Lord Justice Beatson and Mr Justice Simon Approved Judgment

IN THE HIGH COURT OF JUSTICE CO/5379/2014
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Neutral Citation Number: 2014 EWHC 4002 (Admin)
Court No 3

Royal Courts of Justice
The Strand
London WC2 A2U

Thursday, 27 November 2014

Before:

LORD JUSTICE BEATSON

and

MR JUSTICE SIMON

BETWEEN:

THE QUEEN
on the application of:
OJSC ROSNEFT OIL COMPANY

Claimant

-and-

(1) HER MAJESTY'S TREASURY
(2) THE SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS
(3) THE FINANCIAL CONDUCT AUTHORITY

Defendants

MR PUSHPINDER SAINI QC, MR PATRICK DUNN-WALSH and **MS SARAH TULIP** (instructed by Joseph Hage Aaronson LLP) appeared on behalf of the Claimant.
MR GERRY FACENNA and MS JULIANNE MORRISON (instructed by the Treasury Solicitor) appeared on behalf of Defendants 1 and 2.
MS TETYANA NESTERCHUK (instructed by Kingsley Napley) appeared on behalf of Defendant 3.

Lord Justice Beatson and Mr Justice Simon Approved Judgment

Thursday, 27 November, 2014

(12.00 pm)

APPROVED JUDGMENT (to be approved)

1. LORD JUSTICE BEATSON: This hearing has two purposes. The first is to decide the application of OJSC Rosneft Oil Company ("Rosneft") for interim relief pending the hearing of its application for judicial review. The challenge is to UK secondary legislation giving effect to the sanctions imposed by the EU by Council Regulation (EU) No. 833/2014 amended by Regulation 960/2014. The sanctions are imposed as the result of the Russian Federation's actions in Ukraine. The challenge is also to guidance given by the second and third defendants, the Secretary of State for Business, Innovation and Skills, and the Financial Conduct Authority concerning the interpretation of certain terms in the EU Regulation. The application for interim relief concerns the part of the secondary legislation prohibiting or restricting the supply of sensitive equipment and technology and services for types of oil exploration by Russian entities or entities operating in Russia. The second purpose of this hearing is for directions for the further conduct of these proceedings. The third defendant, the Financial Conduct Authority, took no part in the submissions on interim relief but provided helpful assistance to the court as to its position in relation to directions.

2. Proceedings were filed on Thursday, 20 November 2014 when urgent consideration and expedition were sought, and Rosneft stated that it might need to seek an interim injunction pending the substantive hearing. The first and second defendants, Her Majesty's Treasury and the Secretary of State, were sent a copy of the claim form, grounds and application by e-mail and later served with a printed copy and bundles, late on the afternoon of that day.

3. The application came before Collins J within 24 hours, i.e. on Friday, 21 November. That day he ordered an oral hearing of the application for interim relief and stated that further directions could be considered at the hearing. The speed at which all this has happened has had two unfortunate

consequences. The first is that a letter from the Treasury Solicitor's Department indicating when it had received the application and stating that the first and second defendants wished to make observations on it and intended to do so by midday on Monday, 24 November, did not reach the judge before he made his order. The second is that the Treasury Solicitor's Department did not receive a copy of that order until the afternoon of Monday, 24 November, after they had filed their submissions. Those submissions were, in particular, that the application for directions, including expedition and urgent consideration, be refused. Underlying their position was the submission that this is, in reality, a challenge to the validity of the EU Regulation, a matter over which the courts of England and Wales have no jurisdiction, and in respect of which Rosneft has launched annulment proceedings in the EU's General Court.

4. The EU sanctions restrict: (a) the dealing in transferable securities and certain money market instruments; (b) dealing in and providing financial assistance in relation to various technologies relating to the oil industry; and (c) the provision of specified services for certain types of oil exploration and production. They were, as I have stated, imposed following a decision of the Council of Ministers by Council Regulation (EU) No. 833/2014, dated 31 July 2014, which, following another decision of the Council of Ministers, was amended on 8 September by Council Regulation (EU) No. 960/2014. I shall refer to this as "the EU Regulation". The amendment extended the sanctions to include the prohibition on the provision of certain services necessary for "deep water" and "arctic" oil exploration and production and for “shale oil projects” in Russia.

5. The UK has given effect to the financial services restrictions by the Ukraine (European Union Financial Sanctions) No. 3 Regulations 2014 SI 2014 No. 2054, which were made and came into force on 1 August 2014 and were amended by SI 2014 No. 2445. It has given effect to the oil and related restrictions by the Export Control (Russia, Crimea, Sevastopol) Sanctions Order 2014, SI 2014, No. 2357, made on 2 September 2014, in force since 26 September, and amended on 5 November by SI 2014, No. 2932 ("the Export Control Regulations"), which amendments are due to come into force

this Saturday, 29 November 2014. The Export Control Regulations, as amended, impose criminal liability on persons dealing contrary to the prohibitions and restrictions in the EU Regulation.

6. Rosneft challenges the legality of the UK's implementing regulations, and guidance concerning the interpretation of certain terms in the EU Regulation by the Financial Conduct Authority and Secretary of State and seeks a reference to the CJEU on a number of questions. As the application for interim relief only concerns Article 5A of the Export Control Regulations, only the first item of the relief sought needs to be set out. It is that:

"Article 5A of the Export Control Regulations be quashed on the basis that it purports to impose criminal liability on an uncertain basis, and is thus unlawful both at common law and as a result of Article 7 of the European Convention of Human Rights as incorporated into the law of England and Wales by the Human Rights Act 1998."

7. I set Article 5A out later in this judgment. As to the form of interim relief sought, in its application Rosneft appeared to contemplate an interim injunction but now seeks a stay of Article 5A.

8. Rosneft is one of three entities subject to the prohibition in Article 5(2)(b) of the EU Regulation prohibiting the sale or provision of investment services, security and money market instruments with a legal person, entity or body established in Russia which is publicly controlled or with over 50 per cent public ownership and with estimated total assets above a certain amount and whose estimated revenues "originate for at least 50 per cent" from the sale or transportation of crude oil or petroleum products.

9. Rosneft is also affected by Article 3 which provides that prior authorisation by competent EU authorities is required for the supply of equipment or technologies to any person or entity in Russia, or if the equipment or technology is for use in Russia, to a person or entity in any other country.. Article 3(5) requires the competent authorities not to grant authorisation "if they have reasonable grounds to determine that the sale, supply, transfer or export of the technologies is for projects pertaining to deep

water oil exploration and production, arctic oil exploration and production, or shale oil projects in Russia". By Article 4(3) "financing or financial assistance" related to the specified technologies must also be authorised by the competent EU authority. The amending Regulation extended the controls by inserting a new Article 3a, providing that it is prohibited to provide, directly or indirectly, services necessary for "deep water oil exploration and production, arctic oil exploration and production, or shale oil projects in Russia".

10. I have referred to Rosneft's application before the General Court of the European Union for the annulment of the EU Regulation. That was launched on 9 October 2014. One of the grounds on which annulment is sought is that the Regulation breaches the EU requirement of legal certainty because the terms "deep water", "arctic" and "shale oil projects" are vague, undefined and ambiguous. Rosneft submits in those proceedings that Article 3a is unlawful because it creates a criminal offence that depends for its commission on the meaning of these three uncertain legal terms and thus violates Article 7 of the European Convention of Human Rights. Its application for the expedition of those proceedings was rejected on 13 November 2014. Shortly after that, these proceedings were launched.

11. Article 8 of the EU Regulation requires Member States to lay down "the rules on penalties applicable to infringements" of the Regulation, and states that "the penalties provided for must be effective, proportionate and dissuasive". This is, as was common ground, a standard form provision which has been the subject of interpretation by the European courts in other cases. As I have stated, the UK Regulations implement Article 3 and Article 3a by making it a criminal offence to be knowingly concerned, without EU authorisation, in an activity for which such authorisation is required. Article 5A of the Export Control Regulations, in respect of which a stay is sought, implements Article 3a. It provides:

"Offences related to certain associated services necessary for deep water oil exploration, etc. in Russia.

"A person who is knowingly concerned in an activity prohibited by Article 3a of the Russian Sanctions regulation (prohibition on the provision of certain associated services necessary for deep water oil exploration and production, arctic oil exploration and production, or shale oil projects in Russia) with intent to evade a prohibition in that Article commits an offence and may be arrested."

12. The maximum penalty on summary conviction is a term of imprisonment not exceeding three months and, on conviction on indictment, a term not exceeding two years, in both cases as well as or alternatively to a fine.

13. Mr Saini QC on behalf of Rosneft, accepted that the United Kingdom courts do not have jurisdiction to consider the validity of an EU Regulation, but submitted that the fact that a claimant has brought an action for annulment in a European Union court does not deprive the domestic courts of jurisdiction over issues of interpretation of an EU measure. He maintained that the domestic courts undoubtedly have jurisdiction under well-established public law principles to rule on the legality of UK measures made by way of delegated legislation, including the claimed use of power under section 2(2) of the European Communities Act 1972. He cited a number of cases, in particular *R v Secretary of State for Health, ex parte Imperial Tobacco* [2001] 1 WLR 127.

14. Mr Saini submitted that given there is jurisdiction, the requirements for interim relief set out in *American Cyanamid v Ethicon (No. 1)* [1975] AC 396, as restated in the context of an application for interim relief against a public authority in *ex parte Factortame (No. 2)* [1991] 1 AC 603 at 671, are clearly satisfied in this case. Addressing the three limbs of the test he submitted that there is a serious issue to be tried, and that far from having no real prospect of success on the merits, Rosneft's substantial case is strong. Secondary legislation is susceptible to common law public law challenges, including challenges based on its uncertainty. He relied on cases to which I will refer later in this judgment.

15. Mr Saini argued that in a letter dated 18 November 2014 from an official in the Export Control Organisation of the Department for Business, Innovation and Skills, the Department and thus the Government "has, in all but name, conceded that the legislation coming into force this Saturday 29 November 2014 is riddled with uncertainties as to definition and scope". See skeleton argument, paragraph 6. That letter stated that the EU Commission and Member States had been reviewing the implementation of the sanctions and that the Department expected "that in due course there will be an amendment to both the Decision and the Regulation which will provide definitions of "deep water", "shale oil project" and "arctic"".

16. Mr Saini also submitted that the government had had a choice as to how to implement the requirements of the Regulation, and could have done so by imposing administrative penalties rather than making contravention a criminal offence.

17. As to the principle that a criminal offence should be clearly described, he submitted that the Strasbourg case law adds nothing to long-established common law principles. He accepted that at common law the test is (see *Percy v Hall* [1997] QB 924) that a provision must be shown to be so uncertain as to have either no ascertainable meaning or be so unclear in its effect as to be incapable of certain application in any case, but argued that the position taken by the Department in its letter dated 18 November and in its guidance shows that, unless and until there is further EU legislation defining the terms in question, they have no ascertainable meaning. There are, he submitted, no criteria and there is no body of case law to provide a means for determining the meaning of these terms. Accordingly, he submitted, there is no "touchstone" of liability - to use the words of Simon Brown LJ in *Percy v Hall* at 941 to 942. For that reason this a case like *Staden v Tarjanyi* (1980) 78 LGR 614, where a byelaw was struck down on the grounds of uncertainty. His argument was that in these circumstances there can be no assurance that any advice taken as to the meaning of Article 5A and these terms would be correct. In those circumstances the statements of Lord Bingham in *Rimmington* [2006] 1 AC 459 at 33; and *Jones (Margaret)* [2007] 1

AC 136 at 29; the statement by the House of Lords in *Norris* [2008] 1 AC 920 at 53 to 54; and Lord Sumption's statement in *Nicklinson* [2014] UKSC 38, that "a high degree of clarity and precision is required of any law defining the elements of a criminal offence", apply and show that there is a strong argument that the conduct that is criminalised by Article 5A does not meet the test.

18. As to the particular terms, Mr Saini submitted in respect of "deep water" and "arctic" that there is no generally accepted industry definition, and that there is a range of possible meanings with those for "deep water" ranging from 150 to 400 metres, and that for "arctic" either encompassing the entire arctic circle, which itself does not have a clearly accepted geographical definition, or simply offshore oil exploration within it. As to "shale oil project", he observed that it is said that it is unclear whether it means all types of unconventional oil or gas projects that involve drilling through shale rock, or just the specific type of project that involves pumping out oil found within the pores of the shale rock. The second defendant, the Secretary of State, has stated that its understanding of the term,namely "exploration and production projects related to oil contained in shale or other strata enclosed in shale and produced by way of hydraulic fracturing except drilling activities through shale deposits, horizons or formations which are performed with the objective to explore for, develop or produce conventional oil", is under discussion at EU level and may change. How, asked Mr Saini, can there be certainty when the department in question can say no more than that and indicate that there may be change?

19. The second limb of the *American Cyanamid/Factortame No. 2* test concerns damages. Mr Saini submitted that it is clear that this is satisfied because Rosneft has no remedy in damages before the English court.

20. The third limb of the test is the balance of convenience. Mr Saini relied on what he submitted was a very strong case on the merits, for the reasons I have summarised above; the absence of identifiable third parties who would be affected by the grant of a stay in any appreciable way; and four factors which

he submitted detracted from the weight to be accorded to the public interest in ensuring that EU sanctions against Russia have teeth.

21. The first factor is that a stay is sought only for a short period of time, i.e. pending the substantive hearing, which can be expedited. Mr Saini submitted there was no reason advanced by the government as to why 29 November is a critical date. That point also relates to the second factor. Mr Saini argued that the Secretary of State's conduct is inconsistent with the suggestion that there is a public interest in ensuring that the prohibitions in the EU Regulation should be backed up by sanction, let alone a criminal sanction, because the prohibitions in Article 3a were made on 8 September, but Article 5A of the Regulations will only come into force over two-and-a-half months later. Had the public interest in having a sanction been critical, he submitted, domestic penalties would have been imposed sooner.

22. The third factor relied on by Mr Saini was a counter to Mr Facenna's written submission that there is no need for a stay because people who have traded with Rosneft in the past and who might have traded with Rosneft are already abiding by the restrictions. Mr Saini submitted that, if that is so, there is no reason not to stay the operation of Article 5A for the short time until the hearing of the substantive challenge.

23. The fourth factor relied on by Mr Saini concerns the court's duty. He submitted that the court should not allow legislation to come into force which the party introducing the legislation "itself effectively concedes is not sufficiently certain in its use of terms on which the commission of criminal offences depend" and which therefore cannot be implemented in practice. How, he asked, could a prosecution get off the ground? He also relied on the "chilling effect" that an unclear law has. The problem is not just the risk of prosecution, but the likelihood that people who do not know what they can and what they cannot do will over-comply and refrain from activities which ultimately fall outside the prohibition.

24. I have referred to the Treasury Solicitor Department's letter dated 24 November. Mr Saini made

a number of observations about points in this letter, points which were developed in Mr Facenna's written and oral submissions. First, Mr Saini submitted it was wrong to suggest that Member States have no discretion as to whether to implement the EU regulation in a form of a criminal penalty, and thus it was wrong for the defendants to argue that the alleged infringement of Article 7 of the European Convention flows necessarily from the EU Regulation. Rosneft had contemplated the possibility of administrative rather than criminal penalties in its application to the General Court for annulment. He argued that a court in one of the United Kingdom jurisdictions is the only venue that can be used to challenge the decision to introduce UK criminal legislation to implement the EU Regulation. Accordingly, he submitted, the issue raised in this application is not the very same issue raised in the General Court.

25. Secondly, Mr Saini observed that the letter dated 24 November failed to respond substantively to Rosneft's points about the uncertainty of the key terms, except to state that the Department's guidance provides "a degree of reassurance".

26. Thirdly, he submitted that, on the assumption that the Treasury Solicitor's Department was right in arguing that the prohibition in Article 3a is directly applicable in UK law and thus prevents the activities to which it applies, there can be no compelling need to pass criminal legislation.

27. Fourthly, he argued that the suggestion that Rosneft does not have a right to bring a claim under the Human Rights Act because it is not a victim within section 7(1) of the Act is a proposition which goes nowhere. This is partly because, in the light of *R (Rusbridger) v Attorney-General* [2004] 1 AC 357, and the observations of Lord Steyn in that case, relying on *Norris v Ireland* [1988] 13 EHRR 186, that the fact that the risk of prosecution was remote did not mean a person was not a victim; but more directly, in any event, Rosneft has standing under the common law to bring judicial review proceedings.

28. Finally, Mr Saini submitted that it is very unattractive for the government to submit that the issues of uncertainty and invalidity in the Regulation should be left to be raised in future criminal proceedings rather than the judicial review, and this does not reflect the approach in modern law, for example the approach taken by Lord Slynn and Lord Steyn in *Boddington v British Transport Police* [1999] 2 AC 143 at 164 and 176.

29. Mr Facenna, on behalf of the Treasury and the Secretary of State, resisted Mr Saini's application as in reality simply an aspect of Rosneft's challenge to the validity of the EU Regulation, raising points raised in the annulment proceedings which are before the EU's General Court, properly before that court, and in circumstances where the UK courts do not have jurisdiction to consider the validity of the Regulation. Secondly, Rosneft is not at risk of prosecution under Article 5A and therefore has no standing as a potential victim under section 7 of the Human Rights Act. Thirdly, in practice, no one else is at risk of having rights under Article 7 of the Convention or the common law breached by the coming into effect of Article 5A because "even assuming there are 'UK persons' who would seek to provide the relevant services to the Russian oil industry without first seeking advice from the Department as to the scope of the prohibition in Article 3a of the EU Regulation, any subsequent prosecution under Article 5A would itself need to be compliant with Article 7 of the Convention and the common law".

30. Mr Facenna also submitted that whether the interim relief test is that stated in *American Cyanamid* as modified by *Factortame (No. 2)*, or that in *Joined Cases C143-88 and C92-89 Zuckerfabrik* [1991] ECR I-415 and Case C-465/93 *Atlanta*, [1995] ECR I-3761, Rosneft does not satisfy it. His primary position is that since this is a challenge to the content of an EU measure the correct test for interim relief is that in the *Zuckerfabrik* line of cases. They require that serious doubts are shown about the validity of the community regulation on which the contested administrative measure is based, an injunction must be necessary to avoid serious and irreparable harm to the parties seeking it and the court must take into account the interests of the EU and not set aside a regulation without proper guarantees and without

assessing whether the measure would be deprived of all effectiveness if not implemented immediately. If the question has not yet been referred to the CJEU, the national court should do so, setting out the reasons for which it believes that the Regulation must be held to be invalid. See paragraphs 23 to 24, 28, 30 to 31 and 33 of *Zuckerfabrik*.

31. As to whether this is, in reality, a challenge to the EU Regulation, and whether the issues of legality that are said to arise as a result of the uncertainty inherent in the specified terms will arise in every Member State, Mr Facenna relied on *Joined Cases 387-02, 391-02 and 403-02 Berlusconi* [2005] ECR I-3565. In those cases the CJEU held that, while the choice of penalties remains within the discretion of Member States, they must ensure in particular that infringements of community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

32. Mr Facenna argued that, since it is a criminal offence under UK law to export, import or trade in goods that are subject to sanctions and an embargo regime without a specific licence from the appropriate government department (see the Customs and Excise Management Act 1979), Article 5A supplements existing national law offences for breach of export controls. The UK was required to put in place a penalty which was analogous to the domestic penalty and has done so. Moreover, he submitted that Rosneft's submissions in these proceedings are inconsistent with its submissions before the General Court where it argued that national implementing measures must in the substance be criminal under the European Court of Human Rights approach, and would "necessarily build upon existing domestic schemes for sanction enforcement, schemes which were and are invariably criminal" (see annulment submissions paragraph 156).

33. It is, argued Mr Facenna, absolutely clear from Rosneft's application to the General Court, that the issues

of legality that arise as a result of the alleged uncertainty inherent in the terms are those which will arise in every member state and which are also raised in these proceedings. For those reasons he submitted that it could not be said that the essential question is whether domestic law only is relevant. EU law has application, and so the *Zuckerfabrik* test for interim relief applies.

34. As to the merits, Mr Facenna submitted there are no arguable serious doubts about the validity of the Regulation. While there is scope for interpretation of the relevant terms at the margin and for clarification, the terms themselves are sufficiently clear to allow affected persons to determine whether their conduct may give rise to an obvious risk of breaching the prohibition, and thus there are no serious doubts about the validity of the Regulation itself.

35. He also submitted that Rosneft cannot fulfil the second of the requirements, urgency, the necessity to avoid serious and irreparable damage, and that taking into account the third requirement, the interests of the EU, the interim relief is inappropriate in this case. As to the latter, without the offence created by Article 5A, the prohibition created by Article 3a will not be capable of enforcement in the United Kingdom, a large Member State of the EU with an important internal market in the provision of services to the oil industry. That would inevitably risk lessening the effectiveness of the EU sanctions and the "global co-ordinated response" (in his words) to actions taken by the Russian Federation on the territory of a neighbouring country.

36. As to the *American Cyanamid* principles, Mr Facenna argued that although the common law has a principle of legal certainty, particularly in a criminal law context, in the light of, for example, the test in *Percy v Hall* to which I have referred and to which I shall return, it is not possible to say that Rosneft has any real prospect of succeeding in obtaining an order quashing Article 5A on the grounds of breach of the common law or the European Convention. He argued that although there is a need for the criminal law to be predictable and certain, and the principle of certainty is well-established, all that is

necessary is for the citizen to be able to foresee, if need be with appropriate legal advice, whether there is an obvious risk of committing the offence. As a matter of common law the domestic courts have upheld several apparently ill-defined common law offences, including causing a public nuisance, blasphemous libel, outraging public decency and blasphemy. The crime of public nuisance defined by Lord Bingham as "an act not warranted by the law…if the effect of the act is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects" has been held to meet the requirements both of the common law and Article 7. It was Lord Bingham who pointed to the fact that what is required is sufficient certainty, not absolute certainty, and that because the law must be able to keep pace with changing circumstances, some vagueness is inevitable. Mr Facenna also pointed to the Strasbourg jurisprudence as being of the same effect.

37. I have concluded that in all the circumstances of this case a stay should not be granted. I substantially accept Mr Facenna's submissions save those relating to standing under the Human Rights Act. I reserve my position on that issue, save to observe that Mr Saini's submissions on this point appeared to me to have force. But, as he also submitted, Rosneft has standing under national, i.e. the public law principles of England and Wales.

38. As to the merits, I start by observing that it is important to bear in mind that the threshold is a high one. The provisions here could have been more precise and clearer, but in my judgment they do not come near reaching the required threshold for invalidity either at common law or EU law.

39. *Percy v Hall*, to which I have referred, concerned whether byelaws protecting areas of land identified the protected areas with sufficient certainty. The byelaws described the land as belonging to the Secretary of State and certain named parishes and, for convenience, identified the land by a thick, black line on a small scale plan annexed to the byelaw. Simon Brown LJ at page 938A to B, stated that "there will

always be, literally, a borderline of uncertainty. That should not in my judgment invalidate the byelaws and make them void and unenforceable even against those who deliberately and flagrantly trespass within the very centre of the protected areas".

40. He discussed the two approaches in earlier cases to determining whether a bylaw is sufficiently uncertain render it invalid. The first was that in *Kruse v Johnson* [1898] 2 QB 91. The second was that in *Fawcett Properties v Buckingham County Council* [1961] AC 636. The former required the byelaw to contain adequate information as to the duties of those who are to obey. The latter held that a byelaw is invalid only if it can be given no meaning or no sensible or ascertainable meaning.

41. In *Percy v Hall* Simon Brown LJ, with whom Peter Gibson LJ and Schiemann LJ agreed, chose the *Fawcett* test. He stated that it was better to treat an instrument as valid unless so uncertain in its language as to have no ascertainable meaning or so unclear in its effect as to be incapable of certain application in any case. I emphasise the last three words.

42. He discussed *Staden v Tarjanyi* (at 931), and explained it. It was a case about a byelaw prohibiting hang-gliding over a particular pleasure ground in circumstances where another court had held it was lawful to fly at such a height that no one could possibly be inconvenienced. Simon Brown LJ described the case as one in which there was no lawful touchstone of liability in the prohibition, and that was the phrase taken up by Mr Saini in this case. But Simon Brown LJ stated that had a criterion of nuisance or annoyance been used "uncertain in its application though that would no doubt have been, the court would still have found it acceptable" (at 942G). He also stated that "so long as in certain circumstances an offence will undoubtedly be committed, byelaws should (subject to any question of severance as arose in *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783), be upheld and to that extent enforced". This last statement shows the height of the threshold.

43. There are also statements showing the height of the common law threshold in the cases of *Misra* [2005] 1 Cr App R 21 at paragraph 63, and *Gul* [2014] EWHC 373 (Admin) at paragraph 58.

44. In *Cantoni v France* [1996] European Court of Human Rights, application 17862/91, it is stated at paragraph 32 that where the legislative technique of categorisation is used there will often be grey areas at the fringes of the definition. "This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases". It was also stated at paragraph 35 that, "a law may still satisfy the requirements of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail… This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation."

45. Accordingly, in my judgment, while there may be a debate about whether land within the Arctic Circle is included within the scope of the prohibition, it is clear that the sea within it and close to the North Pole is. Similarly, while there may be an issue about whether equipment to be used for exploration at a depth of 500 feet is to be sold for exploration in "deep water" for the purposes of the Regulation and Article 5A, it is clear that exploration at a depth of 1,000 or deeper metres is in "deep water". The fact that the Department acknowledges that there are grey areas and that it is seeking, and hopefully will secure, clarification does not mean that at present there is uncertainty of a sort which satisfies the *Percy v Hall* test.

46. I also do not consider that there is a risk of serious or irreparable damage to Rosneft. It is not at risk of prosecution for breach of Article 5A. Any harm that it suffers will be a direct consequence of the sanctions, which have been in force for some time, and because of the chilling effect on those who might have otherwise dealt with it, rather than because of Article 5A. It is also clear that in EU law (see case

C4 6593 Atlanta [1995] ECRI 3761 at 41), purely financial loss is insufficient.

47. Additionally, in relation to the chilling effect point, there is no indication, let alone evidence, that UK traders in the relevant products find Regulation 3a and Article 5A unacceptably uncertain. Given the requirement of mens rea in Article 5A, it is unlikely that any trader who takes advice, for example from the Department, and acts on it would be guilty of an offence.

48. I also accept Mr Facenna's submission that, taking account of the interests of the EU, interim relief is inappropriate in this case. Such relief would inevitably risk lessening the effectiveness of the EU sanctions, particularly if (see *Atlanta* at 44) the cumulative effect which could arise if other Member States adopt interim measures for similar reasons is taken into account.

49. In these circumstances, whether under the *Zuckerfabrik* test or the *American Cyanamid* principles as moderated in *Factortame (No. 2)*, in my judgment the balance of convenience plainly favours allowing Article 5A to come into effect.

50. It remains to deal with the future conduct of the case. I consider that there should be a rolled-up hearing next term to consider permission and, if permission is granted, to adjudicate on the substantive claim. It is not suggested that the questions relating to the FCA's guidance cannot be determined then. It is possible that those relating to the Department's Guidance can also be dealt with then.

51. On the "uncertainty contention", if I can describe it in that portmanteau way, the submissions on behalf of the first and second defendants are that permission should not be granted because Rosneft has and is pursuing an alternative remedy in the European General Court, and/or that judicial review should be stayed pending the outcome of those proceedings. Those submissions can be heard at a suitable point during the hearing. The parties should seek to agree in advance a sensible way to structure that hearing

and, if necessary, seek further directions.

52. I will not be prescriptive about the timetable until we have heard submissions from counsel, but for my part my starting point is the timetable suggested in Kingsley Napley's letter dated 25 November on behalf of the FCA.

53. MR JUSTICE SIMON: I agree both as to the conclusions on Rosneft's application for a stay and on the general directions which have been given for the future conduct of the claim.

(1.00 pm)
