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Case No: CO/3340/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2020

Before :

THE HON MR JUSTICE KERR

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Between:

THE QUEEN on the application of

(1) CERTAIN UNDERWRITERS AT LLOYDS LONDON **Claimants**
(2) ALLIANZ CORNHILL INSURANCE PLC
(3) AVIATION AND GENERAL INSURANCE COMPANY LTD
(4) ENGLISH &AMERICAN INSURANCE COMPANY LTD
(5) MARKEL INSURANCE COMPANY LTD
(6) MINSTER INSURANCE COMPANY LTD
(7) MMO/NEW YORK MARINE AND GENERAL
(8) NIPPON INSURANCE COMPANY OF EUROPE LTD
(9) RIVERSTONE INSURANCE (UK) LTD
(10) SOVEREIGN MARINE & GENERAL INSURANCE COMPANY LTD
(11) SR INTERNATIONAL BUSINESS INSURANCE COMPANY LTD
(12) TOWER INSURANCE LTD
(13) LA REUNION AERIENNE

– and –

HM TREASURY

Defendant

– and –

(1) SYRIAN ARAB REPUBLIC **Interested Parties**
(2) SYRIAN AIR FORCE INTELLIGENCE
(3) GENERAL MUHAMMAD AL KHULI, CHIEF,
SYRIAN AIR FORCE INTELLIGENCE
(4) BASHAR AL-ASSAD
(5) MAJOR GENERAL JAMIL HASSAN,
HEAD OF SYRIAN AIR FORCE INTELLIGENCE

(6) GENERAL AMER AL-AACHI, HEAD OF THE INTELLIGENCE BRANCH OF THE AIR FORCE INTELLIGENCE SERVICE

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Shaheed Fatima QC and Naina Patel (instructed by **Clyde & Co LLP**) for the **Claimant**
Richard O'Brien (instructed by **Government Legal Department**) for the **Defendant**
The Interested Parties did not appear and were not represented.

Hearing date: 13th May 2020
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Approved Judgment

Mr Justice Kerr:

Summary

1. The claimants, a consortium of reinsurers, want information from the UK government which the latter says it is powerless to provide. The claimants are trying to trace funds, owned by the Syrian state and its agents, which are frozen in accordance with EU law sanctions against Syria. If they can discover where the funds are, they intend to ask the UK government to authorise release of some of the money to satisfy a judgment in their favour.

2. In 1985, an Egyptian aircraft was hijacked and almost completely destroyed in a terrorist attack causing many deaths. The claimants are reinsurers of the aircraft. They obtained a judgment in the USA in 2011 for about US $51.5 million against the Syrian state and its agents found responsible for the attack on the aircraft. In 2018, the High Court in England ordered that the US judgment be enforceable in this country.

3. By then, Syria and certain of its agents were subject to sanctions imposed under EU law. The relevant sanctions instrument is Consolidated Regulation (EU) No 36/2012 (**the Regulation**). This claim is brought against Her Majesty's Treasury (**HMT**). The claimants believe HMT knows the location of Syrian owned funds frozen under article 14 of the Regulation. HMT says the law prevents it from revealing any such information to the claimants.

4. The UK government may, under article 18(1)(a) and (b), release frozen funds to satisfy a judgment or arbitral award (at least where given *in rem* and, perhaps, also *in personam*). Under article 29(1), HMT receives information about the location and details of frozen funds from third parties such as banks holding frozen assets, which "must supply immediately any information which would facilitate compliance with this Regulation" to the competent authority for the EU member state concerned.

5. However, by article 29(2) "[a]ny information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received". HMT says those purposes must be to "facilitate compliance" with the Regulation, but that does not include facilitating a request for authorisation under article 18(1)(a) and (b) to release funds for the benefit of a judgment creditor.

6. HMT therefore says it would be in breach of article 29(2) if it revealed to the claimants the whereabouts of the frozen Syrian owned funds. The claimants differ from this interpretation. They say that to "facilitate compliance" with the Regulation includes facilitating an authorisation request under article 18(1) to release funds for a judgment creditor. Although there are three grounds for this claim, its outcome turns only on which interpretation is correct.

The Facts

7. Much of the detailed background facts may be omitted as the detail is not needed to decide the sole point of construction before me. In 1985, the attack on the Egypt Air

flight 648 took place. The claimants (or in some cases their predecessors) incurred liability to insured parties as a result.

8. In April 2006 and March 2008, the claimants brought two sets of proceedings against (among others) the first, second and third interested parties (**IPs**). The IPs are the Syrian state and certain of its agents. The Syrian authorities did not respond to or defend the claim.

9. The US District Court for the District of Columbia issued a default judgment (in the first action) in September 2011 for just under $24 million, in favour of the claimants. In October 2011, the Syrian defendants entered an appearance and attempted to appeal, but the appeal foundered and was withdrawn in 2012.

10. The defendants continued to resist the judgment on the basis of a deficiency in service. In April 2012, the US District Court increased the award, correcting a calculation error, to just over $51.5 million including interest. In December 2013, the District Court ordered that the judgment was final and enforceable against the first to third IPs within the USA (**the US judgment**).

11. The claimants then began common law enforcement proceedings in the High Court, believing that assets against which the US judgment could be enforced were frozen in the UK. After protracted procedural difficulties relating to service, due to the absence of diplomatic relations between the UK and Syria, an order dispensing with service was made.

12. From December 2017 onwards, the claimants made attempts to obtain information about assets of the IPs in the UK, against which the US judgment could be enforced. The information sought was, in the case of each, whether they had any bank accounts, if so in what name, with which bank and branch, the account number, the last known balance, information regarding historic use of funds in the account and the sources of the information sought (collectively, **the information**).

13. The claimants made a request under the Freedom of Information Act 2000 (**FOIA**) on 21 December 2017. HMT declined, saying the information was exempt from disclosure because to disclose it would contravene an EU obligation, namely article 29(2) of the Regulation: providing the information would not facilitate compliance with the asset freeze or prevent funds or economic resources being available for the benefit of designated persons.

14. On 1 March 2018, Mr Andrew Henshaw QC (as he then was), sitting as a judge of the High Court, made an order against the first to third IPs, recognising the US judgment in the UK and permitting enforcement of the judgment sum together with interest and costs (**the UK judgment**).

15. The claimants complained to the Information Commissioner's Office (**ICO**) of HMT's refusal to provide the information. On 14 February 2019, the ICO dismissed the complaint, stating that disclosing the information would contravene article 29(2) because it would place the information in the public domain and there was no guarantee that it would be used only to facilitate compliance with the Regulation by enabling an authorisation request to be made by the claimants under article 18(1).

16. The claimants accepted that analysis and did not appeal against the ICO's decision. Instead, they offered a guarantee that the information would not enter the public domain and would be used only for the purposes of making an authorisation request under article 18(1). They made a further request for the information in a letter of 7 May 2019, not under the FOIA, and subject to undertakings of confidentiality including that the information disclosed would only be known, in confidence, by members of a "confidentiality ring".

17. HMT responded by letter of 23 May 2019 in brief terms, repeating its reasoning based on the interpretation of article 29 of the Regulation it continues to support: that article 29 did not permit disclosure of the information because that would not facilitate compliance with the Regulation:

> "as doing so would not facilitate the asset freeze or prevent funds or economic resources being made available to or for the benefit of designated persons".

18. The letter concluded by saying that HMT was therefore precluded from disclosing the information into a confidentiality ring. Evidently, HMT did not regard the offer of a confidentiality ring as sufficient to bring the disclosure sought within the reach of article 29. There was no mention in the letter of article 18 and the power to authorise release of funds to satisfy a judgment or arbitral award.

19. The claimants also approached a bank, HSBC UK Bank plc (**HSBC**) in November 2019. The claimants had reason to believe from private investigations back in 2009 that the fourth IP, the Syrian head of state, then had an account with HSBC in the UK with a balance then exceeding the amount of the judgment debt.

20. The claimant asked HSBC to consent to an application for disclosure of, substantially, the information in so far as it related to the first to fourth IPs, as it considered this could reveal the location of assets in the UK against which the UK judgment could be enforced. HSBC responded that it would neither consent to nor oppose such an application but that it had carried out a search, the exact results of which were not clear to the claimants.

21. In December 2019 the claimants applied against HSBC under the *Norwich Pharmacal* jurisdiction and under section 7 of the Bankers Books Evidence Act 1879 for an order that HSBC disclose the information sought. On 13 March 2020, Butcher J made the order sought. However, in April 2020 HSBC indicated that it had drawn a blank and had found none of the entities in question on its system.

22. The claimants know of no other bank in the UK which, they have reason to believe, holds relevant assets of the IPs. They would have to obtain a similar order against up to all of the 300 or so banks in the UK, if that could be achieved. They comment that this would be like looking for a needle in a haystack.

23. The claimants believe HMT's interpretation of the Regulation is wrong and so bring this claim. There are three grounds which I paraphrase as follows: failure to take proper account of a relevant consideration, namely article 18 of the Regulation; erring in law or fettering discretion in construing the Regulation, by interpreting it too narrowly; and disregarding another relevant consideration: that the confidentiality

ring undertakings would ensure that the information was only used for a purpose falling within the Regulation.

24. Of these three grounds, only the second matters. If HMT misconstrued the Regulation as the claimants assert, the first and third grounds could succeed; but those grounds do not help the claimants unless HMT misconstrued the Regulation as claimed under the second ground. In relation to the first ground, HMT produced evidence that in fact article 18 was considered; not surprisingly, since the claimants pointedly referred to it in correspondence.

25. There were some difficulties with service of the judicial review claim on the IPs. The claimants identified the IPs as such and anticipated similar difficulties with service of the judicial review proceedings on them, as had been experienced in the private law proceedings leading to the US judgment and the UK judgment. The issue was resolved by an order of Lang J made on 7 November 2019, dispensing with service of the claim on the IPs.

Law and Guidance

26. Although the parties unearthed much contextual and interpretative legal material for which I am grateful, those materials generated no dispute of law and the point of interpretation at the heart of this case is quite short and simple. The parties agree that as the instrument at issue is an EU law one, a purposive interpretation is to be adopted. The question is which of the rival interpretations is to be preferred. I will set out only part of the materials drawn to my attention.

27. The Regulation consolidates earlier Council measures; see Council Decision 2011/273/CFSP of 9 May 2011; Council Regulation (EU) No. 442/2011 also of 9 May 2011; Council Decision 2011/782/CFSP of 1 December 2011 and Council Regulation (EU) No. 36/2012 of 19 January 2012. The most recent consolidated version of the Regulation is dated 30 May 2020 but for the purposes of this case is not materially different to prior versions.

28. The Regulation contains sanctions imposed by the EU on Syria and against persons responsible for the violent repressions against the civilian population in Syria. In particular, it provided for an arms embargo, a ban on internal repression equipment, restrictions on admission to the European Union, and the freezing of funds and economic resources of certain persons and entities responsible for the violent repression in Syria.

29. The Regulation, by its full title, "concern[s] restrictive measures in view of the situation in Syria …. ." It contains several chapters. These address definitions (article 1); export and import restrictions (articles 2-11); restrictions on participation in infrastructure projects (article 12); restrictions on financing certain enterprises (article 13); freezing of funds and economic resources (articles 14-22); restrictions on financial services (articles 23-26) and general and final provisions (articles 27-37).

30. There are three provisions at the heart of the case. In Chapter V, headed *Freezing of Funds and Economic Resources*, article 14 provides:

> "1. All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex II and IIa shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annex II and IIa.
>
> 3. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1 and 2 shall be prohibited."

31. Article 18, which is within the same Chapter, provides:

> "By way of derogation from Article 14, the competent authorities in the Member States as listed in Annex III may authorise the release of certain frozen funds or economic resources, if the following conditions are met:
>
> (a) the funds or economic resources in question are the subject of a judicial, administrative or arbitral lien established prior to the date on which the person, entity or body referred to in Article 14 was included in Annex II or IIa, or of a judicial, administrative or arbitral judgment rendered prior to or after that date;
>
> (b) the funds or economic resources in question will be used exclusively to satisfy claims secured by such a lien or recognised as valid in such a judgment, within the limits set by applicable laws and regulations governing the rights of persons having such claims;
>
> (c) the lien or judgment is not for the benefit of a person, entity or body listed in Annex II or IIa; and
>
> (d) recognising the lien or judgment is not contrary to public policy in the Member State concerned.
>
> The relevant Member State shall inform the other Member States and the Commission of any authorisation granted under this Article."

32. And article 29 provides, within Chapter VII, headed *General and Final Provisions*:

> "1. Without prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, entities and bodies shall:
>
> (a) supply immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen in accordance with Article 14, to the competent authority in the Member State where they are resident or located, as indicated on the websites listed in Annex III, and shall transmit such information, either directly or through the Member States, to the Commission; and
>
> (b) cooperate with that competent authority in any verification of this information.

> 2. Any information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received."

33. As to the correct approach to interpretation of these provisions, it was common ground that "a broad purposive approach was to be followed, giving due weight to the travaux préparatoires and recitals …": *Shanning International Ltd v Lloyds TSB* [2001] 1 WLR 1462 per Lord Bingham at [15]. At [24], Lord Steyn approved the following passage from Cross, Statutory Interpretation (3rd ed., 1995, at pp.105-112):

> "You have to start with the wording (ordinary or special meaning). The court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration."

34. Lord Steyn continued, at [24]:

> "*Cross* points out that of the four methods of interpretation—literal, historical, schematic and teleological—the first is the least important and the last the most important. *Cross* makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with *Bennion, Statutory Interpretation*, 2nd ed (1992), section 311, *Cross* states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, *Cross* points out that a purposive construction may yield either an expansive or restrictive interpretation. It follows that Regulation No 3541/92 ought to be interpreted in the light of the purpose of its provisions, read as a coherent whole, and viewed against the economic and commercial context in which the regulation was adopted."

35. The parties also drew my attention to the speech of Lord Hope, at [33]:

> "The effect of Regulation (EEC) No 3541/92 is to be determined according to the rules of construction which are firmly established in Community law. As Lord Templeman said in *Litser v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, 558E, the courts of the United Kingdom are under a duty to follow the practice of the European Court of Justice when construing Community instruments. A purposive approach is to be adopted, and the travaux préparatoires may be referred to for guidance as to what was intended. Community legislation is to be interpreted, so far as possible, in such a way that it is in conformity with general principles of Community Law: *Dowling v Ireland* (Case C-85/90) [1992] ECR I-5305, 5319, para 10 per Advocate General Jacobs."

36. I was also referred to the recent judgment of Newey LJ in *Ministry of Justice & others v International Military Services* [2020] EWCA Civ 145, [2020] 1 WLR 1726. After referring to Lord Steyn's observation in *Shanning* that, according to Cross, the British doctrine of purposive construction is more literalist than the European variety, Newey LJ said at [28]:

> "Considerations of proportionality and certainty can also bear on the interpretation of EU instruments. With regard to the former, "the principle of proportionality is one of the general principles of European Union law and requires that measures implemented through provisions of European Union law be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them" (*Melli Bank plc v Council of the European Union* (Case C-380/09P) EU:C:2012:137, at para 52 of the CJEU's judgment). The principle is commonly relied on as a basis for impugning validity, but there may be cases in which it is relevant to interpretation (where, say, a provision is susceptible to two possible constructions of which one, but not the other, would infringe the principle of proportionality). However, those promulgating EU legislation are recognised as having a substantial degree of discretion. … ."

37. I was also referred to guidance issued by the European Council on the implementation of sanctions regulations generally: see *Guidelines on the implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy* (**the Sanctions Guidelines**); and *Best Practices on Effective Implementation of Financial Restrictive Measures* (**the Best Practices Guidance**), both most recently updated on 4 May 2018.

Submissions

38. The claimants submit, through Ms Shaheed Fatima QC and Ms Naina Patel, that to "facilitate compliance" with the Regulation under article 29(1)(a) includes facilitating a request under article 18(1) to release funds for a judgment creditor. They say the statutory injunction in article 29(2) ("[a]ny information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received") does not prevent HMT revealing the information to those in the confidentiality ring.

39. The claimants' main submissions may be paraphrased as follows. To pass on the information would facilitate compliance with the Regulation because it would help HMT to decide in accordance with article 18(1) whether to grant a subsequent request to release identified frozen funds to satisfy the UK judgment. That is a purpose, say the claimants, which amounts to compliance with the Regulation. The article 18 authorisation regime forms part of the Regulation, just as the freezing provision in article 14 does.

40. The claimants further submit as follows. A person may become obliged to supply information to a competent authority under article 29(1) for many reasons, not confined to the reason in article 29(1) itself, namely giving details of frozen accounts. A person could become obliged to supply information for other reasons such as in connection with the sale of equipment that could be used for internal repression (the

subject of article 2) or regarding grant of a loan to certain persons or entities (see article 13).

41. Article 29(2) cannot sensibly prevent the competent authority receiving the information from using it other than for the specific purpose for which it was in fact provided. Thus, if information is provided in connection with a loan to a person subject to sanctions, that information could be used, for example, to identify a bank account that should be frozen under article 14. Otherwise, the competent authorities would be hampered in ensuring the implementation of the restrictive measures, contrary to the policy of the Regulation.

42. The competent authority, the claimants submit, may use the information for any purpose that would facilitate compliance with the Regulation. That is consistent with article 29 appearing in the chapter on general and final provisions. To "facilitate" means to make something possible or easier. "Compliance" just means acting in accordance with the Regulation. There is no reason why that cannot include sharing the information with others if to do so would facilitate a course of action that is in accordance with the Regulation.

43. A judgment creditor applying for release of frozen funds to satisfy a judgment engages in such a course of action, i.e. one that accords with article 18(1). HMT accepts that it can use the information itself to decide whether to release funds under article 18. If granting an application for release of funds is an act done in compliance with the Regulation (which HMT accepts), then providing information to the claimants to enable them to identify the funds eligible for release must likewise be facilitating compliance with the Regulation.

44. It is wrong to construe article 29(2) narrowly to include within the "purposes" for which information is provided under article 29(1) only the implementation of the restrictive measures. The scope of those measures is delineated not just by the freezing provisions but also by the derogations, i.e. exceptions, from the freezing provisions. The restrictive measures are defined in a manner that ensures they are proportionate and thus lawful. The derogations are necessary to ensure this.

45. The derogations are found not just in article 18. There is also a power to release frozen funds where that is necessary to satisfy the basic needs of natural or legal persons or entities and their families and dependants, for food, housing, medicine and other basic essentials (see article 16) or to provide humanitarian relief (article 16a) or for the purpose of maintaining a diplomatic mission (article 16b) or for the essential energy needs of the civilian population of Syria (article 17).

46. These and other derogations are grouped together within the chapter of the Regulation, Chapter V, comprising articles 14-22 and headed *Freezing of Funds and Economic Resources*. The derogations from the restrictive measures are as much part of the purposes of the Regulation as the restrictive measures themselves, say the claimants. They are not, as HMT submits, permissive exceptions carved out from its purpose.

47. The Best Practices Guidance does not assist HMT, the claimants submit. Its status as an aid to interpretation is at best weak; it is only guidance. And although, as HMT points out, it refers (at paragraphs 33 and 41) to an obligation to inform competent

authorities of "information at their disposal which would facilitate the application of the freezing measures", those measures are themselves applied or not applied in accordance with the rules determining when funds are frozen and when they are not. This is made clear elsewhere in the Best Practices Guidance.

48. The claimants submitted that it would be contrary to the fair trial rights of judgment creditors if article 18 were interpreted in a manner that enabled the competent state authorities to impede access to normal enforcement processes in national courts or in arbitral proceedings, shielding the perpetrators of terrorist atrocities from delivering up the fruits of a civil action against them for redress. Conversely, using frozen assets to satisfy a judgment is in harmony with the policy of ensuring that such assets are not available to the designated persons subject to the sanctions enacted by the Regulation.

49. There is no good reason, say the claimants, why they should have to pursue expensive, speculative and uncertain proceedings against banks to pursue remedies in the civil courts against state sponsors of acts of terrorism, while the UK government, knowing where the wrongdoers' money is located, keeps secret its location and thereby protects the wrongdoers' funds from reaching the parties who, justice requires, should be able at least to request their release.

50. For HMT, Mr Richard O'Brien made submissions contrary to the claimant's interpretation. His main points may be summarised as follows. Article 29 does not permit HMT to provide the information to the claimants because that would not facilitate compliance with the Regulation. It would be an impermissible strained interpretation of the Regulation to construe facilitating compliance as meaning "making it easier to apply for frozen funds to be released so that a judgment can be enforced".

51. HMT's argument is that both the recitals to the Regulation and its substantive articles overwhelmingly focus on imposing the panoply of restrictive measures provided for. The recitals and full title do not refer to the derogations. They are exceptions to the purpose of the Regulation rather than included within its purpose.

52. Mr O'Brien submits that although the restrictive measures are tempered by derogations to ensure they are proportionate and lawful, the compliance that must be facilitated where information is provided is with "the Regulation", i.e. with the restrictive measures. That is not so in cases where the information sought is intended to lead to a relaxation of the restrictive measures.

53. The Best Practices Guidance has been produced and updated since April 2008 and emanates from the Council itself; as such, it is a sure guide to the correct interpretation of the Regulation. It explains that information must be provided to the competent authorities "to facilitate the application of the freezing measures" and that subsequent use of that information by the competent authorities must be restricted to the same purpose; see paragraphs 33 and 34 of the original version of the Best Practices Guidance (now paragraphs 41-42).

54. Paragraphs 70 and 71 of that Guidance refer to the need for an assessment to be made of whether a non-listed legal person or entity is controlled by a listed legal person or entity. The sharing of information to enable that assessment to be carried out is then referred to as information required to be disclosed to the competent authorities and

articles 29 and 30 of the Regulation are given as examples in a footnote. Economic operators who are aware that a non-listed person or entity is controlled by a listed one must disclose this. HMT says this indicates what the proper territory and scope of article 29 is.

55. HMT submits that the Best Practices Guidance does not support the claimants' interpretation at all. It nowhere refers to provision of information by a competent authority to a third party to facilitate a derogation. References in it to supplying information to a court or tribunal or "law enforcement" body are not comparable and do not assist the claimants' argument, for these bodies are organs of the justice system, not private interests.

56. The term "non-compliance" is likewise used at the start of the Sanctions Guidelines (at paragraph 4) exclusively with reference to the restrictive measures. This is another indicator that the phrase "facilitate compliance with this Regulation" should be read as meaning "facilitate compliance with the restrictive measures in the Regulation".

57. Further, in assessing whether a listed person or body controls a non-listed one, it does not follow that because the answer may be negative, i.e. that the listed person or body does not control the non-listed one, the information supplied to enable that assessment to take place can be used to support the private interest of a third party in achieving a derogation under article 18. The assessment is needed to impose the restrictive measures and determine their application.

58. HMT submits further that the nature of the information sharing obligation is such that the restrictions on its subsequent use should be strictly construed. The information is by its nature confidential and sensitive; hence the qualification at the start of article 29(1) in the words "[w]ithout prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy … ."

59. Mr O'Brien submits that the phrase "without prejudice to …" denotes that the obligation to disclose information overrides those rules, not that it is subject to them. I agree; the provision would make little sense unless bankers and others were required to disclose information they would otherwise be bound to withhold. But he contends that the recognition that the disclosable information would otherwise be non-disclosable argues for a circumspect reading of the restriction on subsequent use by a competent authority.

60. Mr O'Brien relied on a decision of the Information Tribunal, *RAID by its Executive Director Patricia Feeney v The Information Commissioner and HM Treasury*, EA/2015/0019 (a case involving similarly worded sanctions against Zimbabwe) to support this proposition. The Tribunal stated at [21]:

> "[Article 8(3)] should be given a purposive interpretation. The sanctions regime over-rides confidentiality, the role of 8(3) is to minimise the harm to that key principle by restricting the use of confidential information to what is necessary for sanctions administration. The word "use" has a broad meaning however the uses to which the information may be put are strictly limited to "the purposes for which it was provided or received" – the administration of a sanctions regime; not for putting into the public domain under FOIA."

61. Thus, HMT's submissions were sharply focussed on the need to protect and uphold the rights of listed persons to privacy and protection of personal data and the need to interpret the provisions interfering with those rights narrowly, in such a way as to safeguard and guarantee respect for those rights and their protection under the European Convention on Human Rights, the EU Charter of Fundamental Rights and general principles of EU law.

62. Mr O'Brien pointed out that the degree of publicity which listed persons have to put up with is referred to in recital (7) to the Regulation and regulated by article 15(3), in the interests of legal certainty. The names (including aliases), date and place of birth, nationality, gender, address and profession of a listed person are to be published; while there is no corresponding clear authorisation to disclose other personal data or private information relating to such a person to a third party to further the private rights of the third party.

63. It was not a sufficient answer, HMT submitted, that the category of information to be published under article 15(3) was published to the world at large, into the public domain, while the information sought by the claimants here was only to be published to them in confidence for the specific purpose of seeking release of funds under article 18. The distinction drawn does not adequately explain the silence in article 29 on the issue of disclosure to support third party private interests, contrasted with the express words providing for publication of identifying information into the public domain.

64. If the notion of "facilitating compliance" were as broad as the claimants suggest, providers of information would be obliged to include information relevant to any of the derogations provided for in articles 16, 17 and elsewhere as well as information relevant to private judgment creditors' interests in enforcing a judgment; extending, for example, to mortgage bills or bank statements showing what the basic needs of a listed person are.

65. While the claimants accept this consequence of their interpretation and deny that it is undesirable, contending that information providers should provide this information anyway, HMT says they are wrong to deny that the consequences are undesirable. The obligation to provide information would be unacceptably wide and burdensome; there are over 25 European sanctions regulations which use the phrase "facilitate compliance with this Regulation".

66. As for the suggestion that HMT's interpretation helps terrorists by shielding them and their money from private law redress, that is wrong, Mr O'Brien submitted. The judgment creditors are in no worse position than any other judgment creditor who lacks knowledge of the whereabouts of assets against which to enforce. The fact that, adventitiously in this case, the judgment debt results indirectly from a heinous hijacking, is not relevant to the question of interpretation the court has to consider.

Reasoning and Conclusions

67. I agree with Mr O'Brien and HMT that the starting point should be to recognise that the Regulation is part of an edifice intended to change behaviour by imposing international sanctions on persons and bodies associated with conduct regarded as reprehensible, such as hijacking aircraft and other terrorist or hostile acts against the

member states of the EU. The Regulation is one of 25 or more such instruments containing similar wording.

68. It is therefore clear that the main aim of the Regulation is to make life difficult for those involved in repression in Syria by denying them access to the territory of the EU, to their funds, to weapons and equipment used for repression and to other materials, finance, trade, infrastructure or aid that could be used for their hostile purposes.

69. Next, the parties agree that the provisions in the Regulation can, broadly, be placed in two categories: sharp edged punitive measures, on the one hand, tempered by exceptions or derogations moderating their impact, on the other. Such is, indeed, the character of the substantive measures provided for in the Regulation and, no doubt, many others like it applying to different countries, regimes, people and organisations.

70. The analysis is, thus far, not controversial. However, I do not accept Mr O'Brien's proposition that the purposes of the Regulation are necessarily to be found exclusively in the punitive and aggressive parts of the Regulation imposing the restrictive measures, rather than, in addition, in the moderating provisions creating exceptions and derogations from the restrictive measures.

71. I can see no good reason why the purposes of the Regulation should not be, or include, achieving an appropriate balance between the two types of measures. Mr O'Brien says, on the one hand, that the purposes of the Regulation are essentially pugilistic, i.e. they seek to hit the targets; and, on the other, that the rights of the targeted persons that are worthy of protection are protected but their protection is somehow excluded from the purposes of the Regulation.

72. I do not see why measures on one side of the balance are categorised as falling within the purposes of the Regulation while those on the other side are not. In general, I prefer the approach of the claimants to discerning the purposes of the Regulation: to inflict a necessary and desirable yet measured and proportionate degree of pain on the targets. I do not see why the striking of that balance should not be treated as within the purposes of the Regulation.

73. Most traditions of advanced statecraft, including that of the United Kingdom, hold that the conduct of international relations should be subtle and measured rather than crude and blunt. Hence, the exceptions and derogations to safeguard humanitarian relief, the basic needs of relevant persons and their families, maintaining diplomatic activity to keep dialogue going and preserving the essential energy needs of the civilian population of Syria.

74. These are mainly intended to ensure that innocent people should not suffer unnecessarily. Those innocent people could be called third parties who may become victims of the sanctions regime without having done anything to deserve their suffering. HMT's approach to the interpretation of the Regulation would treat the preservation of humanitarian relief as outside the purposes of the Regulation. That seems to me an unworthy approach which runs counter to our tradition of protecting the innocent and vulnerable.

75. Commercial reinsurers of aircraft may seem an unlikely category of innocent civilian victims of the Syrian regime and its agents. But in the structure of the Regulation, judgment creditors are not conceptually in a different position from civilians deprived of water or energy supplies. A person owed money by a listed target body may suffer by losing that money if funds needed to satisfy a judgment are frozen.

76. That is a lesser hardship than the suffering of civilians deprived of food and water, but it is still a hardship. Article 18(1) tempers that hardship by permitting the release of funds to satisfy the judgment, at the discretion of the competent state authority, in this case HMT. To release the funds is to act in compliance with the Regulation. Why then should providing information about the location of the funds not be using that information to facilitate compliance with the Regulation?

77. I do not accept HMT's narrow view of the purposes of the Regulation, which would lead to that conclusion. I do not agree with HMT that the claimants' construction of article 29, viewed in its context and in the light of the purposes of the Regulation as a whole, is an impermissibly strained construction. In the overall context of the EU sanctions regime comprising 25 or more regulations imposing sanctions against various states, people and organisations, I find the claimants' interpretation to be a more natural reading than HMT's.

78. I accept Mr O'Brien's linguistic point that the recitals to the Regulation and the guidance documents accompanying it (though perhaps not strictly forming part of the travaux préparatoires, being subsequent to previous incarnations of this and other sanctions regulations, and regularly updated) focus sharply on the "teeth" of the sanctions and not on the measures tempering the hardships they cause and are intended to cause.

79. I do not find that surprising. The recitals and the guidance documents are where you would expect to find a more rhetorical exposition of the provisions than in the text of the provisions themselves, with emphasis on the need for a firm hand to ensure their effectiveness at changing the behaviour of the targeted persons and bodies, rather than on the balancing measures to ensure that the sanctions are lawful and proportionate.

80. I have considered also whether the arguments made by HMT concerning the breadth of the obligation to provide information to competent authorities should persuade me to prefer HMT's interpretation of article 29 and adopt its narrow view of the "purposes" for which the information was provided or received and for which, alone, it may subsequently be used.

81. It is correct, as the claimants accept, that the information that must be provided is likely to be, by its nature, sensitive and confidential; and that providers of information may have to go into considerable detail to enable frozen funds to be differentiated from non-frozen funds by being under the control (or not) of a targeted person or body, or to enable the competent authority to determine whether one of the exceptions applies.

82. I do not find HMT's arguments compelling, however. Providers of information such as banks, contractors or mortgagees necessarily have to make judgments about whether information they hold falls within the disclosure obligation imposed upon

them by article 29(1). To do that, they must consider whether providing the information would "facilitate compliance" with the Regulation.

83. In practice, that will mean entering into a discussion or negotiation with the competent authority over what categories of information they hold and what should be disclosed. I do not think the purposes of the Regulation should be read down in order to ease the burden on those who hold or may hold information which may be disclosable under article 29(1).

84. I do not think HMT's narrow reading of the "purposes" for which information is provided is assisted by reliance on *RAID v The Information Commissioner and HM Treasury* (cited above). The contrast drawn by the Tribunal there was between the purpose for which information is provided or received, namely "the administration of a sanctions regime" and the broader purpose, outwith the purposes of the regulation, of "putting into the public domain under FOIA". The information sought here is not destined for the public domain and the sanctions regime includes the article 18 derogation and other derogations.

85. I also agree with the claimants that the rights of the target persons and bodies to privacy, commercial secrecy and protection of their data are adequately safeguarded by defining the restrictive measures in terms that are proportionate and lawful, being subject to the derogations and exceptions to ensure that they are.

86. I do not think those rights are in need of further protection by an artificially narrow approach to the purposes of the Regulation and I accept that the rights of creditors are of some weight too, along with those of others who may suffer hardship – in many cases, much greater personal hardship. Nor, in my judgment, does the explicit provision in article 15(3) regulating publication of information about targeted persons and bodies affect the scope of the purposes of the Regulation and what would facilitate compliance with it.

87. It is not quite correct, as HMT submits, that these claimants are in no worse a position than any judgment creditor who does not know where to find assets to enforce against. As against a body other than a competent authority, the judgment creditor could in this country seek a *Norwich Pharmacal* order compelling disclosure of the location of relevant assets. The claimants have already attempted this in the case of HSBC, without success. The same would apply in other EU member states if relief equivalent to a *Norwich Pharamacal* order is available there. If HMT's construction of the Regulation is correct, article 29 would provide a clear answer to any such application.

Conclusion

88. For all those reasons, I prefer the submissions of the claimants and I accept their construction of the Regulation as correct. HMT has the power to provide the information the claimants seek and is not prevented from doing so by article 29 of the Regulation. I propose to quash HMT's contrary decision and remit the issue back to HMT for reconsideration.