Neutral Citation Number: [2024] EWHC 2963 (Admin)

Case No: AC-2023-LON-000405

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2024

Before :

THE HONOURABLE MRS JUSTICE FARBEY

- -

Between :

THE KING

ON THE APPLICATION OF

(1) L1T FM HOLDINGS UK LIMITED

(2) LETTERONE CORE INVESTMENTS S.À R.L. **Claimants**

- and -

CHANCELLOR OF THE DUCHY OF LANCASTER IN THE CABINET OFFICE (formerly SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY) **Defendant**

- and -

UPP CORPORATION LTD **Interested Party**

Tom Hickman KC and **Paul Luckhurst** (instructed by **Akin Gump LLP**) for the **Claimants**
Rory Phillips KC, Georgina Wolfe, Emmanuel Sheppard and **Karl Laird** (instructed by **Government Legal Department**) for the **Defendant**
Tim Buley KC and **Alex Jamieson** (instructed by the **Special Advocates' Support Office)** as Special Advocates
The **Interested Party** did not appear

Hearing dates: 9 – 12 July 2024

MRS JUSTICE FARBEY:

Introduction

1. The Claimants are companies within the LetterOne Group ("the Group") which was formed for the purpose of making long-term investments in other companies in the energy, technology, health and retail sectors. By Re-amended Grounds for judicial review, the Claimants seek a quashing order, declarations, and damages under sections 7 and 8 of the Human Rights Act 1998 ("the HRA") in relation to a "Final Order" ("the Order") made by the Secretary of State for Business, Energy and Industrial Strategy ("BEIS"). The Order was made pursuant to section 26(3) of the National Security and Investment Act 2021 ("the NSIA" or "the Act") on grounds of national security. It required the First Claimant to divest itself of 100% of its shareholding in Upp Corporation Limited ("Upp"), a fibre broadband start-up company.

2. The Order was made by the Secretary of State personally (not by officials on his behalf). Responsibility for the Order moved from the Secretary of State for BEIS to the Chancellor of the Duchy of Lancaster who also was appointed Secretary of State in the Cabinet Office. I shall for convenience refer to the person with responsibility for the Order at any one time as the Secretary of State or (for emphasis when applicable) the Secretary of State for BEIS.

3. The formulation of the grounds of challenge has evolved. I do not criticise the Claimants' lawyers who have assisted the court by their comprehensive consideration of a statutory scheme which (I was told) has not been the subject of previous case law. Nevertheless, for the sake of fairness to the Secretary of State as well as for clarity, I will hold the Claimants to their pleaded Re-amended Grounds. Consequently, this judgment will not follow the precise scheme of the Claimants' skeleton argument or of the Claimants' oral submissions.

4. The Re-amended Grounds may be summarised as follows:

    i. **Human rights**: Under Ground 1, the Claimants contend that the Order breached section 6(1) of the HRA as being disproportionate and contrary to the Claimants' right to the protection of property guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). Ground 1 is divided into two elements. Under Ground 1A, it is submitted that the Order was disproportionate because the Secretary of State could and should have imposed less intrusive measures than divestment. Under Ground 1B, the Claimants contend that the Secretary of State's failure to ensure full compensation for the financial loss incurred by divestment gave rise to a breach of A1P1.

    ii. **Common law principles of public law**: Under Ground 2, the Claimants contend that the Order breached public law principles. Ground 2 is also divided into two elements. Under Ground 2A, it is submitted that the Order was based on irrelevant considerations or a failure to have regard to all relevant considerations; and it was made in breach of the duty of inquiry established by *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("the *Tameside* duty"). Under Ground 2B, it is submitted that the Order was irrational in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223).

iii. **Procedural fairness**: Under Ground 3, the Claimants contend that the decision to make the Order was procedurally unfair because (i) the national security risks were not sufficiently disclosed to the Claimants before the Order was made; and (ii) the Claimants were not given a fair opportunity to address the concerns of the Secretary of State's advisers in relation to measures falling short of divestment.

5. The Re-amended Grounds sought a declaration (under section 4 of the HRA) that section 26(3)(b) of the Act was incompatible with the Claimants' Convention rights. While the claim for a declaration of incompatibility was not formally withdrawn, it was not advanced in any meaningful way in the Claimants' skeleton argument (where it was simply footnoted as an issue that might arise) and was not pursued in oral submissions. It does not feature in the agreed List of Issues for the court's determination. Having heard no argument to the contrary, I proceed on the basis that the statutory scheme (if lawfully operated) is compatible with the Claimants' human rights.

6. In resisting the claim, the Secretary of State relies on sensitive material that cannot be placed in the public domain for reasons of national security. Following the court's orders permitting a closed material procedure pursuant to sections 6 and 8 of the Justice and Security Act 2013, the Secretary of State relies on both "open" material (disclosed to the Claimants and their lawyers) and "closed" material (not disclosed to the Claimants or their lawyers). The claim was listed for a "rolled-up" hearing. I received written and oral submissions in open and closed session. Mr Tom Hickman KC and Mr Paul Luckhurst appeared on behalf of the Claimants. Mr Rory Phillips KC, Ms Georgina Wolfe, Mr Emmanuel Sheppard and Mr Karl Laird appeared for the Secretary of State. Mr Tim Buley KC and Mr Alex Jamieson appeared as Special Advocates, representing with skill the Claimants' interests in the closed session from which the Claimants and their lawyers were excluded. Upp filed an acknowledgement of service as an Interested Party, stating that it did not intend to contest the claim. It has taken no further part in the proceedings.

The NSIA

7. The NSIA received Royal Assent on 29 April 2021. For all material purposes, its provisions came into force on 4 January 2022. Its long title states that it is an "Act to make provision for the making of orders in connection with national security risks arising from the acquisition of control over certain types of entities and assets; and for connected purposes." As expressed in Mr Phillips' skeleton argument, the Act aims to prevent hostile actors from acquiring control of critical parts of the United Kingdom's economy and infrastructure by empowering the Secretary of State to "call in" and assess a qualifying acquisition on grounds of national security.

Assessment of acquisitions on national security grounds

8. Section 1 of the Act empowers the Secretary of State to issue a "call-in notice" if the Secretary of State reasonably suspects that a "trigger event" has taken place that has given rise or may give rise to a risk to national security. Although other forms of acquisition may qualify as trigger events, I shall for simplicity explain the scheme of the Act by reference to the acquisition of shares. A "trigger event" includes (among other share acquisitions) a situation where the percentage of the shares that a person holds in a UK company increases from less than 75% to 75% or more (sections 5, 7 and 8 of the Act).

9. Section 2 makes further provision about call-in notices. It stipulates that no more than one call-in notice may be given in relation to each trigger event (section 2(1)). It empowers the Secretary of State to issue a call-in notice in relation to a trigger event that occurred before the call-in power came into force provided that (i) the trigger event occurred on or after 12 November 2020 and (ii) the notice is issued within six months of "commencement day", meaning 4 January 2022 (section 2(4)(a)). The power to call in an acquisition of shares completed before 4 January 2022 was used in the present case. There is no challenge either to the retrospective effect of the legislation or to the power to issue a call-in notice in relation to an acquisition of shares that had already taken place before the provisions of the Act came into force.

10. The Secretary of State must consider a called-in acquisition within an "assessment period" which begins with the date on which the call-in notice is given to the acquirer of the shares (section 23(2)). The "initial period" for assessment is 30 working days but the Secretary of State may give an "additional period notice" which extends the assessment period by an additional 45 working days (section 23(3)-(5) and (8)). At the end of the assessment period, the Secretary of State must either make a "final order" or give notice that no further action is to be taken (section 26(1)-(2)).

Interim and final orders

11. The Secretary of State may, during the assessment period, make an interim order for the purpose of preventing or reversing pre-emptive action that might prejudice the exercise of the Secretary of State's functions under the Act (section 25(1)-(3)). An interim order may require a person to do, or not to do, certain things (section 25(4)(a)).

12. Section 26(3) makes provision for the imposition of a final order as follows:

> "The Secretary of State may, during the assessment period, make a final order if the Secretary of State—
>
> (a) is satisfied, on the balance of probabilities, that—
>
> (i) **a trigger event has taken place** or that arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event, and
>
> (ii) **a risk to national security has arisen** from the trigger event or would arise from the trigger event if carried into effect, and
>
> (b) reasonably considers that the provisions of the order are **necessary and proportionate for the purpose of preventing, remedying or mitigating the risk**" (emphasis added).

13. It was not in dispute that, when the First Claimant purchased a 100% shareholding in Upp, a "trigger event" took place. Nor was it in dispute that a risk to national security arose from that trigger event. The dispute between the parties concerns the Secretary of State's decision under section 26(3)(b) that an Order requiring full divestment was "necessary and proportionate for the purpose of preventing, remedying or mitigating the risk" to national security.

14. Section 26(5) provides that a final order may include the following provisions:

> "(a) provision requiring a person, or description of person, to do, or not to do, particular things,
>
> (b) provision for the appointment of a person to conduct or supervise the conduct of activities on such terms and with such powers as may be specified or described in the order,
>
> …
>
> (d) consequential, supplementary or incidental provision".

15. By virtue of section 30, the Secretary of State may, with the consent of the Treasury, give "financial assistance" to an entity "in consequence of the making of a final order." For this purpose, "financial assistance" means loans, guarantees or indemnities, or any other kind of financial assistance. In general terms, the grant of assistance of £100 million or more requires the Secretary of State to lay a report of the amount before the House of Commons.

Procedures under the Act

16. The Act contains procedural provisions. By virtue of section 19, the Secretary of State has the power to require a person to provide information as follows:

> "(1) The Secretary of State may give a notice to a person (subject to section 21) to require the person to provide any information in relation to the exercise of the Secretary of State's functions under this Act which—
>
> (a) is specified or described in the notice, or falls within a category of information specified or described in the notice, and
>
> (b) is within that person's possession or power.
>
> …
>
> (3) A notice under subsection (1) is referred to in this Act as an information notice.
>
> (4) An information notice may—
>
> (a) specify the manner in which the information is to be provided,
>
> (b) specify a time limit for—
>
> (i) providing the information,
>
> (ii) notifying the Secretary of State that the information is not in the person's possession or power, or
>
> (c) require the person to provide any information within their possession or power which would enable the Secretary of State to find the information required by the notice.

> (5) An information notice must—
>
> (a) specify the purpose for which the notice is given, and
>
> (b) state the possible consequences of not complying with the notice.
>
> (6) A person is not required under this section to provide any information which that person could not be compelled to provide in evidence in civil proceedings before the court.
>
> …".

17. The Secretary of State may also compel the attendance of witnesses at a specific time and place to give evidence (section 20). Before making a final order, the Secretary of State must consider any representations made to him or her (section 26(4)). Section 28(5) permits the Secretary of State to exclude from the final order or from explanatory material accompanying the order anything that the Secretary of State considers, if disclosed, would be contrary to the interests of national security.

After a final order has come into effect

18. Section 27(1)-(2) requires the Secretary of State to keep a final order under review and empowers the Secretary of State to vary or revoke it. A person required to comply with a final order may request that it be varied or revoked (section 27(3)). The Secretary of State is not required to consider such a request absent a material change of circumstances since the order was made (section 27(4)).

19. The failure to comply with a requirement of an order amounts to an "either way" offence for which the maximum sentence (if a person is convicted on indictment) is 5 years' imprisonment (sections 33 and 39(1) of the Act).

20. A challenge to a final order must be brought by way of judicial review proceedings. Save in exceptional cases, proceedings must be commenced within 28 days after the day on which the final order is made (section 49(2) and (4) of the Act).

Statutory statements

21. By virtue of sections 3 and 4 of the Act, the Secretary of State may lay before Parliament and publish a statement that sets out how the Secretary of State expects to exercise the power to give a call-in notice. Any such statement must be reviewed at least once every 5 years. In the statement that was in force at the material times in this case, the Secretary of State said that the call-in power was likely to be exercised to deal with (among other things) the risk to national security arising from "the potential impact of a qualifying acquisition on the security of the UK's critical infrastructure" (Government Statement under Section 3 of the NSIA; 2021) ("the Section 3 Statement"). Despite some suggestion from the Claimants that Upp's network was too small and localised to constitute "critical infrastructure", there is no good reason to suppose that fibre broadband falls outside the Statement.

22. There are no other published policies or guidance documents about how the Secretary of State will exercise his or her powers under the Act. The Section 3 Statement and its

successor published in May 2024 are not comprehensive statements of policy. In particular, as the Claimants' solicitors pointed out to the Secretary of State in representations, the Section 3 Statement is silent on how the Secretary of State would assess the effectiveness of measures falling short of divestment.

Operation of the NSIA in practice

23. As set out in the Secretary of State's evidence, the assessment of risk to national security under the Act is carried out and co-ordinated by the Investment Security Unit ("ISU"). At the date of the Order, the ISU was located within BEIS, moving shortly afterwards to the Cabinet Office. During the statutory assessment period, the ISU consults and works with other government departments ("OGDs") with expertise in national security. It also consults and works with OGDs and public bodies with expertise in the subject matter of the case. In the present case, the ISU consulted the Department for Culture, Media and Sport ("DCMS") which has executive responsibility for broadband expansion. The ISU also consulted Building Digital UK, an agency of DCMS which promotes broadband services.

24. Before a final order is made, three assessments will be completed.

ISRA

25. The Investment Security Risk Assessment ("ISRA") will set out the ISU's assessment of the national security risks arising from the trigger event. It is "cleared" (i.e. authorised) by a member of the Senior Civil Service (as defined by grade of employment) within the ISU. The ISRA will provide reasons for recommending that a final order be made. Any disagreements among officials about the recommendation will be noted in the ISRA so that they can be brought to the Secretary of State's attention.

26. The ISRA contains information provided by teams in government departments with relevant knowledge and expertise. It will contain a Diplomatic Assessment by the Foreign, Commonwealth and Development Office ("FCDO") and an Economic Assessment drafted by the lead department for the relevant sector of the UK economy (in the present case, DCMS). These assessments are provided to the Secretary of State to assist him or her to put the decision in context.

Remedies Assessment

27. The Remedies Assessment sets out those steps or actions (known as "remedies" or "mitigations") which may prevent or effectively meet the risks described in the ISRA. It recommends to the Secretary of State the steps and actions which the ISU considers to be necessary and proportionate to prevent, remedy or mitigate the national security risk arising from the trigger event. The Remedies Assessment analyses each potential remedy according to effectiveness; likely level of compliance by those who would be subject to the terms of a final order; enforceability; cost or burden to the Government; and cost or burden to the parties to the final order. Individual remedies may be combined into "packages" for their cumulative effect. Disagreements among officials about remedies will be brought to the Secretary of State's attention.

Representations Assessment

28. The Representations Assessment will summarise all representations received for or on behalf of those who will be affected by a final order, including any representations relating to national security risk or to remedies.

Secretary of State's decision

29. As I have indicated, the decision whether to make a final order is taken not by officials but by the Secretary of State personally. Before taking a decision, the Secretary of State will be provided with a Ministerial Submission ("MinSub") drafted by ISU officials. The MinSub will contain the ISU's recommendation. The ISRA, Remedies Assessment, Representations Assessment and other relevant documents will be provided to the Secretary of State as annexes to the MinSub.

Summary of the competing arguments

30. The Claimants do not contend that no final order should have been made. Their case is that the Secretary of State acted unlawfully by imposing divestment in the Order as opposed to less intrusive measures. The Secretary of State contends that the decision to impose divestment and to reject less intrusive measures was lawful. Alternatively, if any aspect of the decision or the decision-making process was flawed, the court ought to refuse relief pursuant to section 31(2A) of the Senior Courts Act 1981 on the basis that it is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred.

31. During the decision-making process, the imposition of divestment became known as "Remedy A." The imposition of a set of less intrusive measures became known as "Remedy B." Both remedies were placed before the Secretary of State in a Remedies Assessment.

32. The package of measures in Remedy B was derived in part from representations made on behalf of the Claimants but did not contain all of the Claimants' detailed proposals for measures other than divestment. The various elements of Remedy B may be summarised as follows:

    i. A Security and Resilience Committee ("SRC") would be established by Upp to monitor compliance with the final order.

    ii. Upp would create lists of "permissible information" to which the Group's representatives would have access in order for them to make funding decisions about Upp. All other information would be considered "prohibited" in the sense that the other companies in the Group would be unable to access it.

    iii. The Group would maintain its existing right to appoint three "Investor Directors" to the Upp Board but would have no role in appointing the remaining four directors. The Group and Upp would need Government approval of any Board appointments.

    iv. Upp would not require investor consent to appoint directors to its Board or to enter into any contracts below £2,000,000.

v. Subject to defined exceptions, the Group's representatives would not have access to Upp's sensitive sites, data and personnel. They would only be able to visit the Upp headquarters when accompanied by a member of the SRC.

vi. Upp would be required to appoint and pay for an independent, third-party auditor approved by the Government to conduct a bi-annual audit of Upp's compliance with the final order and of the work of the SRC. The auditor would be accountable to the Government.

vii. Upp would be required to conduct a one-off audit of its network security, undertaken by an auditor approved by the Secretary of State.

viii. All "critical physical network assets" would remain in the United Kingdom.

ix. A whistleblowing mechanism would be set up and then managed by an independent third party approved by the Government.

x. The Group would alter the provisions of their investment agreement with Upp to ensure that the terms of the final order could be complied with.

33. The Claimants had advanced additional suggestions. I have nevertheless summarised Remedy B in the form considered by the Secretary of State as it is convenient at this point to indicate the less intrusive measures that were drawn up by the ISU as an alternative to divestment. Much of the dispute between the parties relates to whether it was lawful to impose Remedy A (the Secretary of State's case) or whether the Secretary of State could and should have imposed Remedy B, whether in the form submitted to the Secretary of State or in some modified and expanded form (the Claimants' case).

Facts

34. I turn to the facts of the case which are set out in the documents and witness statements filed on behalf of the parties.

The purchase of Upp

35. On 21 January 2021, the First Claimant acquired the entire share capital in a non-operating UK company called FibreMe. The purchase price was £100. The company was renamed Upp on 1 June 2021. The Claimant's evidence describes Upp as having a "mission to bring next-generation full fibre broadband with industry leading security and reliability to under-served rural communities in the UK." Upp's first customer was connected to the internet in September 2021. By January 2022, Upp's network extended across eight towns in East Anglia.

The Group and its owners

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.

38. The founders are Russian nationals. On 24 February 2022, Russian troops entered Ukraine. On the same day, dividends were paid to Group companies owned by Mr Aven, Mr Khan and Mr Kuzmichev. On 28 February 2022, Mr Fridman and Mr Aven resigned from their Board roles in the Group. On 4 March 2022, Mr Kosogov likewise resigned.

39. Before Mr Fridman resigned, he wrote to the Group's employees saying that he saw the Ukraine conflict as a tragedy for the Ukrainian and Russian peoples and that he wanted the bloodshed to end. He said that he had responsibilities to both Ukrainian and Russian employees. Mr Phillips relied on the letter as demonstrating Mr Fridman's ongoing interest in the Group's workforce. He invited me to infer from the letter that Mr Fridman could not be trusted to divorce himself from running the Group. I take the view that the letter reads more like a "puff piece" than a statement that Mr Fridman would continue to have daily influence on the Group. In any event, there is no evidence that the Secretary of State considered the letter before making the Order: it appears to have had no role in the decision-making process. For these reasons, it is irrelevant to any issue I have to decide. I do not propose to say more about it.

40. In February 2022, the European Union had imposed sanctions on Mr Aven, Mr Fridman, Mr Khan and Mr Kuzmichev. In March 2022, the United Kingdom imposed sanctions on them pursuant to the Sanctions and Anti-Money Laundering Act 2018 and the Russia (Sanctions) (EU Exit) Regulations 2019. In their respective designations as sanctioned persons under the UK provisions, they were described as "pro-Kremlin" or "supporting the Government of Russia." Mr Aven and Mr Khan were described as associates of President Vladimir Putin. The Secretary of State was also aware that Mr Aven attended the televised meeting of Russian oligarchs organised by President Putin on the day that Russian troops entered Ukraine.

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.

The assessment process

43. In October 2017, the Secretary of State published a consultation paper in the form of a Green Paper on proposed legislative reform in relation to the Government's National Security and Infrastructure Investment Review and, in particular, in relation to the Government's Review of the national security implications of foreign ownership or control of investments in the British economy. In July 2018, the Secretary of State published a consultation paper in the form of a White Paper on proposed legislative reform in the sphere of national security and investment. In November 2020, the Secretary of State published the Government's response to the consultation.

44. On 20 December 2020, officials within BEIS met representatives of the Group to discuss the Group's proposals for the acquisition of FibreMe. At the meeting, the Group's Chief Executive Officer, Mr Jonathan Muir, sought to promote the Group as already having a significant role in the UK retail sector through its ownership of Holland & Barrett. He provided a description of the Group's governance structure, identifying its Chairman (former Trade Minister Lord Davies of Abersoch) and various other distinguished Board members.

45. During the course of discussions, the Group's external lawyer raised the issue of whether the Secretary of State would intervene either under existing provisions of the Enterprise Act 2002 or under the NSIA when in force. The unchallenged minute of the meeting, drawn up by the Claimants' solicitors, records the following comment from the then Deputy Director of National Security and Investment in BEIS:

> "[The Deputy Director] reiterated her comments during an earlier telephone conversation…i.e. that she had no particular concerns about the proposed acquisition, that she could not imagine the Secretary of State intervening under the existing legislation [i.e. the Enterprise Act 2002] or calling this investment in under the incoming legislation once in force."

46. Mr Hickman emphasised this early reassurance by a member of the Senior Civil Service. He submitted that the reassurance had contributed to unfairness or to an irrational approach in the Secretary of State's subsequent decision to make the Order. However, the Claimants do not contend that the Deputy Director gave them an assurance founding a legitimate expectation that the acquisition of FibreMe would not be called in. The Deputy Director's comment in 2020 could not bind the Secretary of State in the changed geopolitical landscape of 2022. In the context of the legal issues before me, Mr Hickman gave the Deputy Director's comment undue weight.

47. On 16 December 2020, Mr Muir wrote to the Secretary of State to promote the Group's proposed purchase of FibreMe. The Minister for Investment responded by letter of 14 January 2021, confirming that he regarded the Group as having notified the Secretary of State of its plans. The Minister referred Mr Muir to the passage in Parliament of the National Security and Investment Bill.

48. Mr Hickman emphasised that the Minister's letter said that the Government "warmly welcomes LetterOne's continued confidence in the UK." It is reading far too much into the letter to suggest that this remark should have any effect on the lawfulness of the later Order.

49. As I have mentioned, on 21 January 2021, the First Claimant acquired FibreMe. Time then passed until the NSIA came into force and, on 18 January 2022, the ISU Board met. The Board is an advisory group of civil servants from relevant government departments which considers case-specific issues that are referred to it by the ISU. The meeting was chaired by the Deputy National Security Adviser for Intelligence, Defence and Security ("the DNSA"). It was attended by representatives from the Cabinet Office, BEIS, DCMS, the Ministry of Defence ("MoD"), the FCDO, the Home Office, the Department for International Trade ("DIT") and the National Cyber Security Centre ("NCSC"). The minutes of the meeting show that the Board wanted to gain a consensus about how to proceed with the LetterOne case.

50. On 24 March 2022, the NCSC produced a "technical comment paper" ("the NCSC Paper") setting out the ways in which a national security risk could arise through "owner influence" on a broadband network like Upp. The NCSC Paper described the different ways in which the influence of the UBOs (by that time, Mr Aven, Mr Fridman and Mr Kosogov) could present a risk to national security. Areas of concern included:

    i. Access to data including personally identifiable information about customers (such as names, addresses and telephone numbers) which could be used to undermine national security;

    ii. The ability to disrupt and sabotage operations on the broadband network; and

    iii. The ability to conduct espionage operations.

    The gist of the NCSC paper disclosed in open states:

> "the failure to manage the risks now could impact the national security risk to UK telecoms infrastructure generally, including the long-term impacts arising from the longevity of this type of infrastructure and the likelihood of a consolidation of the alt-net market meaning that Upp could form part of a larger network in the medium term."

51. The NCSC Paper recommended that further work be undertaken by BEIS to examine the corporate structure that "sat" between the UBOs and Upp in order to demonstrate any ability of the UBOs to influence the appointment of decision-makers within Upp (meaning Upp's directors and management team).

52. On 31 March 2022, the ISU Board met again. The meeting was chaired by the DNSA and the participants discussed the national security risk and the potential options for dealing with the case.

53. On 5 May 2022, the then Deputy Director of the ISU (Mr Christopher Blairs) issued a call-in notice to Upp and to the First Claimant. The call-in notice referred to the First Claimant's purchase of 75% or more of Upp's shares (the "trigger event" under section 8(2)(c) of the Act) and stated:

> "The Secretary of State reasonably suspects that this trigger event has given rise or may give rise to a risk to national security."

The reference to the risk to national security is a statement of the statutory language (section 1(1)(a) of the NSIA) and so represented the bare minimum of reasons for the call-in.

54. On the same day, the Director of the ISU (Ms Jacqueline Ward) made an interim order on behalf of the Secretary of State, in order to preserve the status quo within Upp, and Mr Blairs issued an Information Notice to Upp. Pursuant to the Information Notice, Upp was required to provide information relating to (among other things) its acquisition by the First Claimant, its suppliers and its security. In relation to its security, Upp was required to provide information relating to the operational and technical management of its network and "confirmation of compliance with the anticipated requirements of the draft Telecommunications Security Code of Practice (under the Telecoms Security Act 2021) to segregate [its] network." I have not been provided with a copy of Upp's response to the Information Notice. Mr Hickman understandably emphasised that the call-in notice, interim order and Information Notice were draconian actions taken over 15 months after the Group had acquired Upp and following the investment of tens of millions of pounds in Upp's development.

55. On 26 May 2022, the Claimants' solicitors made detailed written representations to the Secretary of State on behalf of the First Claimant supported by a suite of documents. The solicitors emphasised that the Group's Board members and Upp's Board were distinguished individuals. None held Russian citizenship. Upp did not serve any sensitive, private or government technologies, information or assets. Neither the Group nor any of its officers or employees were by that time the subject of sanctions. Mr Khan and Mr Kuzmichev had sold their shares to a nominee company whose UBO was Mr Kosogov who was not the subject of sanctions. The only UBOs within the Group subject to UK sanctions were Mr Fridman (who in effect controlled a 37.9% shareholding in the Group's holding companies) and Mr Aven (who in effect controlled a 12.1% shareholding). Together, they did not have an interest of greater than 50% in the Group.

56. The solicitors emphasised that the Group had taken extensive measures, including structural and legal separation, to sever links to sanctioned persons and entities. The solicitors submitted that no sanctioned person or entity could direct or influence the Group's business.

57. The solicitors denied that the acquisition of Upp gave rise to national security concerns, structuring their submissions around the factors described in the Section 3 statement as being those that the Secretary of State would expect to take into account when deciding whether to exercise his call-in power. Those factors were: (i) target risk (i.e. any risk posed by Upp); (ii) acquirer risk (i.e. any risk posed by the Group); and (iii) control risk (i.e. any risk posed by the specific degree of control exercised over the target by the acquirer). The solicitors dealt with each of these factors and indicated that:

> "LetterOne is cognisant of potential theories of harm which the Secretary of State may consider in assessing whether there is a risk to national security in any case, including (i) inappropriate leverage/risk of exploitation; (ii) security of supply of an important or essential input; (iii) access to sensitive technology/information/assets; and (iv) cumulative ownership."

58. Dealing with each of these four aspects of possible harm, the solicitors noted the following in relation to the risk of inappropriate leverage or exploitation of Upp by its UBOs:

> "LetterOne is not answerable to the demands, and short-termism, of external capital. LetterOne has more than GBP 20 billion of patient capital, and therefore respectfully submits that it is not vulnerable to pressure or exploitation by any third-parties, including its UBOs who cannot direct or influence LetterOne's business and who have been legally and structurally separated from the group."

59. As regards Mr Fridman and Mr Aven, the representations confirmed that:

    i. They no longer had any involvement in the day-to-day running of the Group.

    ii. They would not receive any further reward or financial benefit from the Group.

    iii. They had no access to the Group's offices.

    iv. They had surrendered all electronic devices which were provided to them by the Group and had had their access to IT systems permanently disabled.

60. The Secretary of State subsequently issued an Information Notice to Mr Kosogov seeking information about the transfer of Mr Khan's and Mr Kuzmichev's shares in LetterOne Investment Holdings S.A to him. On 26 August 2022, Mr Kosogov responded. On 7 September 2022, the Secretary of State issued a further Information Notice to Mr Kosogov relating to the sale of the shares. On 14 September 2022, Mr Kosogov responded to the second Notice. It seems from that response that the sale of Mr Khan's and Mr Kuzmichev's shares followed an oral agreement made during telephone calls. At the time of the calls, Mr Kosogov was in the Maldives and on his own. It appears from the documents that Mr Khan and Mr Kuzmichev lent Mr Kosogov the funds to purchase their shares (at a price of over $4 billion and $3 billion respectively) with an agreement that they could buy back their stakes within 10 years.

61. Mr Aven and Mr Fridman retained their shareholdings. As Ms Wolfe emphasised, Mr Aven, Mr Fridman and Mr Kosogov were the only UBOs of the Group, and the only UBOs of Upp, at the date of the Order.

62. The Claimants criticise those parts of the ISU documents that fail to state accurately the total number of UBOs, and the number of sanctioned UBOs, at any one time. Any such errors are immaterial. The decision to impose the Order does not depend on precise numbers.

63. On 10 October 2022, an Additional Period Notice was issued under section 23(5) of the Act, extending the time for assessment of the case until 21 December 2022 (subsequently corrected to 22 December 2022). On the same day, the present Deputy Director in the ISU, Mr James Withers, wrote to the First Claimant. The letter expanded on the risk to national security in the following terms:

> "The Secretary of State considers that, on the balance of probabilities, a risk to national security has arisen from [the] trigger event. The national security risks in this case relate to the ownership of [Upp] by the ultimate beneficial owners of LetterOne Core Investments Sàrl (parent company of L1T FM

> Holdings UK Ltd.). Specifically, to the indirect ownership of the existing and growing full fibre broadband network that [Upp] is rolling out in the East of England."

64. The letter informed the First Claimant that the Secretary of State was considering whether to make provisions in a final order. In determining whether to make a final order, the Secretary of State would consider whether "a remedy is necessary and proportionate to address the national security risks identified." Specifically, consideration would be given to remedies under four headings:

> "i. restrictions on flows of information (including personal information) between [Upp] and the LetterOne group of companies;
>
> ii. restrictions on physical or virtual access to [Upp's] sites, data and personnel by representatives of the investor;
>
> iii. conducting a security audit of the [Upp] network; and
>
> iv. **reversing this acquisition by requiring divestment by [the First Claimant] of [Upp]**" (emphasis added).

The Secretary of State invited the First Claimant to make representations.

65. On 17 October 2022, Mr Withers, together with a junior civil servant in the ISU, Mr Jupp, and a representative of DCMS, held a meeting over a video call with Mr Muir, Dr Easton, Mr Stephen Gillespie (LetterOne's General Counsel) and an external solicitor. Mr Muir outlined the actions taken by the Group to ensure that the sanctioned UBOs could not exert influence on the Group. Mr Withers warned that the Government considered a range of risks when reviewing acquisitions and that the remedies currently under consideration were "not set in stone and could change." He said that the request for representations was "the start of the process rather than the end and that the ISU would welcome further representations." Mr Withers nevertheless made clear that the process of receiving representations was a formal one such that (for example) there was a limit to how much the Group could expect the ISU to comment informally on draft documents. He made clear that the imposition of sanctions on UBOs was "not a permanent mitigation in this case."

66. On the following day, there was a meeting between ISU officials and OGDs including the NCSC, FCDO, Home Office, MoD, DCMS and United Kingdom Government Investments ("UKGI"). After the meeting, Mr Jupp circulated a summary of the discussion to those who had attended. He set out a list of action points and asked that he should be informed of any additional action points.

67. On 24 October 2022, the First Claimant made further detailed written representations to the Secretary of State. The representations responded to each of the four headings in the 10 October letter as well as proposing additional mitigation measures. The First Claimant requested a meeting with officials to "discuss the proposed remedies." It is notable that in this second set of representations, the First Claimant candidly conveyed the influence of the Investor Directors on Upp:

> "For completeness, outside Board meetings, the Investor Directors regularly engage with [Upp] to ensure they are adequately informed of [Upp's] current affairs. This may include calls, emails exchange and/or meetings with certain [Upp] Directors, SLT [i.e. senior leadership team] and select senior staff members at SLT invitation."

68. By letter dated 15 November 2022, Mr Withers informed the First Claimant that, in addition to the four heads set out in the 10 October letter, the Secretary of State was considering the following additional remedies (the term "investor" appearing to be a reference to the Second Claimant):

> "1. The investor would be prohibited from:
>
> a. Recommending appointments to the Board of Upp Corporation Ltd.;
>
> b. Recommending contractors or suppliers for use by Upp Corporation Ltd.
>
> 2. The following actions by Upp Corporation Ltd would no longer require investor consent:
>
> a. Appointment or removal [of] any director or other officer or any committee of the board of directors or varying the composition or remit of the board, any such committee or disbanding any such committee;
>
> b. Entering into any contract which is not on an arm's length basis;
>
> c. Entering into any agreement which is out of the ordinary course of a Group Company's business; and
>
> d. Entering into any contract or make any commitment under which the consideration payable or receivable represents more than £500,000."

69. The ISU granted the First Claimant's request for a meeting. On 22 November 2022, a meeting took place by video call between the same people who had attended the 17 October call. Dr Easton suggested that the two sides "were getting closer on a package of remedies to which they could agree" but Mr Withers warned that all remedies, up to and including divestment, were under consideration.

70. Later in the day, the First Claimant made a third set of written representations responding to the 15 November letter. Those representations made clear that the Group considered it "essential" to retain some limited representation on Upp's Board of Directors in the form of three Investor Directors. In addition, the Group wanted to retain the right to put forward candidates for other members of Upp's Board and to propose contractors and suppliers for use by Upp. The ISU considered the representations on the same day, and the Representations Assessment was finalised.

71. In a witness statement, Mr Gillespie states that had the Secretary of State required further steps to be taken short of divestment, the Group "would of course have considered these." I agree with Mr Phillips that the Group in its third set of representations rejected some of the further steps which the ISU was considering. There was no obligation on the Secretary of State to give the Claimants another chance to agree to them.

72. On 12 December 2022, Mr Jupp sent an email to a large number of officials in OGDs enclosing the ISRA, NCSC Paper, Representations Assessment and Remedies Assessment so that officials could brief ministers outside BEIS in advance of the Secretary of State's final decision. Officials briefed ministers at the FCDO, Home Office and DCMS. In response to those briefings, the Foreign Secretary, Home Secretary and Secretary of State for DCMS wrote letters to the Secretary of State for BEIS ("the Ministerial Letters"). The Foreign Secretary supported the view of the NCSC. The Home Secretary and the Secretary of State for DCMS supported divestment as the only remedy capable of meeting the national security risks. Each of these three Secretaries of State reached their conclusion on the basis of bespoke MinSubs which were approved or cleared by (respectively) the Deputy Director of the National Security Directorate in the FCDO, the Deputy Director of the State Threats Policy Unit in the Home Office and a member of the Senior Civil Service in DCMS.

73. On 15 December 2022, the ISRA and the Remedies Assessment were finalised. On 16 December 2022, the NCA reported that a letter signed by Lord Davies and Mr Muir in April 2022 had stated that the LetterOne Board did not propose depriving the UBOs of the ultimate economic ownership of LetterOne: it was and would remain the property of "the UBOs upon whose wealth the L1 business had been built."

74. On 19 December 2022, the MinSub for the Secretary of State's decision was completed. Officials recommended Remedy A, namely that the Secretary of State should impose a final order requiring the Group to divest itself of shares in Upp. In his witness statement, Mr Withers describes why Remedy A was recommended, as follows:

> "In reaching the decision to recommend Remedy A (i.e., divestment), the ISU considered in detail whether the package of remedies in Remedy B, including the proposals put forward in representations by the parties, would prevent, remedy or mitigate the national security risks arising from the acquisition. ISU concluded that the measures in Remedy B would not prevent the risks, because Upp would continue to be owned by LetterOne Group, and that Remedy B would only partly remedy or mitigate the risks. ISU determined therefore that the measure in Remedy A was necessary and proportionate to prevent the national security risk arising from the trigger event."

75. In addition to the MinSub, the Secretary of State was provided with other documents, including the ISRA, the Representations Assessment, the Remedies Assessment, the NCSC Paper, an Economic Assessment from DCMS, the ISU Legal Assessment and the Ministerial Letters.

76. Mr Jupp sent the documents to the Secretary of State's Senior Private Secretary. Mr Withers attended the Secretary of State while he took the decision. The Senior Private Secretary then replied to Mr Jupp in an email which has been disclosed by way of a gist in the following terms in the open material:

> "The Secretary of State reviewed this submission today… He reviewed the case file, representations from the parties, handling advice and legal guidance. He also noted the letters from other Ministers and the potential economic impact of each remedy. Then, he agreed to the recommended Option A for the reasons noted in the submission…"

77. In short, the Secretary of State decided to make the Order which he went on to sign on the same day. The Order explained that the Secretary of State was satisfied on the balance of probabilities that a trigger event had taken place and that a risk to national security had arisen from the trigger event. The risk to national security was described in the following terms:

> "the ownership of Upp Corporation Ltd. by the Ultimate Beneficial Owners of LetterOne Core lnvestments Sàrl (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."

78. The Order required the First Claimant to divest 100% of its shareholding in Upp in accordance with a stipulated timetable. There was no mention of the Secretary of State's power to provide financial assistance under section 30 of the Act.

79. By letter dated 19 December 2022, the Secretary of State informed the Chair of the BEIS Select Committee that the Order had been made. On or around the same date, the Secretary of State gave public notice of the Order (in accordance with section 29 of the Act) in the form of an online statement by BEIS.

80. Following pre-claim correspondence, the present proceedings were launched on 16 January 2023. Following further correspondence between the parties, the Secretary of State on 6 July 2023 refused the Claimants' request for financial assistance under section 30 of the Act. On 8 August 2023, the Deputy Prime Minister (who at that time had responsibility for the application of the NSIA) reviewed the Order under section 27(2) of the Act and concluded that no action was required (i.e. that it should not be varied or revoked).

81. On 5 September 2023, Upp was sold to Virgin Media O2. The Group received less for the sale than the £143.7 million that it had by then invested. In a witness statement, Mr Benjamin Babcock (the Group's Managing Director of Corporate Finance) sets out cogently how the fact of a forced sale was bound to result in a sale price that was below the true economic value of Upp.

Summary of key assessments

82. Although I have referred to them in my recital of the chronology of events, neither the ISRA nor the Representations Assessment nor the Remedies Assessment were disclosed to the Claimants in any form before the present claim was lodged. They have each been disclosed in open form by way of gists of the original documents during the course of the proceedings. The full versions have been provided to the Special Advocates and to the court. The open versions may be summarised as follows.

ISRA

83. The ISRA summarised the risk to national security in the following terms:

> "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 UK 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."

84. The ISRA noted that both Upp and the Group had in their respective representations confirmed the role that Group-appointed Investor Directors had on the Upp Board. The structure of the Group and the role of the Investor Directors were evidence of the Group's ability to influence the day-to-day running of Upp. It was noted that the Group had taken steps to remove the sanctioned UBOs from positions of control or influence but that the Government had to consider the future, when sanctions might be lifted and when the Group would be free to return shares and control to the UBOs. The longer view was relevant because of the assessment that the instalment of fibre infrastructure was likely to be a long-term component of the United Kingdom's broadband infrastructure. The ISRA emphasised that there would not be another opportunity to use legislation to review the acquisition or to intervene – presumably because the NSIA does not permit more than one call-in notice in relation to any trigger event (section 2(1) of the Act) and because of the limitations on retrospective call-in (section 2(4) of the Act). It was assessed that national security risks would grow each year as Upp expanded its network.

Representations Assessment

85. The Representations Assessment summarised the written representations made by the Claimants and by Upp. The Assessment then asked whether the representations contained any information that was not previously known to the Government and, if so, whether it had any material impact on the judgements reached in the ISRA. It was acknowledged that the representations contained new information about the acquisition of FibreMe and about the steps that the Group had taken to abide by the terms of sanctions imposed on their UBOs. However, the Assessment concluded that the new information did not materially change the Government's understanding of the national security risks. The Assessment recorded that:

> "The risks identified in the ISRA are connected to the current and future state of the Upp network and are predicted to grow

> along with it. The ISRA also notes that when taking their final decision, the Secretary of State must consider both the situation now and in the future when sanctions may be lifted and the UBOs returned control of LetterOne. Therefore, sanctions, their impact and steps taken by LetterOne in response do not provide robust or enduring mitigation to the risks in this case."

86. The Assessment set out in tabular form a summary of a package of 13 different remedies proposed by the Group together with the Government's comments on the viability of each of those remedies. Viability was assessed by reference to a "combination of effectiveness on reducing the national security risks identified in the [ISRA], feasibility and ease of compliance and enforcement."

87. In drawing up the Representations Assessment, the ISU received advice from across Government including DCMS, DIT, the Treasury, the Home Office, MoD, NCA, NCSC and UKGI. The Assessment was cleared by a Senior Civil Servant within the ISU.

Remedies Assessment

88. The Remedies Assessment set out the risks to national security as assessed in the ISRA. As I have mentioned, it referred to "Remedy A" as divestment and "Remedy B" as being a package of measures that would impose restrictions on the relationship between Upp and the Group and that would subject Upp to a number of other requirements including regular audits of its compliance with a final order and of the security of its network. In relation to Remedy B, the Remedies Assessment drew on the Representations Assessment. Each element of Remedy B was described and considered. Remedy A was recommended as being "the most effective at mitigating or preventing the national security risks" and as carrying "the highest expectation of compliance and ability for HMG to enforce against breaches." The Secretary of State was advised that "[d]espite the high expected cost to the parties of this remedy, it is still judged to be necessary and proportionate to the risks in the case." Conversely, Remedy B was "not judged to be as effective as Remedy A."

Disclosure

89. Questions of disclosure of documents and of the transfer of material from closed to open were considered by Swift J at an interim stage of the proceedings. The Claimants continue to advance a number of submissions about the disclosure process, such that it is necessary to traverse some of the issues that Swift J has already considered.

90. On 23 February 2024, Swift J handed down judgment in which he considered the Secretary of State's approach to the presentation of open gists of closed documents: [2024] EWHC 386 (Admin). The various gists were initially presented to appear like the original, complete documents (i.e. giving the appearance to the reader that they were the original documents as opposed to being gists of undisclosed documents). Swift J criticised that approach and set out the steps that the Secretary of State had agreed to take in order to remove any misapprehension caused to the Claimants. Government lawyers ensured that those steps were taken.

91. Mr Hickman complained that the Secretary of State was guilty of undue delay in dispelling the Claimants' misapprehension and submitted that the Claimants' lawyers ought to have had been provided with an opportunity to address Swift J on the issue of the presentation

of gists. There has, however, been no appeal against Swift J's judgment and there was no suggestion before me of any residual misapprehension of the sort that concerned Swift J. I see no reason to re-open these matters.

92. More generally, Mr Hickman complained that the Secretary of State had taken an excessive time to comply with disclosure duties in these proceedings. He did not, however, suggest that the Claimants needed further time to deal with any of the documents disclosed. I was not asked to make any directions in relation to late disclosure.

93. At a closed hearing on 27 February 2024, Swift J asked the Secretary of State to provide the Claimants with an open form of words setting out details of the role played by the NCSC in the assessment process. The Secretary of State's lawyers subsequently drafted a form of words which was approved by Swift J and which states as follows:

> "The NCSC's telecoms security team played an integral role in advising the ISU in this case. This team leads the NCSC's work on understanding and reducing the national security threats to telecoms networks and engages with industry and government on telecoms security.
>
> Part of the telecoms security team's role involves using the team's technical research to inform policy relating to telecoms security. This includes providing technical input on the management of security risks in telecoms networks where a transaction is subject to an assessment under the NSIA.
>
> The NCSC first became involved in this case in 2021. In particular, from December 2021 to December 2022, the NCSC advised the ISU on (i) the remedies which were necessary to prevent, remedy, or mitigate the national security risks which had been identified and; (ii) on whether those remedies were proportionate to the level of risk. The NCSC's telecoms security team reviewed iterations of both Remedy A and Remedy B throughout this period.
>
> Remedy B comprised a package of restrictions on the relationship between Upp and LetterOne and would have imposed various requirements on Upp. In December 2022 the ISU sought the NCSC's technical expertise on the Remedy B package and, in particular the NCSC's assessment of its effectiveness at mitigating the national security risks which had been identified.
>
> Work was done internally on this by the NCSC's experts in telecoms security. In particular, two senior telecoms security experts, who combined have 40 years of experience in telecoms and cyber security across industry and government, reviewed Remedy B and provided their technical comments. They provided detailed feedback and concluded that the Remedy B package of remedies did not mitigate the national security risks

> identified in this case in any meaningful way. This was conveyed to the ISU."

94. Mr Hickman submitted that this form of words was inadmissible as evidence because it was set out in correspondence and not contained in a witness statement supported by a statement of truth. However, the mechanism used to convey the information to the Claimants was the one requested by Swift J who doubtless would have directed a statement of truth if there was any real question about its admissibility. Mr Hickman makes a point of form and not of substance. The Special Advocates had ample opportunity to seek an order from the judge seeking further or other content within the form of words. There was no injustice in the Secretary of State relying on the form of words that was served with judicial oversight.

95. More generally, Mr Hickman submitted that the Secretary of State had failed to disclose the underlying documents that (Mr Hickman asserted) could demonstrate that Remedy B was subject to proper technical assessment by the NCSC. He submitted that there ought to have been disclosure of a properly reasoned technical assessment – which the NCSC ought to have provided to the ISU – in relation to why the representations made by the Claimants should not have led to less intrusive measures than divestment. There was nothing in the documents disclosed to the Claimants to suggest that officials in the NCSC had focused on the correct legal issues or been provided with guidance on the concept of proportionality under A1P1. He criticised the form of words approved by Swift J on the grounds that it was vague and incomplete, even when supplemented by Mr Withers' evidence of the role of the NCSC in the decision-making process. The disclosure process in the proceedings had for these reasons been deficient.

96. It is plain from the documents before me that questions of disclosure were actively and vigorously pursued by the Claimants' lawyers and by the Special Advocates in a process that was subject to judicial oversight. In a judgment delivered on 27 February 2024, Swift J refused the Claimants' application for disclosure of documents relating to NCSC involvement. The judge described the application in the following terms in the first two paragraphs of the judgment:

> "1…The application for disclosure…is a request for documents falling within the following categories: (1) documents supplied to the National Cyber Security Centre by the Department for Business, Energy and Industrial Strategy relating to the claimants between May 2022 and 15 December 2022; (2) documents supplied or sent by the NCSC to BEIS relating to the claimants in the same period; and (3) documents recording or evidencing oral communications between NCSC and BEIS in that period, including previous drafts of the representations assessment, remedies assessment or investment security risk assessment showing when changes were and were not made.
>
> 2. The scope of those classes of documents has been further clarified by the terms of a proposed draft order, which makes it clear that the relevant communications and documents, etc. are ones that concern the perceived advantages or disadvantages of the proposal made by the claimants by way of alternative to the Secretary of State's proposal that the claimants sell their shares

> in the interested party. Collectively, the three classes of document cover all communications between the National Cyber Security Centre and the Secretary of State, who took the decision challenged in the period between what was referred to as the 'call-in decision' in May 2022 and the date of the decision challenged, which was 15 December 2022.
>
> 3. These documents, it is said, go to the issue of whether the Secretary of State ought to have taken steps short of requiring the claimants to sell their shares in the interested party. This is a strand of argument that runs through as an aspect of Grounds 2 and 3 of the claimants' pleaded case."

In rejecting the Claimants' application, Swift J held that the disclosure of the documents in question was not necessary for the fair disposal of the issues in the claim.

97. The Claimants' submissions that they have been provided with insufficient documents relating to NCSC's assessment of the respective merits of Remedy A and Remedy B fail for the reason given by Swift J. The form of words approved by him makes clear that the NCSC advised the ISU throughout the decision-making process. I have been provided with no proper reason to re-open issues that were plainly ventilated before Swift J. I decline to do so.

National security context

98. In interpreting and applying the provisions of the Act, the court will treat as axiomatic that Parliament has entrusted the assessment of risk to national security to the executive and not to the judiciary. The court will acknowledge and adhere to the constitutional boundary between judicial and executive power *(R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765, para 56, per Lord Reed PSC, citing *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, para 49, per Lord Hoffmann).

99. Mr Hickman submitted that the ISU had no relevant expertise such that, in considering the proportionality and reasonableness of imposing divestment, as opposed to a package of measures to which the Claimants would be willing to submit, the court was as well placed to take the decision as the Secretary of State and should show no deference to the Secretary of State's assessment.

100. In advancing this submission, Mr Hickman relied on the Secretary of State's various responses to the Claimants' requests for further information under CPR Part 18. In those responses, the Secretary of State accepted (among other things) that the ISU does not have any expertise in how a broadband network could be exploited by the owners of a broadband company. Mr Hickman emphasised that Mr Withers was not able to support technical aspects of the Secretary of State's assessment from his own knowledge. Mr Withers had said in his witness statement that any breaches of prohibitions in a final order restricting access to information in Upp might only be identified months after the fact or possibly not at all but he had no expertise to make such a statement which was founded on the unattributed opinions of others.

101. Mr Hickman's submissions rest on a number of misunderstandings. First, as I have indicated, the statutory question for the Secretary of State was whether "the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk to national security" (section 26(3)(b) of the NSIA). It is plain from the statutory language that the Secretary of State is entitled to take measures that he or she reasonably considers will prevent, remedy or mitigate the risk to national security. That question involves matters of judgment and policy which the court is not equipped to decide (*Begum*, para 56).

102. Secondly, as Ms Wolfe emphasised in her submissions, officials within the ISU cannot be expected to have personal expertise in the full variety of specialist subjects which decisions under the Act may raise. However, as happened in the present case, the ISU is able to draw on the expertise of others in Government in order that the Secretary of State be provided with necessary and sufficient material when making decisions under the Act. The ISU's access to information beyond its own specialism, and its ability to draw on expertise in OGDs, is an inherent part of the executive's institutional capacity which the court lacks. I am not persuaded that decisions by the Secretary of State that rely on consultation with OGDs should be regarded as demonstrating some lesser institutional competence.

103. Thirdly, the Secretary of State exercises powers under the Act in the interests of the safety of people in the United Kingdom. The potentially serious consequences of error mean that decisions "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process." Decisions must be made by "persons whom the people have elected and whom they can remove" (*Rehman*, para 62, per Lord Hoffmann; cited in *Begum*, para 62, per Lord Reed). In the present case, the Secretary of State for BEIS took the decision personally following assessments made by three other Secretaries of State personally. The degree of democratic accountability was high. The scope for the intervention of unelected judges is limited.

104. Mr Hickman singled out Mr Jupp as an unsuitable decision-maker who lacked any relevant expertise. In support of this contention, Mr Hickman relied on a passage of a witness statement by a Senior Lawyer in the Government Legal Department. The statement was filed at an interim stage for the purpose of explaining how the Secretary of State had undertaken his disclosure duties. The lawyer said that, as part of the duty of candour, Mr Jupp's emails had been searched as he was "centrally involved in the decision at the [ISU]." Mr Jupp was, moreover, identified as the "lead official" in the MinSub provided to the Secretary of State. On the basis of these aspects of the evidence, Mr Hickman submitted that key elements of the decision-making process were entrusted to Mr Jupp.

105. Mr Jupp was not the decision-maker. Mr Withers made the position clear at the 22 November meeting when he refused the Claimants' request for a meeting with the Secretary of State in person on the basis that a personal meeting could compromise the Secretary of State's role as a quasi-judicial decision-maker. If they were previously unaware of the position, the Claimants knew or should have known from then onwards that the Secretary of State (and not officials) would make the decision.

106. There is no evidence that Mr Jupp did anything that could not be expected of a junior official working in an administrative capacity (for example, attending and contributing to meetings, compiling documents and circulating emails to OGDs). The evidence

demonstrates that he fell within the ISU structure that included Mr Withers as the lead official.

107. The practical arrangements for drafting MinSubs, and administrative practices for naming civil servants on submissions, are described in Ms Ward's witness statement. She explains that junior civil servants may draft, and therefore be named on, MinSubs but that members of the Senior Civil Service are responsible for their content and will always have "the final say." By alighting on Mr Jupp's name in the MinSub, the Claimants mischaracterise his responsibility.

108. The Claimants have carried out research about Mr Jupp. A print-out of his career history from a social media profile has been deployed in support of the submission that he does not have the skill or expertise that should be required of officials who have a role in the decision-making process. However, Mr Jupp's personal history does not change the balance of institutional capacity as between the court and the executive. His social media presence is irrelevant. The online search for his personal details was frivolous and vexatious.

109. For these reasons, the Secretary of State's assessment of the national security risk posed by the Group's acquisition of Upp, and the remedies required to prevent that risk from materialising, should be accorded respect.

The framing of the national security risk

110. The Claimants founded their submissions on the proposition that the risk to national security was derived from a chain of events – starting with the activities of the Russian Government and working down to Upp's Board and to its management decisions. As framed by the Claimants, the chain consisted of the possibility of the Russian Government exerting influence over the UBOs who would then use their shareholder rights to change the governance of the Group so as to enable the Claimants to cause Upp, through its Board or management decisions, to take significant actions that would undermine national security.

111. The Claimants submitted that the risk of this chain of events occurring was remote and that it could be resolved by corporate change and operating restrictions such as: amended articles of association; investment management contracts; other corporate governance measures; the voluntary assumption of enhanced regulatory obligations; and strong, independent audit and scrutiny requirements. The Claimants criticised the Secretary of State for failing to obtain expert advice in company law and for misunderstanding the robust legal effects of the corporate structures and governance measures covered in Remedy B. The Secretary of State had misunderstood the limits of the UBOs' rights as shareholders to have access to Upp's premises and assets. He had failed to appreciate the lack of opportunity within the rigours of company law for the three Investor Directors to take steps that might compromise national security. The Claimants submitted that Remedy B, with or without their other proposals, was plainly sufficient to allay national security concerns since they would prevent anyone in the Group from ever being in a position to control Upp.

112. Mr Phillips 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.

113. Similar observations apply in relation to the Claimants' submission that the Secretary of State relied impermissibly on the risk of access to customer data (as set out in the ISRA). In support of this submission, Mr Hickman contended that there would be no proper basis for the Claimants or the UBOs to be provided with customer data in light of data protection laws. This submission misses the point. The Secretary of State's concern is not whether the Claimants or anyone else would breach data protection laws but whether malign actors would exploit the connection between the UBOs and Upp to get hold of personal information, which is not the same thing.

114. The Claimants rely on various elements of Remedy B as mitigating the risk of access to data (restrictions on the flow of information to Investor Directors; the prohibition on Group access to Upp sites, data and personnel; independent third-party scrutiny, audit and oversight arrangements; and the assumption of enhanced regulatory expectations). They say (and it is not in dispute) that Upp would act lawfully and would abide by these restrictions. They seek to pick holes in how these various mitigations were regarded or weighed in the assessments before the Secretary of State. They do not, however, advance any realistic case about how the Government should deal with malign actors – hostile to the United Kingdom's interests, with no intention to abide by UK law and no interest in the Group's or Upp's commitment to UK law.

115. In pressing the case for less intrusive measures than divestment, Mr Hickman suggested at one point that the question for the Secretary of State was whether a set of remedies would contribute to the reduction of national security risk. In my judgment, there is no need to gloss the statutory conditions for the making of a final order and no need to reframe the statutory questions which the Secretary of State was bound to ask. The gloss suggested by Mr Hickman would yield a less than perfect implementation of Parliament's intention.

116. Against this background, I turn to the grounds of challenge. The Claimants' skeleton argument and oral submissions presented the three grounds of challenge in reverse order. I shall take the same approach.

Ground 3: Procedural fairness

117. Mr Hickman submitted that the decision to impose Remedy A was procedurally unfair. He contended that the Claimants were given insufficient information about the risks to national security to make meaningful representations. There was no proper opportunity to rebut concerns about the effectiveness of Remedy B.

118. I grant permission to apply for judicial review on this Ground and turn to consider the substantive merits.

Legal framework

119. As a general principle of the common law, those who take executive decisions must do so fairly. The constituents of a fair procedure are not a matter of judgment for the decision-maker, reviewable by the court only on *Wednesbury* principles. Rather, the court must determine for itself whether a fair procedure was followed (*R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, para 65, per Lord Reed JSC).

120. The standards by which fairness is to be judged are not immutable and are dependent on the context of the decision. Fairness will very often require that a person who may be adversely affected by the decision should have an opportunity to make meaningful representations with a view to influencing the decision before it is taken or to changing the decision after it is made. Since the person affected usually cannot make meaningful representations without knowing what factors may weigh against his or her interests, fairness will very often require that the gist of the case to be answered should be provided (*R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531, 560 E-G). I shall refer to the common law duty to disclose the gist of an adverse case so as to allow meaningful representations as "the duty to consult."

121. The duty to consult does not require that the documents before the decision-maker should be provided in their entirety or that every aspect of the decision-making process, however far removed from influencing the decision-maker, must be disclosed (*Doody*, 564C-D). It is the gist of an adverse case that must be provided.

122. The duty serves to prevent the decision-maker from making an erroneous decision. It serves to ensure that "some supposed fact which [a party] could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered" (*Doody*, 563H). It serves to avoid a sense of injustice because respect by the Government for the people it governs entails that people whose rights are significantly affected "ought to be able to participate in the procedures by which the decision is made provided they have something to say which is relevant to the decision to be taken" (*Osborn*, para 68). The requirement on the executive to listen to people with something relevant to say enhances the rule of law, promoting congruence between the actions of decision-makers and the law which should govern their actions (*Osborn*, para 71).

123. As I have set out above, the NSIA itself contains procedural provisions. Those provisions enable the Secretary of State to gather evidence and require the Secretary of State to consider any representations made; but the statute does not state expressly that the Secretary of State is under a duty to consult.

The parties' positions

124. Mr Hickman submitted that, in determining whether the Claimants were provided with a fair opportunity to meet an adverse case, I should look beyond the statute to the common law duty to consult which had not been satisfied in the present case. He emphasised that common law principles of fairness are readily implied to supplement statutory procedures unless clearly excluded (*Doody*, 561E-563D).

125. Mr Phillips submitted that Parliament has enacted a complete and careful code which did not require the Secretary of State to invite representations or afford an opportunity to the Claimants to address any representations made by the officials and departments which had

contributed to the recommendation in the MinSub. In the context of a statute which is concerned with risks to national security, and where it may only be possible to outline those risks without endangering national security, Parliament had deliberately circumscribed the Secretary of State's procedural obligations. This was not an area where the court should supplement the statute by reference to the common law.

Discussion

126. In *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539, 574A-B, Lord Browne-Wilkinson approved a passage in Bennion on Statutory Interpretation (which survives in the current, eighth edition at p.833) in which it is said that, where wide powers of decision-making are conferred by a statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice (i.e., common law principles of fairness). Lord Browne-Wilkinson held:

> "However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures."

127. Lord Browne-Wilkinson's observations are consistent with a longstanding line of authority that the courts will supplement a procedure laid down by Parliament to the extent that the statutory procedure is insufficient to achieve justice (see *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 35-36 and authorities cited therein). In the memorable language of Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194, "the justice of the common law will supply the omission of the legislature."

128. In general terms, I am not persuaded that the procedural provisions of the NSIA could never be supplemented by the common law. I would not rule out that in some future case this court may find cause to supplement them. I do not need to reach a conclusion on this broad question and prefer not to do so. I confine myself to the question whether there is a need to imply a common law duty to consult, which is the issue in the present case.

129. In considering whether the procedural provisions of the Act should be supplemented, the court should not act in a vacuum but (as Mr Phillips essentially submitted) should consider (i) the language of the statutory provisions; and (ii) the circumstances in which the statutory power is to be exercised (*Bank Mellat No 2*, para 179, per Lord Neuberger of Abbotsbury PSC). I shall consider these two elements in turn.

(i) Language of the Act

130. There is force in Mr Phillips' submission that Parliament has in the language of the Act confronted the requirement to consult and has expressly chosen to limit the Secretary of State's duty to a requirement to consider any representations that are made (as happened in the present case). On this analysis, the court would be frustrating the legislative purpose by implying a wider common law duty to consult on all or any part of an adverse case. It seems to me, however, that the second limb of Mr Phillips' submissions (the circumstances in which the statutory power is to be exercised) is determinative on the facts of the present case.

(ii) Circumstances in which statutory power is to be exercised

131. In considering whether a fair procedure has been followed under the NSIA, the court will have in mind the prevalent public interest in ensuring that decision-makers are relieved of the obligation to disclose information to the extent that its disclosure would bring about a risk to national security. Mr Hickman submitted that the open gists filed in these proceedings (in particular, the gists of the NCSC Paper and the Representations Assessment) demonstrate that the Claimants could have been provided with far more information. The Secretary of State could, either in the course of the assessment process or in the Order itself, have provided the sort of information that was belatedly provided in gists during the course of proceedings. He submitted that no national security risk could attach to information that was capable of gist. In the absence of national security risk, the failure to provide more information (until compelled to do so by judicial review proceedings) was procedurally unfair as it had precluded the Claimants from making effective representations as to why Remedy A should not have been imposed.

132. Mr Hickman relied on *Bank Mellat No 2*. In that case, Lord Sumption JSC (with whom Baroness Hale of Richmond, Lord Kerr of Tonaghmore and Lord Clarke of Stone-cum-Ebony JJSC agreed) observed at para 31 that the Treasury had during the course of the proceedings disclosed the gist of the closed material on which the decision under challenge was founded. Lord Sumption stated that he could not see why officials "should have had any greater difficulty in disclosing before [the decision] the material they were quite properly required to disclose afterwards." He concluded (for this and other reasons) that fairness required that the claimant ought to have been consulted before the decision was taken.

133. I do not regard Lord Sumption as laying down the principle that the duty to consult a party before taking an adverse decision is co-extensive with the duty of disclosure in subsequent litigation. Lord Sumption concluded on the facts of the case that disclosure duties in litigation cast light on the practical ability to consult prior to the decision without damage to national security. There is nothing to suggest that, in reaching that conclusion, he intended to modify the principles of fairness established by previous authority. His citation and analysis of *Doody* (at paras 30-31 of his judgment) suggest the opposite, namely that he sought to found his conclusions on orthodox principle.

134. The duty on the Secretary of State was to be fair – no more and no less. It would have been open to the Secretary of State to give the Claimants the gist of certain documents before or at the point of his decision. Alternatively, he may have established some other procedure such as the one urged upon me by the Claimants, namely that they should have been provided with an interim report setting out the Secretary of State's provisional views with a request that the Claimants provide comments (as is the practice of the Competition and Markets Authority under other legislation). However, as Mr Hickman ultimately accepted, the choice as to how the decision is made rests with the Secretary of State (*Doody*, 561A). It is not enough for the Claimants to say that the decision-making procedure could have been better. They must "show that the procedure is actually unfair" (*Doody*, 560H-561A).

135. Consistent with the court's experience and constitutional function as the arbiter of fairness as between the individual and the State, the court will determine for itself whether the Secretary of State's decision-making process under the NSIA was actually unfair. The court will have in mind the rule of law. Democratic principle requires ministers and their

advisers to act in accordance with the law as articulated by the independent judiciary: it is the judgments of this court that mandate the boundaries of lawful executive action. In a context in which both private rights and the public imperative of national security are engaged, the boundaries within which the executive may act need to be defined. Decision-makers should be in no doubt as to what they must do to reach lawful decisions and should not have to undertake uncertain assessments of what fairness might require (*Bank Mellat No 2*, para 60, per Lord Reed JSC) in a dissenting part of his judgment but the observation is persuasive; see also paras 149 and 153 per Lord Hope of Craighead DPSC, also dissenting, whose judgment makes a similar point).

136. Two consequences flow from the need for clearly ascertainable procedural requirements. First, fairness does not require the Secretary of State or officials "to be drawn into a never-ending dialogue" (*R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 Admin (DC), para 25, per Sedley LJ). The value of finality in this area of executive decision-making carries weight. Mr Hickman submitted that the decision-making procedure was inconsistent with the Government's statement (in the November 2020 response to the White Paper consultation) that "[parties] will be encouraged to maintain a degree of dialogue with the Government throughout the assessment process and it is anticipated that these conversations will assist in designing remedies." He drew my attention to the Impact Assessment, which preceded the National Security and Investment Bill and which stated: "the Government expects that businesses will be involved in its discussions about remedies that affect them." It was not submitted, however, that these statements amounted to binding assurances or a legally enforceable expectation. As Mr Phillips submitted, a dialogue was an unrealistic expectation in the context of a statute concerned with national security.

137. Secondly, the fair consideration of each case does not imply a bespoke procedural approach that may vary from case to case in its stages and substance. The Secretary of State is entitled to establish general procedures, such as the production of standard assessments (i.e. the ISRA, Representations Assessment and Remedies Assessment). The approach taken by the Secretary of State of compiling various assessments based on information provided by the Claimants was a proper one. It satisfied the Secretary of State's statutory duties and would satisfy a duty to consult at common law. I discern no actual unfairness in the extent of the opportunity to meet an adverse case.

Claimants' knowledge of case against them

138. Mr Hickman submitted that the Claimants were unaware that there were national security objections to Remedy B, and to their own suggestions for mitigation, until after the claim was issued when they received the gists. He drew my attention to Mr Gillespie's witness statement where he says that it was not clear to him or to his colleagues why the mitigations that they had proposed had not been accepted, or why divestment was considered to be necessary and proportionate.

139. I do not agree that the Claimants knew nothing of the case against them. Although the call-in notice was unenlightening, they were informed of the gist of the national security risks in the October 2022 letter and then again in the Order itself.

140. The Claimants made representations on three occasions. In the first set of representations, the published Section 3 Statement steered them in the right direction. In the second set of representations, the Claimants were guided by the suggested remedies in

the 10 October letter. In the third set of representations, the Claimants were guided by the additional suggested remedies in the 15 November letter. The ISU listened to the Claimants at meetings on 17 October and 22 November 2022 when officials responded to the Claimants' concerns (to the extent that the interests of national security permitted them to do so).

141. The Claimants were able to put forward their own suggested mitigation measures in writing. They expressly made submissions as to why divestment would not be a necessary or proportionate remedy. Those of their suggestions that were considered feasible were fairly and properly incorporated into the formulation of Remedy B. The Representations and Remedies Assessments provided the Secretary of State with a fair and balanced account of Remedy B which the Secretary of State duly considered. I do not accept that there was any material procedural defect.

142. Mr Gillespie says that he was "surprised by the divestment requirement of the Final Order." However, there was never any suggestion that the Secretary of State or the ISU were doing anything other than considering the appropriate remedy in light of the risk to national security. Neither the Secretary of State nor the ISU did anything to suggest that divestment could be ruled out.

143. Mr Hickman pointed to evidence of reputational harm to Upp. Such harm is regrettable but I am not persuaded that it should alter my analysis of procedural fairness in a case concerned with national security.

Conclusion on Ground 3

144. For these reasons, I agree with Mr Phillips that the decision to make the Order was the culmination of a fair process both as regards the Claimants' right to know the case against them and as regards the right to respond to the adverse case. Making the decision for myself, the decision-making procedure was fair. This Ground of challenge is dismissed.

Ground 2A: Relevant/irrelevant considerations and the *Tameside* duty

145. Mr Hickman submitted that (i) the Secretary of State had failed to consider relevant factors and had considered irrelevant factors; and (ii) the *Tameside* duty of a decision-maker to acquaint himself or herself with relevant information had been breached.

Legal framework

146. It was common ground that the rationality of a decision taken by the Secretary of State in person is to be judged by reference to the material before him or her rather than by considerations that were in the contemplation of officials but not presented to the Secretary of State (*R (National Association of Health Stores) v Department of Health* [2003] EWCA 3133 (Admin), paras 26 and 62).

147. The classic formulation of the *Tameside* duty lies in the speech of Lord Diplock (*Tameside*, 1065B): "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?". The nature and scope of the duty is elucidated in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, para 70, as follows:

> "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge…, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

148. It is plain from *Balajigari* that the court will not impugn the absence of an enquiry simply on the basis that a party would have wished that an enquiry be made or because a particular enquiry may have been sensible or desirable. The *Tameside* duty takes its place within the specific framework of public law as being "a specific application of the doctrine of rationality" (*R v (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020, [2019] 1 WLR 5765, para 58). In considering the duty within the broader concept of rationality, the court will show appropriate respect to the institutional expertise of the decision-maker in relation to enquiries made or not made.

149. Mr Hickman's submissions under Ground 2A relied to a significant degree on the Claimants' views of the ISRA and Remedies Assessment. I do not propose to be drawn into the factual arena but will deal with the substance of the submissions under various broad headings.

Other statutory powers

150. Mr Hickman submitted that the Secretary of State had unlawfully failed both to consider and also to apply other statutory powers which would have met the need to protect the public without such draconian action as divestment. He relied on section 132 of the Communications Act 2003 (powers to require the suspension or restriction of the

entitlement of electronic communications network or service providers); section 252 of the Investigatory Powers Act 2016 (powers to give any telecommunications operator in the United Kingdom a national security notice); the Electronic Communications (Security Measures) Regulations 2022 ("ECSM Regulations"); the Telecommunications Security Code of Practice (December 2022) ("the Code") issued pursuant to powers and duties brought into law by section 3 of the Telecommunications (Security) Act 2021 ("the TSA") by the insertion of sections 105E and 105F of the Communications Act 2003; powers bestowed upon the Secretary of State under sections 105A-D of the Communications Act 2003 (concerning the security of public electronic communications and services); and provisions of the Data Protection Act 2018 that (as expressed in the Claimants' skeleton argument) would "not have permitted the flow of individual customers' data to the Investor Directors."

151. Mr Hickman submitted that these various powers were capable of being applied to Upp. The powers were particularly pertinent because the Secretary of State had been advised in the Remedies Assessment that, in deciding whether to make a final order, he should take into consideration that the Government "had to consider the future, when sanctions may be lifted" and when the Group would be free to return shares and control to the sanctioned UBOs. The Remedies Assessment had advised the Secretary of State that, by the time sanctions were lifted, the retrospective provisions of the Act would no longer have effect and that the Government would have "no ready powers to remedy the national security risk arising from the indirect influence of these UBOs over [Upp]." The Secretary of State was in effect advised that he had only one opportunity to intervene.

152. Mr Hickman submitted that the advice in the Remedies Assessment was wrong and misleading because it had indicated that the Secretary of State needed to make a final order under the NSIA at that time in order to avoid some future risk. The Secretary of State should have been advised (whether in the Remedies Assessment or elsewhere) that there were other statutory powers which could have been exercised before the need to resort to divestment came into play. Mr Hickman contended that the question whether it was necessary and proportionate to impose the draconian remedies of the NSIA could not be properly considered without consideration of other less intrusive measures under these various other statutory provisions. The Secretary of State had therefore failed to take into consideration relevant considerations and had failed to make proper *Tameside* enquiries in relation to the exercise of other powers.

153. Mr Phillips submitted that the choice of statutory power was pre-eminently a matter for the Secretary of State and that the decision to exercise powers under the NSIA was not open to criticism. He submitted that the Secretary of State did not need to await some future danger before taking executive action under the statutory provisions that were most effectively able to deal with the risks posed by the UBOs.

154. I agree with Mr Phillips. The Secretary of State exercised powers under the NSIA in order to meet the objectives and purpose of that Act. The court must apply public law principles. Under those principles, the Secretary of State cannot be criticised for having failed to exercise powers under a different Act involving different statutory objectives in some other part of the national security legal landscape. Neither the duty to consider relevant considerations nor the *Tameside* duty required him to refrain from the exercise of his powers under the NSIA. In the context of national security, where constitutional boundaries should be respected and clearly drawn, the selection of statutory power by the

Secretary of State – rather than the lawfulness of its exercise – was either non-justiciable or on the cusp of being so (*Begum*, para 70).

155. There are no possible grounds to criticise the Secretary of State's position that he need not wait to see whether Russian leverage would be applied at some future point. He was indisputably entitled to take immediate action to prevent risks to national security from materialising. Contrary to Mr Hickman's submissions, it was his duty to do so.

156. The court is not concerned with an academic survey of some other powers that the Claimants would have preferred. I shall nevertheless deal in broad terms with the various powers to which Mr Hickman referred.

Section 252 of the Investigatory Powers Act 2016

157. Section 252 of the Investigatory Powers Act 2016 gives the Secretary of State the power to give any telecommunications operator in the United Kingdom a national security notice requiring the operator to take specified steps if the Secretary of State considers that (i) the notice is necessary in the interests of national security and (ii) the conduct required by the notice is proportionate (section 252(1)). Mr Hickman submitted that the broad language of the statutory power was apt to cover the national security risk in the present case so that the Secretary of State had erred in failing to consider the power.

158. As Mr Phillips submitted, these submissions fail to put the section 252 power into its statutory context – which is the regulation of investigatory powers. Section 252(1) does not list the circumstances in which the power to give a national security notice may be exercised. However, section 252(3) casts light on the statutory objective, stating that a national security notice may, in particular, require a telecommunications operator to do an act for the purpose of (i) dealing with an emergency under civil contingencies legislation; (ii) facilitating anything done by an intelligence service; or (iii) providing services or facilities for the purpose of assisting an intelligence service. The Secretary of State in the present case was not dealing with a civil contingency and was not exercising investigatory powers as the Government does when it asks private telecommunications networks to assist the intelligence services. Neither civil contingency powers nor investigatory powers have anything to do with investment risks, such as the national security risks arising from ownership of a broadband network. I see no ground in public law to impugn a decision not to consider an inapt power.

Other powers relating to telecommunications

159. Mr Hickman referred me to the provisions of the ECSM Regulations; the provisions of the Code; and passages from the UK Telecoms Supply Chain Review Report (published by DCMS; CP 158, July 2019). On the basis of these materials, he argued that the Secretary of State has other less intrusive powers designed to address the risks to national security that arise from owner influence in the telecommunications sphere.

160. The following passage of his skeleton argument (omitting footnotes) seems to me to contain the kernel of his submissions that the exercise of this tranche of other powers is designed to, and capable of, quelling national security risks arising from network ownership:

> "67. The protections include the following (by way of example): Section 2, Chapter 5 of the [Code] sets out measures for monitoring and investigating anomalous activity; r.8 of the ECSM Regulations (addressed in section 2, Chapter 7 of the [Code]) imposes requirements to prevent unauthorised access, such as multi-factorial authentication of accounts capable of making changes to security critical functions (r.8(2)(b)), dual approval for manual changes to security critical functions (r.8.(2)(c)), and limitation of security permissions (r.8(4)); the [Code] sets out further stipulations, such as maximum timeframes for patches and updates to systems according to vulnerability (Section 2, Chapter 11, §11.3)…"

161. In response, Mr Phillips submitted that these powers (unlike the scheme of the NSIA) were designed to ensure that providers of public electronic communications networks or services take measures to identify, reduce and prepare for the occurrence of security compromises. Having considered the sources cited by Mr Hickman, I have concluded that Mr Phillips is correct. These other powers do not serve the same purpose as the powers under the NSIA.

162. In relation to the Code, Mr Hickman pointed out that the Remedies Assessment had recorded Upp's willingness to submit to the "additional commitment to the Tier 2 obligations under the [Code] beyond existing Tier 3 obligations with which Upp abides." This passage of the Remedies Assessment is not expressed in good grammar but the meaning is clear. The Secretary of State was being informed that Upp, as a "Tier 3 provider" of telecommunications services, would have been willing to assume the additional burdens of a "Tier 2 provider" as part of a package of measures falling short of divestment. I pause here to note that the Code is a regulatory document that provides guidance for large and medium-sized public telecommunications providers "whose security is most crucial to the effective functioning of the UK's telecoms critical national infrastructure" (Code, para 0.10). To ensure that security risks are mitigated proportionately, the Code includes a tiering system which sets out different expectations on telecoms providers according to the size of their turnover. A Tier 2 provider (defined as a public telecoms provider with relevant turnover of more than £50 million but less than £1 billion) is the subject of more expectations than a Tier 3 provider with a turnover of less than £50 million (Code, paras 0.11-0.12).

163. The Representations Assessment considered and rejected the Claimants' proposal that Upp would, as a Tier 3 provider, assume Tier 2 obligations, noting that the proposal "does not address the risks identified in the case" and that "provisions of the TSA [are] aimed at increasing vendor security." Mr Hickman submitted that the approach in the Representations Assessment was irrational and wrong in law: the TSA (under provisions which were not particularised to me) and the Code set out important and general requirements for network security that are not limited to "vendor security." Mr Phillips accepted that the reference to "vendor security" was wrong but said that it made no material difference: as encapsulated in the Representations Assessment, the TSA and the Code were part of a regime created for a different set of risks. I prefer Mr Phillips' submissions but the real point is that this sort of discussion is arid when the court cannot possibly grant relief in relation to minor errors in the consideration of a different statute.

164. The applicability of powers bestowed upon the Secretary of State under sections 105A-D of the Communications Act 2003 was not separately articulated and only faintly pursued. It is sufficient to say that these powers do not advance the Claimants' case.

Data Protection Act 2018

165. Mr Hickman's submissions under the Data Protection Act 2018 were unpersuasive. It cannot possibly be argued that the Secretary of State's failure to consider powers under data protection legislation amounted to a failure to take into consideration a relevant factor: those powers were not relevant.

Conclusion on other statutory powers

166. In conclusion of this part of my judgment, I agree with Mr Phillips that, as a matter of law, none of the other powers cited by the Claimants would have fulfilled the same function as the Secretary of State's power to make a final order under the Act. The powers under other statutory schemes are not designed to prevent the national security risks which the NSIA is intended to prevent. It was not unreasonable for the Secretary of State not to consider using them; nor was the *Tameside* duty breached.

167. Mr Hickman sought to bolster his submissions by selective references to passages of the Green Paper and other policy material that described the Government's wider powers under other elements of national security law. In doing so, he raised (at most) questions of policy rather than law. Neither the Green Paper nor other policy documents change the legal position.

168. As a matter of fact, as part of the information sought in the Information Notice about Upp's security, Upp was asked to confirm that it complied with the anticipated requirements of the draft Code to "segregate" its network. The Code was therefore in the minds of officials even before the Claimants raised it. Mr Withers confirmed in his witness statement that "the Ofcom Authorisation Regime, Ofcom Code Rights, Ofcom Powers to Suspend a Network, and sanctions" were considered by the ISU. I mention these aspects of the evidence as demonstrating the open mind with which the ISU approached the case.

169. That officials considered and discarded options outside the NSIA does not found any inference that the Secretary of State was bound to consider those options as mandatory considerations before making the Order. I would reject Mr Hickman's submissions to that effect: the NSIA did not mandate that the Secretary of State consider alternative powers. He was in the circumstances reasonable not to do so, which was the test (*R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037, 1049G-1050C, per Simon Brown LJ in a dissenting judgment but the passage represents established law; see also *R v Secretary of State for Transport, ex parte Richmond London Borough Council* [1994] 1 WLR 74, 95B-C, per Laws J as he then was).

Diplomatic considerations

170. Mr Hickman selected the passages in documents that referred to or dealt with diplomatic considerations. For example, the Remedies Assessment stated that the FCDO considered the diplomatic risks "to be low in the case of divestment and medium/high in the case of remedies short of divestment." The ISRA referred to the "reputational risks to the UK if remedies in this case were perceived by allies to be too soft." Mr Hickman submitted that

diplomatic and reputational risks were irrelevant to the necessity and proportionality of the Order and that the Secretary of State ought to have been advised that they should not be taken into account.

171. In my judgment, a fair reading of the documents before the Secretary of State does not lead to the conclusion that the Order was imposed for reasons other than national security. The Secretary of State was provided with legal advice in a document entitled "Legal Considerations" in which the test for making a final order was set out (and side lined in manuscript by the Secretary of State when considering the papers). There is no reason to suppose that he misunderstood or misapplied the test. The proposition that Remedy A was selected instead of Remedy B for diplomatic rather than national security reasons is not made out.

Burden on the Government

172. As part of his commentary on the Remedies Assessment, Mr Hickman referred me to a passage on "Cost to HMG." In that passage, the ISU observed as follows:

> "While compliance measures would be paid for by LetterOne, there would remain a **significant burden on HMG resources**. Even with the assistance of a third party auditor collating a summary of compliance activity, HMG would still be required to review Upp's activities and relationship with LetterOne at least quarterly. That review would likely encompass a large amount of material" (emphasis added).

173. Mr Hickman submitted that the "significant burden on HMG resources" was an irrelevant factor that should not have been taken into consideration. He asked me to infer that concerns about resources related only to the inconvenience to BEIS of reviewing the third-party auditor reports. However, I agree with Mr Phillips that the Secretary of State was entitled to impose a remedy that would be effective to prevent the risk that it was intended to prevent. Questions of effectiveness were part and parcel of the necessity and proportionality of the terms of the Order. The burden on resources that were needed to ensure the effectiveness of the Order cannot be regarded as irrelevant and cannot be reduced to a matter of expedience rather than necessity.

174. Mr Hickman submitted that there was no suggestion that the burden on the Government to monitor compliance with Remedy B would have been so great as to be impractical or ineffective as opposed to absorbing "some departmental resources" (to cite the Claimants' skeleton argument). He submitted that, if resources were a relevant consideration, then divestment would always be ordered as divestment would always be the option with no monitoring burden or administrative costs.

175. It is, however, naïve to think that the Government could permit a third-party auditor to carry out work in the field of national security without public resources being diverted from other priorities in order that the Government itself monitor the auditor. The appointment of an auditor – even in the context of the multiple other elements of Remedy B – could not relieve the Secretary of State of his own ongoing obligation to the public to protect national security. In this context, the need for regular review or monitoring of the auditor's work cannot even arguably be characterised as demonstrating some form of flawed approach. I

have been supplied with no cogent argument as to why Remedy B would have not imposed an undue burden on limited public resources for which there are many competing demands.

176. Mr Hickman submitted that the limited role and powers of the Investor Directors under Remedy B meant that the burden of monitoring would have been greatly reduced and that it would have taken very little time for the Government to review the auditor's reports. I reject this assertion as amounting to no more than an expression of the Claimants' view of the matter. As I have set out, the Remedies Assessment states that the need for the Government to review Upp's activities and its relationship with the Group would involve the scrutiny of a large amount of material. The Claimants may disagree with that assessment but it is sound in terms of public law. It provides no arguable foundation for relief.

BEIS Observer

177. In its written representations, the First Claimant had suggested that, as part of any package of measures less than divestment, BEIS could appoint a permanent observer to Upp's Board. That suggestion was mentioned in the Representations Assessment but was not part of Remedy B in the Remedies Assessment. Mr Hickman accepted that officials had considered the risks and advantages of a Government observer but submitted that the Claimants' suggestion of a BEIS observer to the Upp Board had been omitted or not adequately spelt out for the Secretary of State's consideration in the Remedies Assessment. That omission amounted to the failure to take account of a material consideration and a failure to consider a representation under section 26(4) of the Act.

178. However, reading the documents as a whole, it is unclear how the putative observer would be selected, resourced and tasked in such a way that the proposal could be an effective one. The Claimants have advanced scant details of these material matters. I do not regard any failure by the Secretary of State to consider an impoverished request for a BEIS observer as rendering the Order flawed, whether at common law or under the Act.

Nationality and security vetting of directors

179. Mr Hickman submitted that the Secretary of State had erred in his approach to the part of the Representations Assessment dealing with the Claimants' suggestion that Upp Board members be required to hold certain nationalities only and that Investor Directors be security vetted. The ISU did not regard this part of the Claimants' proposals as useful and it did not form part of Remedy B. Mr Hickman criticised the Representations Assessment for concluding that the nationality or vetting of directors would have only limited effectiveness. He submitted that these measures would provide a very high degree of confidence in the Investor Directors not being Russian "secret agents" or influenced by the Russian Government. This is essentially a challenge to the weight to be given to such factors rather than a properly-focused rationality challenge. It cannot arguably advance the claim.

Failure to obtain a report from the NCSC

180. Mr Hickman submitted that the Secretary of State was under a duty to obtain a further report from the NCSC addressing Remedy B options and providing an assessment of Remedy B against the national security risks set out in the NCSC Paper. I understood Mr Hickman to submit that the failure to obtain a further report after the ISU had formulated

Remedy B breached the *Tameside* duty as it meant that the Secretary of State lacked the technical information properly to assess the effectiveness of Remedy B and the proposals put forward by the Claimants. In light of the ISU's lack of expertise in technical matters, the failure to obtain a written and detailed view from the NCSC on Remedy B and the Claimants' proposals was said to have breached the *Tameside* duty.

181. Mr Phillips submitted that there was no need for input from the NCSC to take the form of a written report. It was plain from the evidence as a whole (including the disclosure about the NCSC's role ordered by Swift J) that the NCSC had provided its assessment of Remedy B. The ISU had kept the NCSC informed of the Claimants' proposals as was evident from the fact that they had received Mr Jupp's 18 October email, which summarised the 17 October discussion with the Group, and his later 12 December email by which the ISRA, Representations Assessment and Remedies Assessment were circulated across relevant Government actors. I accept Mr Phillips' submissions and reject this part of the Claimants' case for the reasons advanced by Mr Phillips.

182. In any event, the NCSC was not the decision-maker but played its part in a multifactorial judgment to which numerous sources across Government contributed. I do not accept that the Order was even arguably unlawful on any ground of public law challenge because of some perceived failure by the NCSC to give a running commentary or to provide further information at any stage.

Size of Upp

183. Mr Hickman submitted that the Secretary of State erred in law because his decision was founded on the irrational and irrelevant comment by Mr Jupp in the 18 October email that "a HMG observer and security governance structures in Upp [as constituents of Remedy B] would represent a significant HMG commitment to a small company." Mr Hickman contended that it was unreasonable to assess the administrative burden of Remedy B by reference to the size of the company. The legislation did not intend to distinguish between large and small companies. Mr Hickman observed that, if Mr Jupp's view was correct, it would mean that small, localised operations would be more susceptible to divestment orders than larger companies.

184. The short answer to these points is that not every comment made by every civil servant in the disclosed documents contributed to the documents before the Secretary of State on which his decision was based. I was directed to nothing in the various assessments – which were the key documents seen by the Secretary of State – to suggest that Mr Jupp's comment had anything to do with the decision to impose Remedy A.

185. For these reasons, Ground 2A is not arguable. I refuse permission to apply for judicial review on Ground 2A.

Ground 2B: Reasonableness

186. Under Ground 2B of the Re-Amended Grounds, the Claimants contend that the decision to reject Remedy B was *Wednesbury* unreasonable. In their skeleton argument and oral submissions, the Claimants did not abandon the *Wednesbury* argument but essentially submitted that the court should apply for itself a more benign proportionality standard under A1P1. The submissions on *Wednesbury* and on proportionality were effectively merged, so that any separate treatment of the *Wednesbury* challenge would add nothing to this

judgment. I shall deal with proportionality below. In relation to *Wednesbury*, it is sufficient to say that the high threshold of unreasonableness is not even arguably met. Permission to apply for judicial review on Ground 2B is refused.

Ground 1A: Proportionality under A1P1

Legal framework

187. The parties agreed that not every final order made under the NSIA will engage A1P1 but nor was it in dispute that A1P1 was engaged in the present case. A1P1 guarantees the right to property and states:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) 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."

188. As set out by Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 107, A1P1 contains three 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."

189. 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 so must be "construed in the light of the general principle laid down in the first rule" (*Fredin v Sweden (No 1)* (1991) 13 EHRR 784, para 41). The second rule (concerning deprivation of property) applies not only to the formal expropriation of property by the State (meaning loss of title for the erstwhile owner and the transfer of ownership to the State) but also to measures which amount to a de facto expropriation albeit that legal title is not taken away (*R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182, [2018] QB 149, para 93; *Fredin*, para 42). In considering whether a measure amounts to a de facto expropriation, one part of the test is

whether any "meaningful" use of the property in question has been retained. If the answer to that question is "yes", then the interference is unlikely to amount to a deprivation as opposed to State control of property (*British American Tobacco* [2016] EWCA Civ 1182, [2018] QB 149, para 96; *Fredin*, para 45).

190. It was not in dispute that the First Claimant's shareholding in Upp amounted to a possession and that the Order was an interference with that possession. Mr Luckhurst submitted that the Order constituted the deprivation of a possession, falling within the second A1P1 rule. He emphasised that the First Claimant was left with no title in Upp because the Government had ordered the sale of the entirety of its shareholding. The sale had a permanent effect: it ended the First Claimant's ownership of Upp on an enduring basis and was a conclusive transfer of ownership. The terms of the Order and its detailed schedules gave broad, deep and peremptory powers to the Secretary of State to ensure that a sale took place within a certain timeframe, including provision for the Secretary of State to take over the sale if necessary. No sale could have proceeded without the Secretary of State's approval of the purchaser. The Order forced a sale without any compensation for financial loss incurred, whether in terms of investment already made or in terms of the expected value of Upp which was a start-up and had not reached its full potential financial value that the purchase of its shares had anticipated. Mr Luckhurst submitted that, although on one analysis the sale involved two private parties (seller and purchaser), the court should "look behind the appearances and investigate the realities" of the effects of what the Secretary of State had ordered (*Sporrong v Sweden* (1983) 5 E.H.R.R. 35, para 63). He submitted that there was in reality no difference between the requirement to sell the entirety of the shares under compulsion by the State and a de facto expropriation.

191. Mr Phillips submitted that the First Claimant had retained some value in the property by means of the sale price. The Order therefore represented the exercise of State control over a private asset and not its de facto expropriation. In any event, there was a dearth of legal authority to suggest that the loss of title to a private actor – as opposed to the assumption of title by the State – could amount to a deprivation under the second A1P1 rule. Mr Phillips relied on the judgment of Green J (as he then was) at first instance in *R (British American Tobacco (UK) Ltd v Secretary of State for Health* [2016] EWHC 1169 (Admin) which held (at para 783) that if the measure "serves a legitimate purpose and title does not transfer to the State, then invariably, the measure is classified as control of use and not expropriation." He pointed out that this part of the judgment was not disapproved on appeal ([2016] EWCA Civ 1182, [2018] QB 149), such that it retained legal force. The First Claimant had received a market price received from a purchaser of its choice after being permitted a period of time to make the sale. There had been no expropriation.

192. I have a great deal of sympathy with Mr Luckhurst's submissions. The degree of State involvement in overseeing and monitoring the sale of Upp's shares under the stringent terms of the Order brought the practical difference between a de facto expropriation and control of use to near vanishing point. In such circumstances, the difference between de facto expropriation of title by the State and the Order to sell is understandably regarded by the Claimants as arbitrary.

193. However, as observed by Lord Carnwath in *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022, para 32, the case law of the European Court of Human Rights ("ECtHR") "shows that the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis." In particular, the question of whether the interference with property is proportionate to the aim of the interference is in substance the same,

irrespective of whether or not the measure under scrutiny amounted to expropriation or merely control, so that "the importance of classification should not be exaggerated" (*AXA General Insurance*, para 108). On this basis, it is not necessary for me to decide whether the Order amounted to a deprivation or a control. The central issue is whether the Order was proportionate.

194. The question of proportionality in the context of the court's consideration of Convention rights has been analysed as having four limbs. As summarised by Singh LJ in *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172, [2024] 1 WLR 3327, para 9:

> "The question whether or not an act of a public authority is incompatible with a Convention right will often depend on whether it complies with the principle of proportionality. That principle has been explained in the authorities as having four limbs, as set out by Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 ("*Bank Mellat*"), at para 74. It is necessary to determine: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) **whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether the measure's contribution to the objective outweighs the effects on the rights of those to whom it applies. The fourth limb is sometimes referred to as the 'fair balance' issue or 'proportionality stricto sensu', i.e. in the strict sense.** Although Lord Reed was in the minority in *Bank Mellat*, there was nothing in his formulation of the concept of proportionality with which Lord Sumption JSC (who gave the main judgment for the majority) disagreed: see para 20" (emphasis added).

195. The first two limbs are not in dispute and can be taken as read. I shall deal in turn with the other two limbs, turning first to limb 4.

Limb 4: fair balance

196. As regards the fourth limb, I need to decide for myself whether the decision to impose Remedy A struck a fair balance between the general interests of the community and the individual rights of the Claimants rather than applying a rationality standard (*R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, paras 67 and 137; *Dalston Projects*, paras 17-18). That does not mean, however, that I am the primary decision-maker or that I should assess the merits of the Claimants' case (*Bank Mellat No 2*, para 21; *Lord Carlile*, para 67; *Dalston Projects*, para 19). The Secretary of State has relevant statutory authority and institutional competence. He is the constitutional decision-maker. The court should give weight to the Secretary of State's view of the balance between competing rights and interests. Nor do the fair trial guarantees of Article 6 of the Convention (which Mr Phillips accepted as applying) require the court to conduct a full re-examination of the merits (*R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384, para 123 and cases cited therein).

197. The weight to be attached to the primary decision-maker's view of the fair balance between individual rights and the wider public interest will depend on the context of the interference with the right at stake (*Bank Mellat No 2*, paras 21 and 71, per Lord Sumption and Lord Reed respectively; *Lord Carlile*, paras 34 and 68, per Lord Sumption and Lord Neuberger respectively). The Claimants relied on the effectiveness of changes to corporate control under Remedy B as capable of removing the influence of the UBOs; the reach of data protection laws as an effective means of protecting customer data; the ISU's acceptance that Upp would comply with the measures constituting Remedy B; the proposal for the appointment of a BEIS observer to the Upp Board; and the Claimants' view that the burden on Government of monitoring and enforcing Remedy B was unreasonably overstated by officials. Both Mr Hickman and Mr Luckhurst emphasised the draconian nature of the decision which had compelled the sale of the entire shareholding in Upp, with no compensation for loss, under the terms of an Order whose breach would have amounted to a criminal offence.

198. I acknowledge the stringency of the statutory scheme and the draconian nature of the Order. Nevertheless, there are powerful reasons for concluding that the Secretary of State struck a fair balance.

199. First, the vital importance of the community's interest in national security must be given considerable weight. Secondly, the assessment of risk to national security is multifactorial, requiring the court not only to consider the facts as presented by the parties but also to undertake a predictive exercise about future risk. The court's lack of institutional ability to make its own predictions about the future warrants a high degree of judicial restraint.

200. Thirdly, the test of proportionality is part of the test for making a final order. The Act itself requires the Secretary of State to apply the principle of proportionality as a condition of making such an order (section 26(3)(b) of the Act). The Secretary of State was advised as part of the Remedies Assessment that Remedy A was judged by officials to be "necessary and proportionate to the risks in the case." He was advised of the full legal test for making a final order (including express reference to proportionality) in the Legal Considerations document. The email from his Senior Private Secretary confirmed that he had considered the "legal guidance." It would amount to an undue encroachment on ministerial working methods for a court to insist that the Secretary of State should have incorporated the concept of proportionality into the email. In context, he can properly be assumed to have considered proportionality. This is not, therefore, a case where there is no indication that the decision-maker has taken account of proportionality, and so the court will be slower to upset the balance which the Secretary of State has struck (*JT v First-tier Tribunal (Social Entitlement Chamber)* [2019] 1 WLR 131, para 90, per Leggatt LJ (as he then was); citing *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, para 47).

201. These various factors mean that the difference between a rationality review and an assessment of fair balance is conceptually sound but in practice small. I do not regard the various factors emphasised by Mr Hickman as capable of dislodging the conclusion that only divestment would meet the national security risk in a meaningful way.

Limb 3: Less intrusive measures

202. Mr Hickman submitted that the Secretary of State had approached the question of proportionality incorrectly because Remedy B (or a close variant with strengthened or supplemental measures) would have achieved the objective of safeguarding national

security while going no further than necessary in terms of its impact on the Claimants' A1P1 rights.

203. The question of whether less intrusive measures could have been imposed is not a question of the court searching out a putative single right answer but is a matter of according appropriate respect to the answer that the executive has reached (*Bank Mellat No 2*, para 75, per Lord Reed). In the national security context, in the absence of exceptional circumstances, the institutional capacity and legitimacy of the executive may in practical terms mean asking whether the measure imposed was reasonable (*Lord Carlile*, para 68, per Lord Neuberger).

204. I would not, however, regard the Secretary of State's decision as a borderline one, turning on some exact exposition of the limb 3 test. The Secretary of State was on any standard justified in having significant concerns about a package of measures less than divestment. As I have already set out, Remedy B and the Claimants' additional proposals would rely on corporate structure and on operating restrictions upon Upp, as well as on enhanced standards of regulatory compliance. The Secretary of State was on any standard justified in concluding that a more far-reaching remedy was necessary.

205. The Claimants' assertion that the risk of UBO leverage would have been remote amounts to no more than a disagreement about an evaluative judgment reached on the basis of evidence before the decision-maker after a proper and fair process for decision. There are no grounds, on any standard of review, to interfere with the Secretary of State's conclusion that the UBOs were vulnerable to Russian leverage which posed a threat to national security.

206. 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.

207. In the third set of representations, the First Claimant told the ISU that it was essential for the Group to retain some representation on the Upp Board and that the Group wanted to retain the right to recommend, appoint, remove and replace three Investor Directors who would not be restricted from putting forward director candidates for the Upp Board's consideration. The representations went on to say that the Investor Directors should not be prohibited from proposing contractors or suppliers for use by Upp provided that their proposals were approved by the majority of the Board. These various elements of the representations demonstrate the risk that links in Mr Hickman's "chain" (as described above) would retain influence over Upp. As expressed in the NCA intelligence report,

there was no question of the Group depriving the UBOs of their ultimate economic ownership.

208. Mr Hickman submitted that both Upp and the Group could be trusted to comply with the measures in Remedy B. He contended that compliance would remove the identified risks to national security. He submitted that the Secretary of State had unreasonably underestimated the impact of the proposed SRC and audit requirements in ensuring the effectiveness of Remedy B whose obligations would plainly be enforceable through criminal sanctions, civil proceedings for an injunction (section 48 of the Act) and monetary penalties (section 40 of the Act). There was therefore no reason to suppose that Remedy A carried "the highest expectation of compliance and ability for HMG to enforce against breaches" as the Remedies Assessment had erroneously concluded.

209. I do not agree. The Remedies Assessment went on to say that Remedy B "would provide limited mitigation, to varying extents, of the national security risks identified." It noted that the Remedy B measures had not been tested and that they "may achieve only a limited protective effect, resulting in unmitigated, extant risks." The clear analysis of risks placed before the Secretary of State was the product of cross-government consultation with input from OGDs with relevant institutional competence and specialism (including technical specialism). Mr Hickman's analysis amounted to a difference of opinion with the Secretary of State and was no more than an invitation to the court to give more or less weight to various factors rather than a targeted proportionality challenge.

210. It seems to me that the rationale for rejecting Remedy B was succinctly set out in the MinSub to the Secretary of State for DCMS:

> "...the [NCSC] has assessed that [Remedy B] would not be sufficient to address the national security risks. While the various restrictions (if implemented perfectly) would theoretically heavily restrict the relationship between the two parties [i.e. Upp and the Group], there is still a possibility that influence could be asserted. HMG would be placing a substantial amount of trust in the SRC and audit arrangements on an ongoing basis in order to implement this remedy. As full fibre infrastructure is likely to be in place for up to three decades and this network, as planned, is likely to grow to be regionally significant, the NCSC advised that this remedy was not sufficient to mitigate the risks."

211. This passage is a clear and sensible summary of the ISU and wider Government case against Remedy B. The Claimants have brought forward no persuasive submissions to undermine its force.

212. I am not persuaded to take a different view of the proportionality of the Order or to conclude that the protection of national security "could be attained equally well by measures which were less restrictive" (*R (Friends of Antique Cultural Treasures Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2020] EWCA Civ 649, [2020] 1 WLR 3876, para 80 (Sir Terence Etherton MR, Singh and Green LJJ)). In short, the Secretary of State justifies his conclusion that nothing less than divestment was necessary and proportionate to quell the risk of Russian State influence through the influence of the UBOs on the Claimants and (further down the chain) on Upp. Taking the decision for

myself, as the law requires me to do, the imposition of Remedy A was proportionate. The length at which Ground 1A was argued does not make it arguable. I refuse permission to apply for judicial review.

Ground 1B: Compensation

213. Mr Luckhurst submitted that the First Claimant's rights under A1P1 had been breached by the failure to ensure that the First Claimant received full compensation for the de facto expropriation of its possession. In relation to this aspect of the claim, Mr Luckhurst made freestanding submissions on proportionality in addition to Mr Hickman's proportionality submissions under Ground 1A. He submitted that the failure to award full compensation to the First Claimant in itself amounted to a disproportionate interference with A1P1 rights. By full compensation, Mr Luckhurst meant the value of the overall loss to the First Claimant (to be assessed by the court at a future point in the proceedings) which was not the same as the price received in the open market under compulsion to sell. A forced sale was bound to reflect far less than the full or fair value of Upp. The Claimants had expected to receive a 20% internal rate of return on a total £400 million investment upon its provisionally planned exit in 2028 and was on course to do so, had the forced divestment not happened.

214. Mr Luckhurst submitted that the Secretary of State had not said that paying compensation would itself cause a national security risk or undermine the statutory purpose of protecting national security. Nor was the NSIA part of a social policy for the redistribution of wealth which would involve the legitimate taking of resources from one party for redistribution to another party (as in *James v United Kingdom* (1986) 8 EHRR 123 in which the ECtHR upheld tenants' rights to purchase landowners' freehold interests in property). There was no social policy of redistributing wealth from one telecoms provider to another. In such circumstances, fair balance required the Secretary of State to award compensation.

215. Mr Luckhurst submitted that the Claimants had not committed any wrongdoing. He contended that there could be no question of the First Claimant simply having underestimated the ordinary risks of investing in the United Kingdom or fallen foul of the sort of regulatory risks that are expected and should be catered for as part and parcel of any UK investment.

216. I grant permission to apply for judicial review on this Ground and turn to consider the substantive merits.

Legal framework

217. The parties referred me to a multitude of authorities on compensation under A1P1. However, upon analysis, the differences between the authorities cited by the Claimants and those cited by the Defendant were narrower than the extensive citation of case law might suggest. It suffices to set out the broad principles and to apply them to the facts of the present case.

218. The key principles are well-established in the case law of the ECtHR. In *James*, para 54, the ECtHR held:

> "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" (emphasis added).

219. In *Vistins v Latvia* (2014) 58 EHRR 4, para 110, the ECtHR observed that 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." This observation, which is consistent with the approach in *James*, does not amount to a statement of principle that the deprivation of property must involve full compensation irrespective of the strength of the public interest in the deprivation.

220. A similarly non-rigid approach has been taken in domestic law. In *R (SRM Global Master Fund LP) v Treasury Commissioners* [2009] EWCA Civ 788, [2010] BCC 558, para 48, Laws LJ observed that:

> "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 fair balance."

221. In order for a deprivation to meet the requirements of A1P1, there must be a procedure for ensuring an overall assessment of the consequences of deprivation, including the award of compensation in line with the value of the expropriated property (*Vistins*, para 111). As regards the assessment of the property's value, the amount of compensation must normally be based on the value of the property at the date on which ownership was lost. Any other approach "could open the door to a degree of uncertainty or even arbitrariness" (*Vistins*, para 111). But that too is not an iron rule. For example, the market value of expropriated land did not represent full compensation when the loss of land included the loss of the means of subsistence for a family and the compensation granted was insufficient for them to acquire equivalent land in the area in which they lived (*Osmanyan v Armenia* (2019) (App No 71306/11), para 70).

Discussion

222. The Act makes provision for financial assistance in section 30. Mr Phillips accepted (and was keen to stress) that there is provision for assistance and not compensation. Nevertheless, there is no statutory cap on the amount that may be granted. The possibility of paying large sums to affected parties is contemplated, provided that assistance of more than £100 million is reported to Parliament. The provisions of the Act are adequate to enable full compensation, however that term is defined.

223. The language of section 30 renders the award of financial assistance discretionary. Parliament's decision to enact a discretion, rather than a duty, to award financial assistance is consistent with the case law of the ECtHR and the domestic position as I have set out above. Even if the Order amounted to a deprivation under the second A1P1 rule, I have

been referred to no authority to the effect that the principle of proportionality requires that compensation must without exception be paid in order to avoid a breach of A1P1. Nor does the case law go so far as to say that only in instances of redistribution of wealth is the State justified in withholding compensation. Such a fixed line would be inconsistent with the fact-sensitive approach to striking the fair balance between the competing interests under A1P1.

224. It is not contended that section 30 is incompatible with A1P1. I discern no reason to conclude that it is incompatible in so far as it does not compel the award of full compensation. I see no dearth of procedural mechanisms for the overall assessment of either the award of financial assistance or its amount.

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.

226. In his reply submissions, Mr Hickman went further than Mr Luckhurst by making the freestanding argument that a State is bound to pay compensation unless, by doing so, the purpose of the measure that requires deprivation of property would be undermined. As this struck me as being more than a submission to be made in reply, I asked Mr Hickman to take the court to the passage in the Claimants' skeleton argument where such a bold proposition was set out but Mr Hickman did not do so, referring only to a passage of the Re-Amended Grounds from which the point did not clearly emerge. The argument struck me as being ad hoc to the extent that it went further than Mr Luckhurst whose submissions relied on more than this single factor. Mr Hickman did not cite any authority which would persuade me to accept the argument. In any event, I did not hear anything like full argument on whether the payment of public funds to the Claimants (who cannot speak for Upp as regards any job losses or other financial impacts arising from the sale) was or was not in the public interest.

227. I have been referred to no authority to the effect that, in order to avoid a breach of A1P1, the amount of compensation must reflect the value of Upp as assessed by the Claimants – rather than by the market at the point of deprivation. The reluctance of both the ECtHR and domestic courts to apply this sort of fixed reasoning reflects the general principle of Convention law that the various articles of the Convention and its protocols need to strike a balance between public interest and individual rights. It seems to me that the balance is, in the context of A1P1, acutely fact-sensitive in the sense that the balance of competing factors will depend on the facts of the case. Context is crucial.

228. For reasons that I have already explained, the court is not acting as a primary decision-maker in carrying out the balance. I agree with Mr Phillips that the Secretary of State should be afforded a wide margin of discretion in relation to whether a party operating an entity in a way that is contrary to the interests of national security ought to be reimbursed for financial losses upon divestment under the Act.

229. 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.

230. For these reasons, this ground fails.

Section 31(2A) of the Senior Courts Act 1981

231. Mr Phillips relied on section 31(2A) of the Senior Courts Act 1981 as an alternative ground for the refusal of relief on the basis that, even if the decision to impose Remedy A or the decision-making process involved an error of law, I can be confident on the totality of the material before me that the Secretary of State's decision would inevitably have been the same. Given my other conclusions, it would serve no purpose for me to reach a conclusion on this alternative argument and so I shall not do so.

Conclusion

232. I grant permission to apply for judicial review on Grounds 1B and 3 but dismiss them substantively. I refuse permission to apply for judicial review on Grounds 1A, 2A and 2B. The claim is accordingly dismissed. I reach these conclusions on the basis of the open evidence but they are supported by the closed material with which I deal in a closed judgment.