the principle of proportionality.

85. The governing principle in the European case law is that there has to be a "reasonable relationship of proportionality" between the value of the property and the amount given in compensation. Sometimes the Court refers to "full compensation" but, as the above citations make clear, this is not required in every context. In any event, what amounts to full compensation must depend on the context. In the present context, it became clear during the hearing before us that what the Appellant really seeks is the fair market value of the shares which it had to divest by reason of the Order, not (for example) reimbursement of the money it had invested in the past or loss of future profits.

86. In my judgment, that was not required in the present context. As Sir James Eadie submits, the Appellants were able to conduct a sale in the open market and to retain the proceeds of sale. They were able to choose who the buyer should be so long as that person did not also pose a risk to national security. True it is that the Appellants were forced to sell and to do so at a time that was not of their choosing but, in the circumstances, I do not think that leads to the conclusion that there was not a reasonable relationship of proportionality.

87. There is a wide margin of judgement which must be afforded to the legislature and the executive in this context. This applies as much to the question of compensation as it does to the underlying question of whether property should be regulated or taken in the first place (here on grounds of national security). I accept Sir James Eadie's submission that this margin is to be afforded to Parliament and not only to the executive. This is because Parliament has created a scheme in primary legislation and has chosen not to include in it a scheme for compensation as it could have done and did do in other contexts, for example when the Leasehold Reform Act 1967 was enacted and when aircraft and shipbuilding companies were nationalised in 1977. In this context, although the fact that consideration has been given to the issue in Parliament may be a reason for the Court to give weight to their assessment of proportionality, the absence of such consideration is not to be regarded as counting against them: see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, at para 182 (Lord Reed PSC). The question ultimately is one for the Court: is the measure in question proportionate?

88. It is also important to keep in mind that what is in issue is the risk posed to national security by the ultimate beneficial owners of a company, which may be at several steps removed from the entity concerned. In the present case those UBOs were individuals who had been the subject of Russian sanctions, including in the UK. There is no question, as Mr Hickman urged upon the Court, of impugning the character of the Appellants as such but it is important to keep in mind that the ultimate risk to the security of this country comes from the UBOs.

89. In this context Sir James Eadie emphasised before this Court what had been said by the Judge at para 206, in a part of her judgment which is not under appeal to this Court:

> "Nor am I persuaded that a remedy founded on changes to corporate structure and other restrictions to which the Claimants showed willingness to submit would have the benign effects for which the Claimants contend. On the contrary, I accept Mr Phillips' and Ms Wolfe's submissions that the Claimants consistently accepted or implied that the Group and its UBOs had – and should retain – influence and control over Upp. In the first set of representations, the First Claimant accepted that the Group had some control over Upp, albeit denying that the Group exerted a high level of control. The first set of representations demonstrated that Mr Kosogov had not been placed under the same measures of structural and legal separation from the Group as the sanctioned UBOs (Mr Fridman and Mr Aven). In the meeting with the ISU on 22 November 2022, the Group indicated that it did not accept the ISU's proposal that investor consent (in practical terms, their own consent) should no longer be required for all high value contracts, describing the elimination of investor consent as 'extremely difficult.' Dr Easton made clear that the Group wanted to retain the ability to influence the Upp Board through the Investor Directors."

90. Mr Hickman emphasised before us that there is no suggestion that the Appellant companies have done anything wrong or that they themselves pose a risk to national security. He is entitled to emphasise that the law recognises a distinction between the corporate entities and the ultimate beneficial owners. Nevertheless, in this context it is clearly the risk posed to national security from those ultimate beneficial owners which has prompted the Respondent to make the order. In this context, particularly having regard to the importance of national security, courts must be alive to the realities of the situation irrespective of the legal position that a corporate entity is distinct from its shareholders or others.

91. Furthermore, the presence in the statutory scheme of section 30 of the NSIA is important to the overall assessment of proportionality. That is a provision which would allow mitigation measures to be taken, for example by way of financial assistance (if hardship was shown or something of that sort).

92. One also needs to keep in mind that the process for assessing the "fair market value" of a company, as distinct from what it can actually be sold for albeit in circumstances of a forced sale, is likely to be a complicated and lengthy process. This is evident from the disposal plan which we were shown in the present case. This would have the potential to impede the process by which the Respondent is able to achieve the important public interest purposes which lie behind the scheme of the NSIA.

93. Finally, it is important to note that there is no Strasbourg authority directly on point. Sir James Eadie submits that none "comes close" to requiring that a State must compensate against any diminution in value flowing from a forced sale, or for past

investment and/or possible future profits. This is important, because it is well-established that the courts of this country should follow the clear and constant jurisprudence of the European Court of Human Rights, neither more nor less. As Lord Reed PSC explained in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559, at para 63, although it is open to domestic courts to develop the law in relation to Convention rights beyond the limits of Strasbourg case law, on the basis of the principles established in that law, they should not go further than they can be confident that the European Court would do.

Conclusion

94. For the reasons I have given, I would dismiss this appeal.

Lord Justice Males:

95. I agree.

Lord Justice Popplewell:

96. I also agree.