Claim Nos. CO/1995/2022 and CO/2007/2022

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

BETWEEN:

THE KING
On the application of
(1) ELLIOTT ASSOCIATES L.P.
(2) ELLIOTT INTERNATIONAL L.P.

- and -

THE KING
On the application of
JANE STREET GLOBAL TRADING, LLC

Claimants

- and -

(1) THE LONDON METAL EXCHANGE
(2) LME CLEAR LIMITED

Defendants

DETAILED GROUNDS OF DEFENCE

Note on references:

- *References to "Chamberlain, ¶x" are to paragraph "x" of the First Witness Statement of Matthew James Chamberlain.*
- *References to "Jones, ¶x" are to paragraph "x" of the First Witness Statement of Christopher Jones.*
- *References to "Farnham, ¶x" are to paragraph "x" of the First Witness Statement of Adrian John Winston Farnham.*
- *References to "Cressy, ¶x" are to paragraph "x" of the First Witness Statement of First Witness Statement of James Cressy.*
- *Documents exhibited by the Defendants' witnesses are in the form [exhibit/x/y], where "x" is the tab number, and "y" is the page number in the relevant exhibit.*
- *Other documents relied on by the Defendants are in the form [DB/x/y] where "DB" refers to the bundle of documents filed with these Grounds, "x" is the tab number, and "y" is the page number in that bundle.*

A. Introduction

1. By these claims, two hedge funds ("**Elliott**") and a commodity trading firm ("**Jane Street**") challenge the decision-making of the First Defendant ("**LME**") on 8 March 2022 when it acted in the public interest to protect the stability and integrity of the global market in nickel, in fulfilment of its core statutory duty to maintain an orderly market.[1] The Claimants contend that this intervention prevented them from obtaining very large profits ($450m in a single morning) from their trading counterparties. They seek to recover those sums by way of damages, ostensibly for an infringement of their human rights arising from the LME's performance of its regulatory functions. The claims are without merit and should be dismissed.

2. The LME is the world's leading investment exchange for trading in industrial metals. It operates a market in standardised futures contracts and options in base metals. The Second Defendant ("**LME Clear**") is the clearing house for trading on the LME. Neither the LME nor LME Clear has any speculative interest in the trade in metals: they simply provide the forum and market infrastructure through which trading and clearing can occur. These are important public functions which the LME and LME Clear perform in accordance with a detailed statutory regime. One of the LME's central regulatory functions is to maintain order within the market it operates.

3. Early on the morning of 8 March 2022 the market for nickel futures, specifically the three-month nickel contract ("**3M Nickel**"), experienced extreme and unprecedented disorder. The price for 3M Nickel lurched upwards from an opening price of around $50,000 per tonne ("**p/t**") to around $88,000 p/t by 6:00; peaking at $101,365 p/t 8 minutes later, before falling suddenly in 20 minutes to trade between approximately $75,000 p/t and $86,000 p/t until 8:15. Within just over three hours of the market opening, the price had almost doubled, and had by that point risen by 230 per cent in just over 24 hours. For context, the monthly average 3-month Closing Price from January to 3 March 2022 had been between $22,000 p/t and $25,000 p/t and the average daily price range was 2.6%. The LME's executives had never previously witnessed such extreme price convulsions,[2] nor were they explicable by rational market forces. In the LME's expert view the market had become disorderly.

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1 Chamberlain, ¶¶5, 10, 206, 242; Notice 22/053 [MC1/78/1810-1812].

2 Chamberlain, ¶139.

4. This disorder presented a systemic risk to the nickel market itself and to the LME's wider market as a whole. If this disorderly trading was treated as valid and representative of market value, it would have resulted in all open market positions being re-marked, resulting in unprecedented margin calls (in addition to the record-breaking margin calls of the three previous trading days), of a minimum of approximately $19.75bn: some ten times higher than the record set on 4 March (which was itself 40% higher than the previous record).[3] In the exercise of their expert judgement, both the LME and LME Clear considered that those margin calls were highly likely to push multiple market participants into simultaneous default, thereby disrupting access to, and the orderly functioning of, the LME's metals market. This would have rippled out beyond the nickel market, with significant negative implications for "real-world" users and producers of metal.[4] The position was grave and called for immediate action to protect the public interest.

5. On the morning of 8 March 2022, the LME took two key decisions: first to suspend nickel trading; second to ensure that no trading arrangements made on the LME's nickel market after midnight on 7 March 2022 ("**Tuesday Trades**") should result in a binding contracts under the LME Rulebook. Both decisions were taken in the public interest and following consultation with LME Clear.[5] The Claimants challenge only the second of those decisions, which, for convenience, the LME refers to as the decision to "**wind back the clock**" or the "**Decision**". The Decision was taken by the LME not LME Clear and the latter is not, therefore, a proper defendant to these claims.

6. Both claims are over-engineered and advance numerous overlapping grounds some of which simply repackage and repeat the same underlying complaints. Each of those Grounds is addressed in turn below. The fatal flaws in the claims can be shortly summarised:

   (1) The Claimants are challenging the expert multi-factorial judgements of a specialist body seeking to protect the public interest in a complex, fast-moving situation which presented unprecedented challenges, including the threat of systemic disruption to the market as a whole. It is difficult to conceive of a case in which this Court would be more reluctant to second-guess the balance struck by the designated decision-maker.

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3 Jones, ¶¶17-21 (and in particular Table 1).

4 Farnham, ¶¶114-117, 128 (and in particular ¶115); Chamberlain, ¶205(e)-(f); Jones, ¶¶56-57.

5 Whilst there was a strong consensus between LME and LME Clear as to the appropriate action to take, the decisions to suspend and cancel were taken by the LME exercising powers under its rules. The LME, not LME Clear, is, accordingly, the proper defendant to these proceedings.

Each of the Claimants' many grounds of challenge represents an unsuccessful attempt to circumvent this intractable reality. None of those grounds has merit.

(2) The LME plainly had *vires* – indeed it had express powers both to suspend and cancel trades under its constitution, to which all LME Members subscribe: the "London Metal Exchange Rules and Regulations" ("**LME Rulebook**").[6] Those powers were clear, specific and without relevant qualification. Moreover, they were powers which statute obliges the LME to maintain.[7] The attempt to confine them within preconditions is contrived and contrary to well-established canons of interpretation. In particular, it plainly was not the case that the LME was disabled from acting unless it had policies which pre-empted every future circumstance in which its powers might be deployed.[8]

(3) The LME did not enjoy the luxury of time, but it had sufficient information at its disposal and took relevant matters into account.[9] It was well aware that winding back the clock would prevent traders from profiting from the Tuesday Trades. However, it reasonably considered that this was the only appropriate course open to it. The Claimants' suggestion that the LME should have undertaken a market-wide consultation before acting is unreal: the matter was urgent and a decision could not be delayed.[10] In any event, when announcing the suspension, the LME informed the market that it was urgently considering whether to reverse or adjust existing trades. None of the Claimants contacted the LME to submit that cancellation should not occur.

(4) The LME plainly did not act so as to "*favour*" or advance the financial interests of a particular "*cohort*" or "*limited category*" of traders, still less its own private interests or those of LME Clear.[11] Those allegations are wholly unfounded and contrary to the evidence. The imputations of apparent bias and disqualifying pecuniary interests are similarly misconceived; indeed, they require the Claimants to impugn arrangements which are mandatory features of the statutory regime (see Ground 2(b)). As to the substance of the LME's decision-making, the Claimants disagree with it, since it

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6 *Pace* Elliott Statement of Facts and Grounds ("**SFG**"), Ground 1; Jane Street SFG, Ground 1.

7 See ¶¶11-14 below.

8 *Pace* Elliott SFG, ¶26; Jane Street SFG, ¶34.

9 *Pace* Elliott Grounds 3 and 5; Jane Street Grounds 2, 5 and 6.

10 *Pace* Elliott Ground 2(a); Jane Street Ground 5.

11 *Pace* Elliott Grounds 3 and 4; Jane Street Ground 4.

prevented the Tuesday Trades from proceeding, but they cannot begin to show that the Decision was irrational or *Wednesbury* unreasonable.[12]

(5) The Claimants' claims are not improved by recourse to the Human Rights Act 1998 ("**HRA**") and Article 1 of the First Protocol of the European Convention on Human Rights ("**A1P1**", "**the ECHR / the Convention**"). So far as Elliott is concerned, they cannot even clear the first hurdle: their trading arrangements were inchoate and never reached the stage of forming Contracts qualifying as "*possessions*" under A1P1.[13] In any event, there was no "*interference*" with any of the Claimants' trades, since they were always subject to the LME Rulebook (including the LME's power of cancellation) and were therefore set aside in accordance with their terms.[14] Alternatively, any interference was plainly lawful and proportionate.[15] The LME took account of the impact on those who had entered into the Tuesday Trades and specifically considered alternative options. However, in the exercise of its expert judgement, it concluded that none of these alternative options was appropriate.

(6) Even if (which is denied) the Claimants could establish some species of unlawfulness, this would be a clear case for the denial of relief under s. 31(2A) of the Senior Courts Act 1981 ("**SCA**") and/or because no damages are required to provide "*just satisfaction*". This was not a marginal decision – it was (at least) "*highly likely*" to have been taken in any event. In particular, it was not a decision which could realistically have been altered by some difference in procedure or by reference to additional documents or information. Indeed, LME Clear had its own powers to cancel Contracts, which it would have exercised if the LME had been unable to do so.

(7) Even if (which is denied) s. 31(2A) SCA does not bar relief, just satisfaction does not require (and the Court should not permit) an award of damages or, alternatively, an award in the sums claimed, given (a) the nature of the alleged unlawfulness; (b) the Claimants' failure to mitigate; and/or (c) the wider circumstances of the case.

7. To develop these points, these Grounds (i) introduce the Defendants and the regulatory framework (**Section B**); (ii) explain how trading on the LME works (**Section C**); (iii) summarise the relevant factual background (**Section D**), (iv) address the Claimants'

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12 *Pace* Elliott SFG ¶¶78-85; Jane Street SFG ¶¶51.

13 *Pace* Elliott SFG ¶¶87-91.

14 *Pace* Elliott SFG ¶¶87-91; Jane Street SFG ¶56.

15 *Pace* Elliott SFG ¶¶92-114; Jane Street SFG ¶¶57-58.

Grounds for judicial review in turn (**Section E**); (v) address the claim under the HRA (**Section F**); and (v) explain why the Claimants are not entitled to relief in any event (**Section G**). The Defendants adduce four witness statements in support of their case:

(1) Matthew Chamberlain, the Chief Executive Officer ("**CEO**") of the LME, and a director of LME Clear, who was the decision-maker responsible for the Decision. His evidence explains the role of the LME; his reasons for taking the Decision; why the alternative actions now proposed by the Claimants were not viable; the status of the Claimants' alleged trades; and the actions taken since the Decision.

(2) Adrian Farnham, who was, until his retirement in July 2022, CEO of LME Clear. Mr. Farnham's evidence addresses the function of LME Clear, its role in the process leading to the Decision and the likely consequences for the commodities market and wider financial markets had the Decision not been taken.

(3) James Cressy, the acting CEO of LME Clear, who was at the relevant time the Chief Operations Officer of the LME and LME Clear. His evidence explains the mechanics involved in putting the Decision into effect, and addresses matters relevant to the existence and quantification of the Claimants' alleged losses.

(4) Chris Jones, the Chief Risk Officer ("**CRO**") for the LME and LME Clear. Mr. Jones explains the likely consequences if the Tuesday Trades had been allowed to stand and LME Clear had then issued margin calls in order to ensure that it was adequately collateralised in compliance with its regulatory obligations.

B. <u>The Defendants and the applicable regulatory framework</u>

8. The LME and LME Clear are both "*recognised bodies*" under Part XVIII of the Financial Services and Markets Act 2000 ("**FSMA**"). They are, respectively, a "*recognised investment exchange*" ("**RIE**") and a "*recognised clearing house*". Their respective functions and relevant aspects of the regulatory framework are outlined briefly below.

The LME

Overview

9. The LME provides a regulated forum or "*venue*" within which buying and selling interests meet. To that end, it operates three "Execution Venues", namely a physical trading floor (called "**the Ring**"), an electronic market (through an online platform called "**LMEselect"**)

and the Inter-Office Market (which involves counterparties arranging trades *inter se* and then executing them on an online matching system called "**LMEsmart**").

10. The LME operates within a complex patchwork of domestic and EU legislation (now Retained EU law), which has developed incrementally over time and prescribes the functions which the LME must perform and the minimum powers which it must maintain:

    (1) The core domestic regulations are the "**Recognition Requirements Regulations**".[16] In Parts I and II of their Schedule, they prescribe the criteria for qualification as an RIE. Those criteria have in turn been incorporated verbatim into the FCA's Recognised Investment Exchanges Sourcebook, referred to as "**REC**".

    (2) The main EU requirements derive from Directive 2014/65,[17] commonly referred to as "**MiFID II**". MiFID II lays down high-level requirements upon "*trading venues*", which term includes the LME. Some of MiFID II's requirements are implemented by a series of EU Regulations creating what are known as Regulatory Technical Standards ("**RTS**"). The relevant one for present purposes is Regulatory Technical Standard 7 ("**RTS 7**").[18] Although RTS 7 had direct effect (and therefore continues to form part of UK law),[19] the Recognition Requirements Regulations also give effect to some of its requirements, in addition to some of the requirements under MiFID II itself.[20]

    (3) In order to give effect to the above regulatory requirements, and generally govern its operations, the LME has created, and is subject to, the LME Rulebook.

The LME's duty to maintain orderliness and powers of cancellation

11. Central to the LME's regulatory responsibilities is its overriding duty to maintain market orderliness. That duty is reflected in paragraphs 4(1) and 9ZB of the Recognition Requirements Regulations, which provide as follows:

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16 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001 (SI 2001/995).

17 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).

18 Commission Delegated Regulation (EU) No 2017/584 of 14 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying organisational requirements of trading venues.

19 By virtue of the European Union (Withdrawal) Act 2018 ("**EUWA**"), s.3(2).

20 These provisions continue to have effect as "EU-derived domestic legislation" via s.2 of the European Union (Withdrawal Act) 2018 (as amended) ("**EUWA**").

> "The UK RIE must ensure that business conducted by means of its facilities is conducted in an orderly manner and so as to afford proper protection to investors" (paragraph 4(I); emphasis added).
>
> "The rules of the UK RIE must ensure that: (a) financial instruments admitted to trading on a regulated market operated by it are capable of being traded in a fair, orderly and efficient manner; … and; (c) contracts for derivatives admitted to trading on a regulated market operated by it are designed so as to allow for their orderly pricing as well as for the existence of effective settlement arrangements" (paragraph 9ZB; emphasis added).

12. The Recognition Requirements Regulations go on to specify the minimum powers that the RIE must have in order, *inter alia*, to secure these objectives. Paragraph 3B of the Schedule and REC 2.5.1 provides that (emphasis added):

> "The RIE must be able to: (a) temporarily halt or constrain trading on any trading venue operated by it if there is a significant price movement in a financial instrument on such a trading venue or a related venue during a short period; and (b) in exceptional cases be able to cancel, vary or correct any transaction."

13. These stipulations originated in Art. 48(5) of MiFID II, which provides:

> "Member States shall require a regulated market to be able to temporarily halt or constrain trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction" (emphasis added).

14. It is, therefore, a core tenet of the regulatory framework that an RIE must be able to suspend trading in the event of significant volatility and to cancel trades "*in exceptional cases*". Notably, both the EU and domestic draftsman have left the latter category undefined.

The LME Rulebook

15. To trade on the LME, participants must be "Members" of it, and all Members are bound by the LME Rulebook.[21] As Mr. Chamberlain explains, the LME Rulebook "*is a 'living document' that is revised iteratively over time, for example to address new regulatory requirements and/or implement new policy initiatives and market reforms*".[22]

16. The LME Rulebook has many parts. The relevant parts for present purposes are Part 1 (Definitions and General Rules) and Part 3 (Trading Regulations ("**TR**")). Part 3 includes the following provisions on suspension and cancellation upon which the Defendants specifically rely:

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21 LME Rulebook, Part 1, Rule 2.5 [MC1/11/203].

22 Chamberlain, ¶37.

> "1.3 The Exchange may, at its absolute discretion and acting reasonably suspend trading on one or more of the Execution Venues for such period it considers necessary in the interests of maintaining a fair and orderly market. Trading will be resumed as soon as reasonably practicable following any such suspension of an Execution Venue."
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> "22.1 Notwithstanding, and without prejudice to, the general power set out at Trading Regulation 1.3, the Exchange may temporarily halt or constrain trading in accordance with the relevant procedures established by Notice if there is a significant price movement during a short period in a financial instrument on the Exchange or a related trading venue (as such term is defined in Article 4(1)(24) of the MiFID II Directive). Where the Exchange considers it appropriate, the Exchange may cancel, vary or correct any Agreed Trade or Contract" (emphasis added).

17. The distinction between "*Contracts*" and "*Agreed Trades*", is addressed further below. At this stage, the Court is invited to note that, in keeping with the regulatory framework, the LME maintains wide-ranging powers both to suspend trading and to cancel existing trades.

LME Clear

18. LME Clear is a clearing house and "*central counterparty*" ("**CCP**") under the UK European Market Infrastructure Regulation ("**UK EMIR**").[23] Its operations are governed by the "LME Clear Limited, Rules and Procedures" ("**LME Clear Rules**"), by which all Clearing Members are bound.[24] The details of its role and function are set out in the evidence of Mr. Farnham. Only the key points for present purposes are included below.

19. As a CCP, LME Clear interposes itself between the proposed counterparties to trades on its market: it becomes the buyer to every seller and the seller to every buyer. The purpose of this arrangement is to manage systemic risk, *viz.* the risk that if one party defaults this might leave its counterparty unable to perform its obligations to other participants, producing a "*domino effect*".[25] If a Member fails to discharge its obligations, LME Clear stands in its shoes and ensures that its contracts are transferred or closed out in an orderly fashion.

20. In order to fulfil this role, a CCP must take collateral from participants which it can apply against any losses that may be suffered if it has to close out defaulting Members' contracts.

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23 The retained EU law version of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

24 LME Clear Rules, r. 2.1 [AF1/2/57-58]. The term "Clearing Member" is used in the LME Rulebook to denote LME Members who are permitted to clear contracts with LME Clear: see LME Rulebook, Part 1 [MC1/11/164]. Members who are not Clearing Members and who enter into Contracts on the Exchange must be Clients of Clearing Members in order for the transactions to which the Contracts relate to be cleared via LME Clear. The LME Clear Rules refer only to "Member", since there is only one category of Member of LME Clear.

25 Farnham, ¶13.

UK EMIR obliges a CCP to collect sufficient margin to ensure that it is fully collateralised against all Member positions in Art. 40:

> "A CCP shall measure and assess its liquidity and credit exposures to each clearing member … on a near to real-time basis."

And Art. 41(1):

> "A CCP shall impose, call and collect margins to limit its credit exposures from its clearing members … Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant position. They shall also be sufficient to cover losses that result from at least 99% of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all clearing members … at least on a daily basis. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions, taking into account any potentially procyclical effects…."

21. The collateral that a Member is required to post is termed its "Margin Requirement". This is comprised of two parts, "Initial Margin" and "Variation Margin". Initial Margin is the collateral that LME Clear needs to protect itself against the risk that, in the interval before it can close out a Member's positions, the market value may move against it.[26] It is calculated based on a range of factors, including assumed close-out periods, confidence levels and historic look-back periods.[27] Variation Margin is the collateral needed to cover the losses (if any) that exist on a Member's open positions, when those positions are "*marked-to-market*", *viz.* valued at the prevailing market price.[28] For 3M Nickel, this is calculated as the difference between (i) the contract value of the original transaction (taken from the prices agreed in the Contract); and (ii) the contract value at the time of the calculation (based on market prices at that time).[29]

22. At around 22:30 every business day, LME Clear calculates overnight margin requirements, which are released at 03:00 the following business day, with any increases payable by Clearing Members by 09:00. In addition, where appropriate, LME Clear may release an additional intra-day margin call.[30] When it does so, Clearing Members have one hour to

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26 LME Clear Rules, Clearing Procedure C3.1 [AF1/2/231]. See Farnham, ¶¶41-56 (in particular ¶¶51-53).

27 LME Clear Rules, Clearing Procedure C3.2 [AF1/2/231].

28 LME Clear Rules, Clearing Procedure C4.1 [AF1/2/233]. See Farnham, ¶¶54-56.

29 LME Clear Rules, Clearing Procedure C4.2(b) [AF1/2/233]. Market prices are calculated based on the most recent positions between LME Clear and the Member and LME Clear's "Price Sets", which include the Closing Price derived from LME trading: LME Clear Rules, Clearing Procedure A6.9(a) [AF1/2/208]; see the definition of "Closing Prices" at LME Rulebook, Pt. 1, Rule 1.1 [MC1/11/167] and TR 6.1 [MC1/11/284].

30 LME Clear Rules, Clearing Procedure C6 [AF1/2/235]; referred to as "Intra-Day Margin Requirement" [AF1/2/34].

pay.[31] Market volatility may result in larger margin requirements, in particular since larger Variation Margin may be required to cover losses on open positions, which may put pressure on market participants and cause stress in the market, and interconnected markets.

23. LME Clear is required to maintain, and does maintain, a default fund to cover the risk that any losses may exceed the margin posted by a defaulting Member.[32] EMIR prescribes a "Default Waterfall" whereby losses are to be absorbed first by the defaulting Member's collateral, then by that Member's contributions to the default fund, then by a fixed sum of LME Clear's own resources (known as "Dedicated Own Resources" and sometimes referred to as "skin in the game") and finally by the remainder of the default fund (comprised of non-defaulting Members' contributions).[33] If the default fund is fully depleted, LME Clear may require non-defaulting Members to contribute additional funds.[34]

24. An aspect of LME Clear's role as a CCP is assessing creditworthiness, capital and liquidity arrangements of Clearing Members through its "Credit Risk Assessment Framework". Based on a combination of publicly available information and information provided to LME Clear, LME Clear assesses the resources which each Clearing Member is likely have available to meet their obligations to the CCP and gives them a credit rating.[35]

25. It is also of note that LME Clear has its own power to cancel Contracts in r. 6.15.1 of the LME Clear Rules. This provides, insofar as relevant that:

> "LME Clear may cancel any Contract in the event that:
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> (a) LME Clear reasonably considers that such Contract or the performance by any party of its obligations under such Contract would:
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> … iii. be contrary to the rules of any Approved Transaction Platform or the cancellation of such Contract is necessary to enable the Approved Transaction Platform to maintain an orderly market in the Eligible Products traded on such Approved Transaction Platform".

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31 LME Clear Rules, Clearing Procedure C6.3(b) [AF1/2/235].

32 The default fund must be large enough to absorb losses arising from the default of the two Clearing Members to which LME Clear has the largest exposure: UK EMIR, Art 45(4).

33 UK EMIR, Art. 45; LME Clear Rules, r.10.10.1 [AF1/2/149-151]. See the explanation of the Default Waterfall in Farnham, ¶¶57-67.

34 Referred to in the LME Clear Rules as Default-Specific Replenishment Notices (Rule 10.10.1(e)) [AF1/2/150] and Stabilisation Replenishment Notices (Rule 10.10.5) [AF1/2/154]; Jones, ¶¶48, 51.

35 Farnham, ¶¶14-16; Jones, ¶¶25-30.

C. How trading on the LME works[36]

26. The Defendants' evidence explains how trading is conducted on the LME.[37] Those explanations are not repeated here, but the following points bear emphasis.

27. A core feature of trading on the LME is that no trading contract is formed unless and until a trade is "Executed" in accordance with the LME Rulebook.[38] When execution occurs, a "Contract" is formed between LME Clear and the relevant Member.[39]

28. Before a transaction is Executed and a Contract results, there may be an "Agreed Trade". This is a pre-contractual agreement between two trading parties of the terms of a proposed transaction for the purpose of enabling "Contracts" to be formed between them under the LME Rulebook.[40] An Agreed Trade is not a binding contractual agreement and does not give rise to a Contract unless it is Executed.[41]

29. "Execution" is defined in the LME Rulebook as "*the point at which the transaction represented by the Agreed Trade is concluded, resulting in the formation of one or more Contracts*".[42] Execution differs depending on the "*Execution Venue*" on which the trade is made. As above, there are three such venues: the Ring, LMEselect (the electronic market) and the Inter-Office Market. Only the latter two are relevant to this case.

30. Trades on LMEselect involve two corresponding halves of an Agreed Trade being "*matched*" by the electronic platform. The Agreed Trade is Executed, and a Cleared Contract comes into being, when LME Clear confirms that it satisfies relevant Acceptance Criteria and Pre-Execution Checks.[43]

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36 As mentioned below, trades also occur on the over-the-counter ("**OTC**") market: see Chamberlain ¶¶63-66.

37 Chamberlain, ¶¶43-59; Cressy, ¶¶10-36; Farnham, ¶¶33-40.

38 See Cressy, ¶18. This structure was introduced in conjunction with Art. 29 of Commission Delegated Regulation 2017/582/EU, known as the Markets in Financial Instruments Regulation ("**MiFIR**"), which requires CCPs and trading venues to put in place effective systems, procedures and arrangements to ensure that cleared derivatives transactions are cleared as quickly as practicable using automated systems. The structure under which no binding contract is formed until Execution was designed to address the requirement in Art. 2.1 of Commission Delegated Regulation (EU) 2017/582 of 29 June 2016 ("**MiFIR RTS 26**") for the "*automatic and immediate*" clearing of cleared derivative transactions that are concluded on a trading venue. Trading venues that comply with this requirement are exempt from alternative requirement under Art. 2.2 of MiFIR RTS 26 to provide pre-screening limit checking tools to clearing members.

39 Cressy, ¶14; Farnham, ¶36. LME Rulebook, Pt. 1, definition of "Cleared Contract" [MC1/11/163].

40 TR 2.2.3 [MC1/11/255]. Cressy, ¶16.

41 TR 2.2.3 [MC1/11/255].

42 LME Rulebook, Part 1 [MC1/11/174].

43 Cressy, ¶20. See TR 2.4.1(a)-(b). (For the "Acceptance Criteria" see LME Clear Rules Clearing Procedure B 3.1 [AF1/2/211]; for the Pre-Execution Checks see TR 2.8.1 [MC1/11/260].)

31. The Inter-Office Market refers to trades which commence with a direct communication between the proposed counterparties (for example by telephone, email or other messaging systems), during which they arrange the terms of the proposed trade. The Defendants are not aware of such communications as they occur, or of the existence of the Agreed Trades to which they may give rise. These trades proceed as follows:[44]

(1) Upon the arrangement of an Agreed Trade in the Inter-Office Market, a "Contingent Agreement to Trade" comes into effect between the parties to the Agreed Trade.[45] As the term "*contingent*" indicates, a Contingent Agreement to Trade is not a contract of sale.[46] It is instead an arrangement by which the parties agree to input the details of the trade into the LME's matching system (*i.e.* LMEsmart) within prescribed timescales.[47]

(2) The particulars of an Agreed Trade are entered onto LMEsmart by entering two "*trade halves*" (which is done either by one or two Members, depending on the nature of the trade).[48] Where this is done, LMEsmart will conduct checks, ensure that trade halves are matched and confirm whether the trade details satisfy the minimum Acceptance Criteria, upon completion of which the Agreed Trade will be Executed.[49]

32. Only Members can trade on the LME's Execution Venues. Entities such as the Claimants are not Members. Instead, they become "Clients" of one or more Clearing Members who then enter into trades directly with LME Clear. Clearing Members do not act as the Client's agent; they contract with LME Clear on a principal-to-principal basis.[50] However, when a Member trades for its Client, the Execution of the Cleared Contract between the Member and LME Clear also automatically results in the Execution of a simultaneous back-to-back "Client Contract" between the Member and its Client.[51] The execution of the Client Contract occurs pursuant to the terms of business between the Member and the Client.

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44 Cressy, ¶¶22-24.

45 TR 2.5.1(a) [MC1/11/256].

46 TR 2.10.5 [MC1/11/262]; LME Clear Rules, Clearing Procedure B3.2(c)(x) [AF1/2/213].

47 TR 2.10. Where only one party to the Agreed Trade is a Member, then it is that Member which is responsible for submitting the particulars of the Agreed Trade within the specified timescales.

48 Chamberlain, ¶50.

49 TR 2.5.1(d) [MC1/11/257] (pursuant to Clearing Procedure 3.2(c) [AF1/2/212-213]). See also Clearing Procedure B3.8(d) [AF1/2/215]. Further arrangements apply to trades subject to pre-trade transparency ("PTT") requirements. However, PTT requirements did not apply to the trades in issue in these proceedings.

50 LME Clear Rules, r.2.1.5 [AF1/2/58]. Cressy, ¶13.

51 TR 2.6.1 [MC1/11/258].

However, those must provide that all Client Contracts are subject to the LME Rulebook.[52] A Client Contract is a species of "Contract" for the purposes of the LME Rulebook.

33. If a Client wishes to trade with a Member who is not its Clearing Member, this may be achieved by a process called a "give-up".[53] Under a give-up, the Member with whom the Client wishes to trade is referred to as the "Give-Up Executor". The Give-Up Executor surrenders a Cleared Contract with LME Clear, which is then accepted by the Client's Clearing Member (the "Give-Up Clearer"). Under this arrangement there is never a Client Contract between the Client and the Give-Up Executor. Instead, when the Give-Up Clearer accepts the give-up, a Cleared Contract forms between the Give-Up Clearer and LME Clear and a back-to-back Client Contract forms between the Give-Up Clearer and his Client.

D. Factual background

Events leading up to the week commencing 7 March 2022

34. The LME monitors trading activity on its market on a daily basis. In the months leading up to March 2022, the LME was monitoring the nickel market closely since stocks were at low levels, which can lead to market volatility.[54] When Russia invaded Ukraine in late February 2022, the LME viewed this as giving rise to a particular risk of volatility in the nickel market since Russia is a major nickel producer.[55]

35. In the period immediately following the invasion, the price of 3M Nickel rose significantly, and on 4 March it rose by 7.6% in a single day, closing at $29,130 p/t.[56] This rise triggered a record intra-day increase in Members' Margin Requirements: a total of approximately $2.6bn, which was 40% higher than the previous record.[57] The LME viewed these rises as explicable in light of market developments.[58]

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52 Cressy, ¶15. TR 2.6.4 [MC1/11/259].
53 Cressy, ¶¶27-29.
54 Chamberlain, ¶¶92-93.
55 Chamberlain, ¶93.
56 Chamberlain, ¶¶95.
57 Chamberlain, ¶95.
58 Chamberlain, ¶95.

Events on Monday, 7 March 2022

36. On Monday 7 March, 3M Nickel opened at $29,770 p/t and rose throughout the day with various spikes, the highest being $55,000 p/t. It closed at $50,300 p/t.[59] The price rises were far greater than those observed in respect of other metals trading on the Exchange.[60]

37. These price rises resulted in further record-breaking margin calls being made. Mr. Farnham explains that Initial Margin calls due for payment by 09:00 were missed by three Members. One of these, amounting to $[redacted], remained unpaid, putting the Member in question in default, with potentially serious consequences.[61]

38. By 13.15 pm, Members had faced an unprecedented 9 intra-day margin calls: the cumulative increase in margin requirement was approximately $7bn; this was nearly three times larger than the record set just the previous trading day, 4 March, which had itself been 40% higher than the previous record.[62] LME Clear was concerned that it would not be feasible for Members to meet further intra-day margin calls.[63] On a call at 13:45, the Market Risk Team was so concerned about Member liquidity that it recommended that no further intra-day margin calls be made for the rest of the day. This was extremely unusual and a departure from internal policy; nevertheless, Mr. Farnham considered it appropriate in response to the extreme market conditions, since it mitigated the liquidity pressure by giving Members time to meet their margin calls.[64] Mr Farnham is clear, however, that this was no more than a temporary stop-gap and was not sustainable beyond the end of the day: LME Clear could not continue to be under-collateralised against Member default, particularly in such a volatile market, given the risk this posed to the market as a whole.[65]

39. The price movements on 7 March necessitated numerous increases in the price bands operated on LMEselect, which are price limits set by the LME as a form of pre-trade control.[66] As a result of the rapid rise in prices, a large number of orders were being rejected by LMEselect. Members whose orders had been rejected contacted the Trading Operations

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59 Farnham, ¶75.
60 Chamberlain, ¶98.
61 Farnham, ¶¶77-78.
62 Farnham, ¶72; Chamberlain, ¶95.
63 Farnham, ¶89; Chamberlain, ¶¶104, 117, 125-128.
64 Farnham, ¶¶93-94.
65 *Ibid.*
66 Cressy, ¶¶31-36.

team, which updated the reference price and widened, suspended and restored certain of the price bands multiple times during the day.[67]

40. A meeting of the LME Special Committee was convened at 16:00. It discussed whether the market remained orderly and concluded that it did, since there were geopolitical and macroeconomic reasons for the price increases (in particular, the imposition of sanctions on Russia).[68] At the end of the day, Mr. Chamberlain's view was that the market remained orderly but he was in a heightened state of alertness to potential volatility.[69]

Events on Tuesday, 8 March 2022

41. On 8 March 2022, LMEsmart and LMEselect re-opened at 01:00 in the usual way. The 3M Nickel price opened at just under $50,000 and then surged to a peak of $101,365 p/t by 06:08. The price had almost doubled in the space of three hours, rising by 274.3% relative to the opening price on 4 March and reaching the highest 3M Nickel price ever recorded on the LME.[70] The price then fell again suddenly over the course of 20 minutes, trading between $75,000 p/t and $86,000 p/t until the market was suspended at 08:15.[71] Nothing resembling these price movements in nickel had ever been seen on the LME.[72]

42. As a result of the rapid price movements, multiple orders were rejected from LMEselect as they exceeded the price bands. In response, the Trading Operations team repeatedly adjusted the price bands, and ultimately suspended the price bands entirely at 04:49.[73]

43. When Mr. Chamberlain saw these extreme price movements, he recognised that the market had become disorderly. That view was based on his expertise and long familiarity with the nickel market, the absolute price levels, the extraordinary speed of the increase and the absence of rational market forces capable of explaining these developments.[74]

44. Mr. Farnham was informed at 05:53 that six Members had not paid their overnight margin payments, totalling $2bn (approximately one third of the total due).[75] The massive price

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67 Cressy, ¶36.
68 Chamberlain, ¶¶110-115 (in particular ¶114).
69 Chamberlain, ¶135.
70 Chamberlain, ¶¶137-8. The price had stood at $53,000 p/t at 3:00.
71 Chamberlain, ¶137.
72 Chamberlain, ¶139.
73 Cressy, ¶36.
74 Chamberlain, ¶¶139-140.
75 Farnham, ¶111.

increases on 8 March would have necessitated further and still more unprecedented intra-day margin increases. Based on his estimation of the likely increase in intra-day margin calls (which turned out to be an under-estimate), it was clear to Mr. Chamberlain that there was a very real risk of multiple Member defaults; that many Members would struggle or be unable to meet these margin calls; and that some might face insolvency.[76]

45. This expectation was borne out in the early morning as between 05:33 and 08:18 the senior leadership of LME and LME Clear were approached by no fewer than seven Members who signalled that they were in difficulty in posting margin.[77] The preliminary view of Mr. Chamberlain and Mr. Farnham was that the market ought to be suspended. Mr Chamberlain considered that a final decision ought not to be taken until the 07:30 meeting (see below) had taken place.[78] Preparations for a possible suspension nevertheless began by 06:22.[79]

46. At 07:24 Mr. Kirkwood, Head of Market Risk at LME Clear, circulated a spreadsheet showing margin call calculations based on prices at 07:00, Members' current open positions and LME Clear's assessment of Members' credit worthiness (the "First Default Risk Spreadsheet"). It demonstrated that a minimum of $19.75bn of further intra-day margin calls would need to be made that day, to be paid within one hour of being called.[80] Mr. Farnham describes this sum as "*staggering and not like anything LME Clear had seen before*".[81] It was almost three times higher than the record $7 billion intra-day increase set just the day before on 7 March, and, as explained above, approximately ten times higher than the previous record set only the business day before that.[82] Importantly, the effect of these consecutive increases in margin requirements was cumulative, meaning that each record-breaking increase ratcheted upwards from the one before it.[83] Further, vast as it was, the $19.75bn calculation was a conservative estimate, since it was based on a market price of $80,000 p/t and would increase if the price rose beyond that level, as it already had done during the course of the morning.[84] Indeed, if trading had returned to the high it had hit just over an hour earlier ($101,365 p/t), the margin call would have been 25% greater still.

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76 Chamberlain, ¶146.

77 Farnham, ¶¶119-120; Chamberlain, ¶147.

78 Chamberlain, ¶150.

79 Chamberlain, ¶155.

80 Farnham, ¶¶111-113; Chamberlain, ¶142; [MC1/57/1742-1744].

81 Farnham, ¶113.

82 Chamberlain, ¶179.

83 Chamberlain, ¶¶95, 142, 179.

84 Farnham, ¶¶116.

Notably, these enormous margin calls were not payable only by those who had traded on 8 March itself. Margin had to be posted by any Members with open positions.

47. The data confirmed Mr. Chamberlain's assessment that five Members, who were amongst those who had engaged with the LME that morning, "*would go into default*" and that "*it was likely that at least some … additional Members would default*".[85] In the case of certain Members he considered that there was "*no realistic prospect*" that they would meet the margin calls, that "*multiple Members would find it incredibly difficult to source this level of liquidity in such a short period of time and that, in some cases, this level of additional margin requirement … would potentially be larger than certain Members' total available liquidity*".[86] As for Mr. Farnham, it was clear to him that "*it was likely that at least five Clearing Members would default if those margin calls were made*", which would have a "*catastrophic impact*".[87] He understood from the spreadsheet that "*there was a real and significant risk that margin calls at the levels we were seeing on the morning of 8 March would result in significant and systemic damage to the metals industry*".[88] Indeed, the risk was greater than appreciated: the Defendants' subsequent analysis has shown that the margin calls would have caused at least seven Clearing Members to go into default.[89]

48. The potential consequences of this were dire. Based on his knowledge of Members' businesses, Mr Chamberlain considered that the margin calls could have caused multiple defaults, and that the default process could cause significant losses not just to Members but also to their Clients.[90] These effects would have been felt by any Members and Clients who held open positions, not just those who had conducted trading activity on 8 March. Further, where the defaulting Member operated across multiple of the LME's metals markets, Clients of that Member who did not even trade in the nickel market could have been impacted.[91]

49. Considering the cumulative positions of each of the Members at risk, their prospective default (and the consequent need for LME Clear to step into their shoes) posed a significant

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85 Chamberlain, ¶¶180-183.

86 Chamberlain, ¶184. Mr Chamberlain considered that smaller Members would be under particular threat: Chamberlain, ¶145.

87 Farnham, ¶127.

88 Farnham, ¶117.

89 Jones, ¶¶40-41.

90 Chamberlain, ¶¶146, 185(c)-(d).

91 Farnham ¶115; Chamberlain ¶205(e); Jones, ¶56.

systemic risk: both Mr. Chamberlain and Mr. Farnham considered that there was a risk of the effects of these defaults spilling over into other metals markets and Mr. Farnham considered that the contagion risk extended to other derivatives markets.[92] Mr. Farnham describes this as creating a "*liquidity stress across the entire financial and real world metals market*".[93] The simultaneous default of multiple Members was entirely unprecedented on the LME: Mr. Chamberlain can only recall one Member going into default since 2010; this was in 2011 and resulted from the particular financial circumstances of the Member itself, not a systemic issue.[94]

50. Further, Member defaults had the potential to raise the price even further in what is known as the "*pro-cyclical feedback loop*". Mr. Farnham describes this a "*death spiral, in which the actions LME Clear would be required to take to try to address the defaults would exacerbate the underlying causes, leading to further defaults and so on*".[95] Mr. Chamberlain also took this into account (in the period between the suspension decision and Decision to wind back the clock). This would, in Mr. Chamberlain's view, have been likely to "*make a bad situation much worse, by creating a self-perpetuating spiral of price increases*" leading to further defaults and market disorder.[96] He also knew that this would likely lengthen any suspension, and, even once the market reopened, would reduce the ability of Clients to access the market to adjust their positions accordingly (because fewer Members would be able to trade).[97] He therefore considered that the prospect of multiple simultaneous defaults was a "*serious risk to market stability*" and that trades at these price levels, if allowed to stand, "*posed an immediate and serious systemic risk to the market*".[98]

The decision to suspend

51. A call took place between LME and LME Clear executives starting at about 07:30, a draft of Notice 22/052 ("**Suspension Notice**") having already been circulated to the attendees.[99] On the call, no one objected to Mr. Chamberlain's assessment that the market had become

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92 Farnham, ¶¶114-115, 128; Chamberlain, ¶205(e).

93 Farnham, ¶¶115. Mr. Chamberlain did not consider contagion risk beyond the metals markets at the time, but he agrees with Mr. Farnham's observations which support the Decision he took: Chamberlain, ¶205(f).

94 Chamberlain, ¶205(a). Prior to March 2022, there had never previously been any default by a Clearing Member since LME Clear's establishment: Jones, ¶12.

95 Farnham, ¶121.

96 Chamberlain, ¶205(b).

97 Chamberlain, ¶205(c)-(d).

98 Chamberlain, ¶206.

99 See the account in Chamberlain, ¶155, ¶160; Cressy ¶¶41-42.

disorderly and that the appropriate reaction was to suspend the market. The Suspension Notice, signed by Mr. Chamberlain, was duly published at 08:15.[100] At the same time, the market was notified that margin requirements would, for the present time, be calculated on the basis of closing prices on 7 March,[101] and that further consideration would be given to the question whether trades booked prior to 08:15 should be reversed or adjusted.

52. In the case of electronic trading, the decision to suspend trading was implemented by simply disabling LMEselect.[102] In the case of the Inter-Office Market, it was implemented by severely narrowing the price bands on LMEsmart for the purpose of intercepting and preventing attempts to book trades in breach of the Suspension Notice.[103] No action was needed to suspend trading in the Ring, since it had not opened yet that morning.[104]

The Decision to wind back the clock

53. A decision also had to be reached urgently as to the appropriate margin requirements that LME Clear would need to issue and, relatedly, the status of trades that had occurred during the course of the morning.[105]

54. These matters were very urgent because (i) LME Clear's regulatory obligations require it to be fully collateralised at all times in order not to expose the market to systemic risk, (ii) until margin was called, those Members who might be at immediate risk of default depending on the level of that call might continue to trade in other metals on the LME, thereby increasing the potential impact of a future default, (iii) even market participants who were not at risk of default urgently needed to know their margin position and, (iv) those who had entered into Tuesday Trades needed to know the fate of those trades so they could take decisions in relation to profit/loss positions, including hedging.[106]

55. A call took place between LME and LME Clear executives at about 09:00, to consider what to do about the Tuesday Trades.[107] A number of alternatives were considered on the call.

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100 [MC1/61/1753-1754]. Chamberlain, ¶192.

101 Chamberlain, ¶193.

102 Cressy, ¶¶42-43.

103 Cressy, ¶¶50-53.

104 Cressy, ¶42(a).

105 Chamberlain, ¶195; Farnham, ¶125.

106 Chamberlain, ¶200; Farnham, ¶131.

107 See the account in Chamberlain, ¶¶201-222; Cressy, ¶¶41-42; Farnham, ¶¶132-139.

56. It was first considered whether the Tuesday Trades could be allowed to stand ("**Option 1**"). This could have involved calculating margin by reference to the Tuesday Trades ("Option 1A"), or calculating margin by reference to the Monday Closing Price ("**Option 1B**"). By the end of the call, it was agreed that neither Option 1A nor Option 1B was acceptable.

57. Option 1A would have involved allowing the Tuesday Trades to stand, when the LME had just found the market to be disorderly in the unprecedented circumstances set out above.[108] Further, to have called margin as per the spreadsheet circulated at 07:24 would not have avoided the serious and immediate systemic risk posed by that disorderly market.[109] Indeed, by 09:00, Mr. Farnham had received further information concerning Members' financial positions and had concluded that it was "*highly likely*" that at least five Members would default if margin was called at the levels shown on the spreadsheet.[110]

58. Option 1B also posed an unacceptable risk. It left LME Clear significantly under collateralised in breach of its regulatory obligations.[111] Further, those on the call agreed with Mr. Chamberlain's view that it was logically inconsistent to uphold the Tuesday Trades as valid market transactions when the market had been suspended on the grounds of disorderliness in the unprecedented circumstances described above and LME Clear would not be margining against those trades in the usual way (as the most proximate transactions) precisely because they were not seen as a reliable benchmark of the market price.[112] Mr. Chamberlain's view was that if the market activity "*made sense*" then Option 1A was the right approach; conversely if it did not "*make sense*" (which, in his view, was plainly the case) then the trades should be adjusted or cancelled and the market margined at another price.[113] Option 1B would still have resulted in additional margin being called from Members through the overnight call process and Mr. Farnham's view was that it was highly likely some would still default, creating systemic risk in the market.[114]

59. The LME then considered whether to adjust the prices of the Tuesday Trades ("**Option 2**"). Mr Chamberlain viewed this was the worst option since one or both of the parties simply

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108 Chamberlain, ¶214. See also Chamberlain, ¶185(e).

109 Chamberlain, ¶214.

110 Farnham, ¶¶137, 140.

111 Chamberlain, ¶216; Farnham ¶143.

112 Chamberlain, ¶217; Farnham, ¶138.

113 Chamberlain, ¶217.

114 Farnham, ¶140.

might not have been willing to trade at the adjusted price, and the LME did not think it fair or appropriate to impose trades on them in that context.[115]

60. Having rejected these options, Mr. Chamberlain concluded that the only appropriate course of action was to ensure that no trading activity in the nickel market that had taken place on any of the LME's venues after midnight on 7 March 2022 should result in a binding contract under the LME Rulebook ("**Option 3**").[116] Consideration was given to whether to cancel all trading activity after midnight ("**Option 3A**"), or to seek to identify a point in time during the morning of 8 March as a cut-off for upholding trades ("**Option 3B**"). Mr. Chamberlain decided that it was impossible to identify the precise point in time during the morning when trading became disorderly. Rather, the "*last known good state*" of the market was the close of trading on 7 March, making Option 3A the only appropriate way forward.[117] During this call, the LME expressly considered the powers available to it to "*wind back the clock*", including TR 22.1.[118]

61. After this provisional decision had been taken on the 09:00 call, Mr. Chamberlain reflected further on the significant impact of this decision on traders.[119] He took account of the fact that it would mean that traders with long positions that they would have then sold on 8 March (who he knew were most likely to be financial investors) would not obtain the potentially very large profits which they were expecting, possibly running to billions of dollars. He understood that the Decision "*entailed significant consequences*", but he "*considered at the time, and continue[s] to believe now, that the prejudice to the market participants who had agreed profitable trades was simply outweighed by the counterbalancing factors that justified the Decision.*"[120]

62. After the call, Mr Chamberlain's colleagues went away to consider what steps needed to be taken to achieve the intended outcome, including by drafting a notice to give it effect.[121]

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115 Chamberlain, ¶219.

116 Chamberlain, ¶220. See also Farnham, ¶145.

117 Chamberlain ¶221.

118 Chamberlain, ¶223.

119 Chamberlain, ¶222-3.

120 Chamberlain, ¶¶226-227.

121 Chamberlain, ¶225.

Mr Chamberlain reviewed and approved a draft of that notice.[122] Notice 22/053 ("**Cancellation Notice**") was then signed by Mr. Cressy, who held delegated authority from Mr. Chamberlain to exercise certain powers in the LME Rulebook, including those relevant to the events on the 8 March.[123] Although Mr. Cressy was the signatory, Mr. Chamberlain considered that, in view of its importance, the Decision was ultimately for him to take as CEO, and it was taken by him on that basis.[124] Nevertheless, Mr. Cressy wholly agreed with the Decision, which he would have taken himself had it been left to him.[125]

63. When the Cancellation Notice was published at 12:05, it required the cancellation of "*Affected Contracts*", which were defined as "*all trades executed on or after 00:00 UK time on 8 March 2022 in the inter-office market and on LMEselect*". Mr. Chamberlain intended this to refer only to trades that had been "Executed" within the meaning of the LME Rulebook, so as to become Contracts.[126] He did not consider it necessary for the Notice to refer to Agreed Trades that had not been Executed, because those would have been prevented from becoming Executed Contracts by the suspension itself and it would be well understood by the market that such Agreed Trades were not to proceed to Execution. As set out in their evidence, Mr. Farnham and Mr. Cressy considered that the effect of the Cancellation Notice would be to cancel Agreed Trades as well as Executed Contracts.[127] Overall, it was the intention of all concerned, including Mr. Chamberlain, Mr. Farnham and Mr. Cressy, to wind back the clock, such that none of the Tuesday Trades would persist (whether Agreed Trades or Executed Contracts). It is clear that the Claimants and the market as a whole understood this.

64. In relation to Contracts, such as those held by Jane Street, it was decided that the best way to implement the Decision was for the LME to identify the affected Cleared Contracts (i.e. those between a Member and LME Clear) and to ask Members to cancel or reverse them themselves. All were duly cancelled or reversed, including those of Jane Street.[128]

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122 The draft which he reviewed was identical to the Cancellation Notice which was published, save that it used the term "Executed" rather than "executed". This difference was not discussed, and neither Mr Cressy nor Mr Chamberlain were aware of it at the time. However, Mr Chamberlain understands that the word was amended on the basis that it was a typographical error which did not require his input: Chamberlain, ¶236; Cressy, ¶63.

123 Chamberlain ¶236; Notice 22/053 [MC1/78/1810-1812].

124 Chamberlain ¶236.

125 Cressy ¶56.

126 Chamberlain, ¶238.

127 Farnham, ¶147; Cressy, ¶¶57-60.

128 Cressy, ¶66.

65. In relation to Agreed Trades that had not proceeded to become Contracts before the suspension, such as the Elliott Trades, these did not proceed to Execution. Where these had resulted in unexecuted orders (i.e. unmatched trade halves) being placed on LMEsmart after the suspension (i.e. in breach of it), were either cancelled by the Member, "*rejected*" by the Post Trade Operations team or "*abandoned*" at the end of the day, pursuant to an automatic process that happens each day to any trade halves that remain unmatched at the end of the day.[129]

Events subsequent to the Decision

66. Subsequent to the Decision, it has emerged that underlying the unprecedented price convulsions on 8 March 2022 there very substantial short positions in the over-the-counter ("**OTC**") market contributing to market disorder.[130] OTC trading is carried out directly between the trading counterparties, without the supervision of an exchange.[131] Entities within the Tsingshan Holding Group Co Ltd ("**Tsingshan**") group appear to have been some (but not all) of those holding large OTC short positions. On 8 March, the LME was not aware of the large short positions in the OTC market: the LME does not monitor OTC positions and, indeed, there are only limited circumstances in which the LME requests disclosure of information about Members' (or their Clients') OTC positions.[132] As explained below, the Claimants are simply wrong to suggest that the LME was motivated to protect Tsingshan or others in its position. Mr. Chamberlain reasonably considered that he did not need to isolate the cause of the disorder in order to determine that the market *was* disorderly or to determine the appropriate response.[133]

E. <u>Grounds of challenge</u>

Lack of *vires*

67. Both Claimants contend that the LME acted *ultra vires*. This argument flies in the face of the reality that the LME had express powers both to suspend and cancel which were embodied within the LME Rulebook (see ¶¶1112-14, 15 above). Specifically, the power to

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129 Cressy, ¶¶67-68.

130 Chamberlain, ¶85.

131 Chamberlain ¶¶63-64.

132 Chamberlain, ¶¶71-73.

133 Chamberlain, ¶¶85, 140.

"*cancel, vary or correct any Agreed Trade or Contract*" in TR 22.1 is exercisable "*where the Exchange considers it appropriate*". This drafting is clear, unequivocal and provides a complete answer to the Claimants' case on *vires*. There is no credible basis for a construction that would deprive TR 22.1 of its effect.[134]

68. None of the Claimants' various attempts to circumvent this difficulty withstands scrutiny. Many are misguided attempts to re-characterise as going to "*vires*", points which are also (and more accurately) advanced as arguments on the fairness of procedures or the relevance of considerations (and which are therefore addressed under those headings below).

69. First, the Claimants argue that the LME acted *ultra vires* because it could not exercise any power to cancel outside the scope of its published policies.[135] That argument is unsustainable as a matter of law and fact. As a matter of law, a public body cannot curtail the legal scope of its *vires* merely by publishing a policy, or by failing to do so. Accordingly, any debate as to whether the Defendants had, or complied with, a duty to publish policies, does not go to the question of *vires*. Arguments on policies are addressed separately, where they arise, at ¶¶88-98 below. As a matter of fact, the Decision did not involve any failure to adhere to a published policy (again, this is addressed separately at ¶96 below).

70. Second, Elliott contends that the LME acted *ultra vires* because it did not address its mind to the existence of its powers.[136] Again, this fails both in law and fact:

    (1) Arguments over *vires* turn on whether a public body had the requisite power, not on whether it adverted to the legal provisions through which that power was held. Were it otherwise, public administration would grind to a halt.

    (2) The LME was in fact aware of its powers at the relevant time. Mr. Chamberlain particularly had in mind the LME's power to suspend (which was discussed in the Special Committee meeting on 7 March) and to cancel (the relevant Rulebook powers, including TR 22.1, were discussed on the 09:00 call).[137]

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134 *Pace* Elliott SFG, ¶¶23-26; Elliott's Reply to the Defendants' Summary Grounds of Defence, ¶6.

135 Elliott SFG, ¶¶24-8; Jane Street SFG, ¶34

136 Elliott SFG, ¶22; Elliott's Reply to the Defendants' Summary Grounds of Defence, ¶6.

137 Chamberlain, ¶¶171-172 223.

71. Third, Jane Street argues that the LME's power to cancel pursuant to TR 22.1 was constrained by the terms of TR 13.1, which require the LME to have a policy and which the LME has not satisfied.[138] This point is wrong and is addressed at ¶¶93-99 below.

72. Fourth, Jane Street contends that the Decision was *ultra vires* on the basis that the LME sought "*to protect particular market participants*".[139] This point is without merit and is merely the repackaging of an argument pressed under the rubric of irrelevant considerations and improper purposes. It is therefore addressed at ¶104 below.

73. Fifth, Jane Street suggests that the LME's arguments amount to a proposition that its power to cancel is "*unfettered*".[140] That plainly is not the case: the LME performs all of its functions subject to an exacting regulatory framework and the requirements (both procedural and substantive) of public law.

74. Sixth, Elliott refers to the LME's Fast Market Policy and argues that the absence of any reference in that policy to the cancellation of transactions confirms that the LME had no power to cancel the Elliott Trades.[141] It is a nonsense to suggest that (unfounded) inferences drawn from a policy override the express and binding terms of a rule. In any event, declaring a Fast Market would not have addressed the market disorderliness and, since no Fast Market was declared, the Fast Market Policy is irrelevant.[142]

Procedural unfairness

Failure to allow representations

75. The Claimants contend that the LME acted unlawfully because it failed to allow them to make representations before the Decision was made.[143] There is nothing in this point.

76. It is well-established that there is "*no general common law duty to consult persons who may be affected by a measure before it is adopted*".[144] The passage which the Claimants cite from Lord Neuberger's judgment in ***Bank Mellatt***[145] must be read together with the

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138 Jane Street SFG, ¶34.

139 Jane Street SFG, ¶¶35.2-3.

140 Jane Street SFG, ¶35.1; Jane Street's Reply to the Defendant's Summary Grounds of Defence, ¶4.

141 Elliott SFG, ¶¶27-8.

142 Chamberlain, ¶¶304-307.

143 Elliott SFG, ¶¶30-37; Jane Street SFG, ¶¶45-47.

144 *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, [35], *per* Lord Reed.

145 *Bank Mellatt v HM Treasury (No. 2)* [2014] AC 700: Elliott SFG, ¶31.

observations of Lord Sumption that: "*unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances*".[146]

77. The circumstances in which a duty to consult may arise at common law are limited. The duty should not generally be implied where Parliament (or other law/rule-maker) has decided not to impose a burden of consultation.[147] Nor will the fact that it "*might be a good idea to consult*" generate a duty.[148] The duty will only arise if (a) there is a statutory duty to consult; (b) consultation was promised; (c) there has been an established practice of consultation; or (d) "*where, in exceptional cases, a failure to consult would lead to conspicuous unfairness*".[149] None of these conditions is met here. In any event, the passage from ***Bank Mellatt*** upon which the Claimants rely makes clear that consultation will not be required where it is "*impossible, impractical or pointless*". Here, it was all three.

78. First, the decision whether to cancel or adjust the Tuesday Trades was highly urgent: as set out above, a delay risked leaving LME Clear under-collateralised, compounding the systemic risk to the market and leaving traders in an unacceptable state of uncertainty. Given this, there was no practicable opportunity for the LME to consult.[150]

79. Second, the class of potential consultees would have been wide and uncertain. Even if it could have been limited to those who had traded on 8 March 2022, that was not "*a defined class of traders*", as the Claimants allege.[151] Unless and until they are booked onto LMEsmart, the LME is not aware of Agreed Trades arranged in the Inter-Office market. Further, even when they are booked onto LMEsmart, the LME is unable to identify readily (if at all) the underlying Clients which a Member may be servicing, as it only has visibility over Members' Cleared Contracts and anonymised identifiers for specific clients if the Member elects to use them. More fundamentally, however, the affected persons were *not* limited to those who had traded on 8 March 2022. Every market participant holding an open position would be affected by decisions on margining. As such, any consultation

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146 *Ibid.*, ¶31 (Baroness Hale, Lord Kerr and Lord Clarke JJSC agreeing).

147 *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, [98(6)].

148 *Binder v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin), [44].

149 *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634, [36] citing *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, [98].

150 Chamberlain, ¶¶228-229.

151 Elliott SFG, ¶30; Elliott's Reply to the Defendants' Summary Grounds of Defence, ¶7.

would have been a market-wide exercise, which was completely unrealistic in the circumstances.[152]

80. Third, the LME was well aware that any decision to cancel transactions would inevitably have an adverse impact on some market participants and a beneficial impact on others. The results of any consultation would naturally reflect the competing commercial interests of those responding. Mr. Chamberlain considered that he had sufficient information to make the decisions to suspend trading and to cancel the trades and that it would be neither practicable nor beneficial to delay taking the Decisions in order to seek representations from the market, or a sub-section of the market.[153]

81. Fourth, in any event, the Suspension Notice stated clearly that the LME would "*further consider whether trades booked prior to 08:15 today should be subject to reversal or adjustment, and will again update the market as soon as possible*". If the Claimants had considered that they had any relevant representations to make, they could have advanced them. They did not do so. Since they did not take advantage of that opportunity, they cannot now complain about a lack of opportunity to make representations. In any event, having considered everything which the Claimants have said since the Decision, it is clear that nothing they could have said before it would have altered the result.

Bias

82. The Claimants allege that the Defendants were disqualified from taking the Decision by a direct pecuniary interest, or that their decision-making was vitiated by apparent bias.[154] The substance of the complaint under both headings is the same: the Claimants contend that the Defendants had a financial interest in averting defaults because they had a potential financial exposure under the Default Waterfall, which disqualified them from deciding whether to wind back the clock (described at ¶5 above). These arguments are without merit.

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152 Chamberlain, ¶¶229-230.

153 Chamberlain, ¶229.

154 Elliott SFG, ¶¶38-43; Jane Street SFG, ¶¶44.

83. First, as explained at ¶5 above, the Decision was taken by the LME and not LME Clear. It is LME Clear that has the "*skin in the game*" (*viz*. its Dedicated Own Resources) under the Default Waterfall.[155] The LME had no pecuniary interest in the outcome of its Decision.[156]

84. Second, in any event, the Decision was an administrative act, not a judicial, quasi-judicial or adjudicative determination. The doctrine of apparent bias therefore has no role to play.[157]

85. Third, even if (contrary to the above) the doctrine might otherwise have been relevant, no case of apparent bias can be sustained. LME Clear is obliged by law to maintain "*skin in the game*" under the Default Waterfall.[158] Accordingly, if (as the Claimants maintain) the "*skin in the game*" gave rise to apparent bias, this would mean that the legislature had inadvertently disabled RIEs and CCPs from acting so as to prevent defaults in the very markets they regulate. That is untenable. When an allegation of apparent bias hangs on features that are inherent to an administrative structure, the court may conclude that the presumed or apparent bias rules do not apply,[159] or that the relevant interest was not illegitimate.[160] Furthermore, where decisions are made in a rule-based system to which a claimant has agreed, allegations of bias must be examined from within that framework.[161]

86. Fourth, all the evidence demonstrates that the LME did not take LME Clear's exposure into account and a fair minded and informed observer would not consider that there was any real possibility that it had done so. Mr. Farnham explains that LME Clear's Dedicated Own Resources was not a factor which was discussed or considered at the time.[162] Equally, Mr. Chamberlain is clear that the LME "*categorically was not acting to advance its own interests or those of LME Clear*".[163] All of this is strongly supported by the surrounding circumstances, not least the fact that LME Clear paused intra-day margin requirements on

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155 See Farnham, ¶67.

156 It is no answer to this point that the LME and LME Clear are under common ownership. LME, itself, has no proprietary stake in LME Clear and any case on apparent bias is hopeless for the further reasons set out above.

157 *R (The Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21, ¶66; *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin) at ¶121-125.

158 UK EMIR, Art. 45; LME Clear Rules, 10.10.1 [AF1/2/149-151].

159 See the doctrine of "*necessity*" in *DeSmith's Judicial Review*, ¶10-072; *R (United Company Rusal plc) v The London Metal Exchange* [2014] EWHC 890 (Admin), [85]-[88].

160 *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin), [121].

161 *R. v London Metal Exchange Ltd Ex p. Albatros Warehousing BV, per* Richards J (unreported) 30 March 2000 (QBD), [4], [33].

162 Farnham, ¶¶149-150.

163 Chamberlain, ¶¶9, 292.

7 March 2022 (as above at ¶38). That had been contrary to LME Clear's own financial interests, but was undertaken to advance the wider market interest.

87. Jane Street also alleges bias in favour of the interests of particular market participants.[164] This forms part of its case on relevant considerations and is addressed at ¶¶104-108 below.

Failure to have a policy

88. The Claimants contend that the failure to have a published policy applicable to the Decision was unfair and consequently unlawful. This is presented as an alleged breach of: (i) the requirements of RTS 7, Articles 18(3)-(4); (ii) the common law requirement of transparency; (iii) the lawfulness requirement under A1P1 (this arises as a component of the claim under the HRA but, in so far as it rests on identical arguments, it is convenient to address it here); and (iv) TR 13.1. Each of these points is addressed in turn below.

Alleged breach of RTS 7

89. Both Elliott and Jane Street contend that the LME was in breach of an obligation under Articles 18(3)-(4) of RTS 7 to have a policy addressing cancellations carried out pursuant to TR 22.1.[165] This allegation is (a) irrelevant, being incapable of providing a ground of challenge to the Decision; and (b) in any event, incorrect.

90. As to relevance, even if (which is denied) the LME failed to satisfy RTS 7 in any respect, that would have been a breach a policy-making requirement, but it would not have deprived the LME of the power to cancel or, in consequence, have vitiated the Decision. That is clear as a matter of principle: if a public body should have, but lacks, a relevant policy, that will not invalidate every decision (however rational or necessary) to which that policy would have applied. This is also strongly supported by a consideration of the structure and purpose of the statutory framework.[166] Article 18 of RTS 7 is addressed to the "*Prevention of disorderly trading conditions*" and gives effect to Article 48 MiFID II, which aims to "*ensure orderly trading*"[167] and stipulates that regulated markets must have the power to cancel in "*exceptional cases*".[168] RTS 7's role is to support MiFID II, not to undercut it. It

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164 Jane Street SFG, ¶¶42-43.

165 Elliott SFG, ¶¶46-8; Jane Street SFG, ¶34.

166 See Art. 48(5) of MiFID II and ¶¶4(1) and 9ZB of the Schedule to the Recognition Requirements Regulations.

167 MiFID II, Art. 48(1).

168 MiFID II, Art. 48(5).

would confound that objective if any deficiency in the policies required by RTS 7 could disable an RIE from meeting MiFID II's express requirements.

91. In any event, the allegation that there was a breach of RTS 7 is misconceived:

(1) It rests on a misreading of the nature and scope of the policy-making obligation under Articles 18(3)-(4), which must be read in light of (not artificially decoupled from) the provisions which immediately precede it, namely Articles 18(1)-(2). Those provisions prescribe the specific minimum powers of cancellation which a market *must* maintain, and it is those powers which are the subject of the policy-making obligation. That obligation was discharged by the terms of the LME's policy on "Order Cancellation and Controls".

(2) Articles 18(3)-(4) do not apply to an overarching decision such as that made on 8 March 2022, to wind back the clock. There was, accordingly, no breach of any of its requirements. In any event, if (which is denied) Article 18(3) required an all-encompassing cancellation policy of general application, then this cannot sensibly be read as requiring a policy specifying every factual circumstance in which the power of cancellation could be exercised, still less when MiFID II required the market to retain an untrammelled power to cancel in exceptional cases. In any event, the steps taken by the LME to implement its decision were, in fact, in accordance with its policies (as to which see ¶¶96-97 below).

Alleged breach of common law requirement of transparency/lawfulness requirement under A1P1

92. The Claimants contend that the LME was obliged to have a policy that provided for winding back the clock pursuant to (a) the common law principle of transparency and/or (b) the lawfulness requirement under A1P1.[169] The argument is the same on both grounds; indeed, the Claimants rely on the Strasbourg principles in advancing their common law analysis. The arguments are without merit. The law does not impose a blanket obligation to produce policies. It imposes minimum standards of legal certainty concomitant with the rule of law.[170] Whether those standards are satisfied must be assessed in light of the circumstances as a whole, including the regulatory framework. The standards are satisfied in this case by a combination of: (i) the LME's power to cancel transactions where it

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169 Elliott SFG, ¶¶46-7, 49-50; Jane Street SFG, ¶34.

170 *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin), [141].

considers appropriate under TR 22.1; (ii) the Cancellation Policy and Error Trades Policy, which provide information concerning particular cancellations but which are not, and are not required to, provide an exhaustive list of every circumstance in which the powers might be exercised; (iii) the terms of the Recognition Requirements Regulations, which specify that any RIE must have to cancel transactions "*in exceptional cases*"; and (iv) the regulatory framework, which prescribes the aims which the LME must pursue in exercising its powers (including that trading must be conducted in an orderly manner).

Alleged breach of TR 13.1

93. On its face, TR 22.1 is unqualified by procedural or other preconditions. Nevertheless, Jane Street contends that it is qualified by TR 13.1, with the result (according to Jane Street) that every exercise of the LME's cancellation power must always be anticipated by, and adhere to, the terms of a published policy.[171] This is incorrect.

94. First, the ordinary and natural meaning of the two provisions is that TR 22.1 is unconstrained by TR 13.1, and this is supported by contextual and purposive factors:[172]

(1) The two provisions appear separately in the LME Rulebook under different headings and do not refer to one another, still less provide that one is contingent on the other.

(2) There is nothing in TR 22.1 to suggest that the power is qualified. TR 22.1 identifies when the power may be exercised. Had it been intended that the power should be subject to requirements imposed by another rule this would have been stated expressly.

(3) If TR 13.1 had been intended to qualify TR 22.1, one would also expect that to be stated in TR 13.1. Neither of these supposedly interlinked provisions acknowledges, still less binds itself, to the other. This is striking given that (on the Claimants' own case) there would be only one provision in the whole Rulebook which TR 13.1 qualifies, namely TR 22.1 itself. Had that particular effect been intended, it would have been specified.

(4) Proper weight must be given to TR 13.1's immediate context. TR 13 is structured as a freestanding set of three rules under a single heading. It refers to the LME's policy on error trades and serves as a specific hook in the LME Rulebook for those arrangements.

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171 Jane Street SFG, ¶¶24-6, 34; Jane Street's Reply to the Defendants' Summary Grounds of Defence, ¶4.

172 The principles for interpreting the LME Rulebook are well established: it is to be given a "*commercial*" not a "*legalistic*" meaning; "*technicality is to be avoided*" and "*[i]f the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one*": *Shearson Lehman Hutton v Maclaine Watson* [1990] 1 Lloyd's Rep 570, 586.

TR 13.1 provides that the LME may invalidate trades in accordance with its policies. It introduces the two rules that follow it which, in turn, canvas the two circumstances in which trades may be invalidated under the Error Trades Policy, *viz.* when Members request it (TR 13.2), and when the LME acts of its own motion (TR 13.3).

(5) The LME's interpretation is supported by the background to the two provisions, which demonstrates that they were introduced at different times and for unrelated reasons:

(a) TR 13 was introduced in 2016, at the same time that the LME's Error Trades Policy was amended so as to distinguish between invalidations made at a Member's request and those made of the LME's own motion.[173] The structure of TR 13 mirrors precisely that distinction in TR 13.2 and TR 13.3 respectively.

(b) By contrast, TR 22.1 was not introduced until 2017 and was specifically announced to the market as being an implementation of the requirement in MiFID Art. 48(5) that the LME be able to cancel trades in exceptional circumstances.[174]

(c) Accordingly, TR 13.1 cannot have been intended to qualify TR 22.1, as the latter did not exist when TR 13.1 was brought into force. Nor was TR 22.1 intended to be limited by reference to TR 13.1. That would have constrained the exercise of a power which must be available in exceptional circumstances.

(6) Even if (which is denied) TR 13.1 should be read as having a wider application beyond TR 13.2 and TR 13.3, it does not follow that it constrains TR 22.1. The more natural meaning would be that it addresses the LME's power to promulgate policies which provide for invalidation, providing a hook within the LME Rulebook for whatever policies the LME may promulgate. This is consistent with the drafting of TR 13.1, which is permissive in its terms: it refers to how invalidations "***may***" be accomplished, rather than stipulating that they "*must*" or "*shall*" be done only in the manner prescribed.

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173 See LME's consultation of 5 July 2016 in Notice 16/241 [DB/1/3] and the redline version of the Rulebook annexed to it, introducing TR 13 [DB/2/142]. These changes were promulgated by Notice 16/280, dated 15 August 2016 [DB/3/302].

174 See p.6 of the consultation of 17 July 2017 in Notice 17/246 [DB/4/320]. These changes were brought into effect by Notice 17/340, dated 17 October 2017 [DB/5/324]: see extract from the redline version of the Rulebook annexed to it, introducing TR 22.1 [DB/6/458].

(7) Jane Street's construction would undercut the regulatory scheme: the LME would have laid down a policy requirement which potentially disabled (and, on the Claimants' case, did disable) an essential power which the LME is obliged to maintain.

(8) LME Clear has its own power to cancel Contracts in r. 6.15.1 of the LME Clear Rules. There is no equivalent of TR 13.1 in the LME Clear Rules. It would be absurd if the LME was prevented from cancelling trades when LME Clear was free to act.

95. Second, even if (contrary to the foregoing), TR 13.1 *does* qualify TR 22.1, it has no application to the Elliott Trades. TR 13.1 concerns the invalidation of "*transactions*", which refers to Contracts and not Agreed Trades or unexecuted orders (in contrast to TR 22.1).[175]

96. Third, even if TR 13.1 qualifies TR 22.1 (and even if TR 13.1 applies to Agreed Trades as well as Contracts), the requirement that cancellations occur "*in accordance with the relevant procedures established by Notice*", was met in relation to the Tuesday Trades:

(1) None of the LME's policies applied to the Decision. The circumstances on 8 March presented difficulties which were more wide-ranging than those contemplated by any one of the LME's individual policies, and the Decision was correspondingly wider, applying universally to all Execution Venues and each stage of the trading lifecycle, in a manner not contemplated by any one policy (see further ¶101 below, where this point is developed in relation to the "relevant considerations" ground).

(2) Nevertheless, when it comes to considering the effect of the Decision on the Claimants' various trading arrangements, the unwinding of both Jane Street's Contracts and the Elliott Trades was in fact done "*in accordance with*" the policies then in place.

(3) As for the cancellation of Contracts, such as those held by Jane Street, this was done in accordance with the Error Trades Policy, specifically with its ¶14, which provides:

> "In order to maintain a fair and orderly market, the LME reserves the right, in addition, to invalidate transactions that it considers in its absolute discretion to have been executed at prices that are not representative of fair market value, even where such prices may fall within prevailing no cancellation ranges."

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175 An Agreed Trade contains the terms of a proposed trade but only becomes a "*transaction*" upon execution, whereupon it result in a Contract. The term "*transaction*" is not separately defined in the LME Rulebook, but its meaning is clear from the surrounding rules. In particular, an Agreed Trade is defined as "*the particulars of a transaction in a Contract agreed between two parties*"[175] (r.1.1 of Part 1) [MC1/11/157] and as constituting "*the agreement of the terms of a transaction for the purpose of enabling Contracts to be formed*" (TR 2.2.3) [MC1/11/255].

At the time of the Decision, Mr. Chamberlain took comfort from this provision considering it "*helpful in the sense that it expressly contemplated the LME cancelling trades to maintain a fair and orderly market*".[176] Furthermore, he considered that the procedure to be followed by the LME was broadly consistent with the procedures set out at ¶¶16-17 of the policy.[177] The cancellation of Contracts after a finding of market disorder rooted in disorderly pricing behaviour was plainly in accordance with policy.

(4) As for the cancellation of Agreed Trades, such as those allegedly entered into by Elliott, the LME gave relevant effect to the Decision by removing, or allowing the removal, of unexecuted orders, which was in accordance with Part 4 of the Cancellation Policy, in particular the first two sub-paragraphs, which provided:

> "The LME may be required to cancel orders in order to prevent disorderly trading conditions and breaches of capacity limits.
>
> The LME may operate a kill functionality to cancel unexecuted orders submitted by a Member, or by an order-routing Client, under the following circumstances: …
>
> (c) following a suspension initiated either by the LME or by the FCA or any other relevant regulatory authority."

(5) So far as necessary, the above is supported by a purposive reading of the policies: they should not be read as having prevented the LME from responding to exceptional circumstances, such as those that applied on 8 March 2022. That would be a grossly uncommercial result and contrary to regulatory policy, since it would have prevented the LME from maintaining the power to cancel in "*exceptional cases*".

97. Fourth, in the alternative, any requirement under TR 13.1 for invalidation to occur "*in accordance with the relevant procedures established by Notice"* was satisfied in relation to Jane Street, whose Contracts were cancelled in accordance with the Cancellation Notice.

98. Fifth, even if (which is denied) TR 13.1 applied and was not satisfied, that would not, of itself, render the Decision unlawful. It is one thing to treat TR 13.1 as imposing a policy-making requirement. It is quite another to treat it as disabling a fundamental regulatory power unless that requirement is satisfied in every respect. The drafting of TR 13.1 does not require such an unrealistic result, which would be contrary to the pragmatism required by the case-law (see footnote 172 above). Moreover, it is well established that the failure to satisfy a prescribed procedural requirement does not mean that a decision is automatically

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176 Chamberlain, ¶231(b)(i).

177 See Chamberlain, ¶231(b)(ii).

invalid. The consequence turns on the proper interpretation of the intention behind the requirement, viewed in light of the circumstances of the breach.[178] There is no indication in the LME Rulebook that cancellations which were not carried out in accordance with procedures established by Notice should automatically be treated as invalid. To the contrary, there are very strong grounds for thinking that this was *not* the intended consequence, given that the LME has an overriding duty to maintain its power to cancel.

Relevant/irrelevant considerations

Introduction

99. Neither TR 22.1 nor the wider regulatory regime prescribes what is or is not relevant for the purposes of the LME deciding whether to exercise its power to cancel. Accordingly, it was for the LME to decide, in its judgement, what was relevant to its decision-making process, subject to *Wednesbury* review and a wide margin of appreciation.[179] Further, when reviewing relevance, regard may be had to the context and practical realities of the circumstances surrounding the decision. The decision-maker will not be required to embark on an unmanageable decision-making process, and regard should be had to the "*institutional knowledge*" which a decision-maker brings to bear on the decision.[180]

Failure to consider policies and/or unlawful departure from policies

100. Jane Street contends (i) that the LME failed to consider its Cancellation Policy and Error Trades Policy, which were mandatory relevant considerations,[181] and (ii) that the Decision was an unjustified and therefore unlawful departure from those policies.[182] Neither argument can succeed. We address each in turn.

101. First, the LME's policies were not mandatory relevant considerations for the purposes of the Decision. As above, the Decision to wind back the clock was an overarching response to exceptional circumstances, different in kind from that provided for in any one of the LME's individual policies. The LME was not obliged to sub-divide its Decision so as to map or apportion the cancellation of Executed Contracts or unexecuted orders respectively

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178 *McGrath v Camden London Borough Council* [2020] EWHC 369 (Admin), [52].

179 *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [116]-[119].

180 *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin), [72]-[73].

181 Jane Street SFG, ¶38.2.

182 Jane Street SFG, ¶39ff.

to different policies. When the Decision was taken, the LME necessarily did not know precisely what transactions (specifically Agreed Trades) had been entered into or what stage they had reached. The policies did not, therefore, apply to the Decision, nor were they mandatory relevant considerations. This conclusion is unaffected by the fact that the steps which the LME took to give effect to its Decision were, in fact, in accordance with its policies (see ¶96 above).

102. Alternatively, if (contrary to the above), the policies were mandatory relevant considerations, then, so far as the Error Trades Policy is concerned, the Claimants' argument proceeds on a false premise. Mr Chamberlain *did* consider that policy and (rightly) viewed it as providing comfort for the proposed course of action.[183] The argument therefore fails *in limine.* Further, and in any event, a failure to consult policy documents does not, of itself, provide a basis for challenge. The issue is one of substance not of form, and there is no obligation to review a policy document unless it raises materially different considerations to those already under review.[184] That was not the case here: any further review of the LME's policies would not have materially added to the considerations which the LME took into account in deciding whether to exercise its TR 22.1 power.

103. Finally, if (contrary to the above) the policies did apply to the Decision, there was no unlawful departure, since the steps which the LME took were in accordance with those policies (see ¶¶96-97 above). In the further alternative, if (which is denied) the policies applied but the Decision involved a departure from them, that departure was manifestly justified given the exceptional circumstances on 8 March 2022 (see above, in particular, ¶¶53-6161 and ¶¶119-121).

Favouring one cohort over another

104. The Claimants persistently assert that the LME acted to "*favour*", "*protect*" or "*[bail] out*" one cohort, namely those holding short positions in the nickel market on 8 March 2022.[185] This, in turn, provides the hook for alleging unfairness, the production of perverse incentives, and the consideration of an irrelevant factor. All of it, however, rests on a false premise. The LME did not act so as to favour or protect any particular cohort, or (for the

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183 Chamberlain, ¶231(b)(i).

184 *R (Spitalfields Historic Building Trust) v London Borough of Tower Hamlets)* [2022] EWHC 2262 (Admin) [151]-[156] and cases cited therein.

185 Elliott SFG, ¶¶52-58; Jane Street, ¶¶38.1.

avoidance of doubt) any specific market participant. The evidence is unequivocal on this point.[186] In so far as the LME *was* concerned about the risk of multiple disorderly defaults, that was prompted by a concern for the orderliness and proper functioning of the market as a whole.[187] The Claimants wrongly elide a concern to manage a systemic risk with a concern for those market participants whose failure would make that risk a reality.[188]

105. The potentially catastrophic effects of multiple simultaneous defaults, never before seen on the LME, has been outlined above. In short, Mr. Chamberlain concluded that this risk posed an "*immediate and serious systemic risk to the market*".[189] When he referred in public statements to difficulties being caused for some market participants, he was referring to this systemic risk of multiple simultaneous defaulting Members.[190] This was obvious from the context and, in addition, is specifically confirmed in Mr Chamberlain's evidence.[191]

106. The prospect of an unprecedented simultaneous default by multiple Members presented a grave risk to the market. It simply cannot be correct to say that the LME was legally obstructed from taking this into account. It was plainly a relevant consideration.

107. Jane Street makes a separate but related contention that it is in the nature of a market that some participants make bad bargains, and accordingly it was unreasonable for the LME "*to attach any or any material weight to the objective of avoiding defaults by market participants*".[192] That contention proceeds on the same false premise and ignores the LME's concern for the orderliness and proper functioning of the market as a whole.

108. Finally, Elliott suggests that the LME could have "*immediately reinstated*" the Tuesday Trades when it became clear (in the days following the Decision) that there was limited desire "*particularly from those with short positions*" to "*net off*" long and short positions.[193] This argument does not appear to be seriously advanced: Elliott does not even identify the power by which the LME allegedly could have reinstated cancelled trades. In any event, the argument appears to be that by not reinstating the Tuesday Trades the LME displayed a concern to protect traders with short positions. That argument is misconceived. Members'

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186 Chamberlain, ¶¶9, 84, 227, 257, 294-296.

187 See ¶¶49-51 above.

188 See especially Elliott SFG, ¶56

189 Chamberlain ¶¶205-206.

190 *Pace* Jane Street SFG, ¶15.

191 Chamberlain ¶¶291-296.

192 Jane Street SFG, ¶51.2 (under the heading of irrationality).

193 Elliott SFG ¶58. As to the nature of netting-off arrangements, see Chamberlain, ¶¶276, 282.

subsequent reluctance to "*net-off*" their positions played no part in the earlier Decision, which was motivated by prior concerns about the risks posed to the market.[194]

Failure to consider serious detriment to market participants

109. Elliott contends that the LME failed to consider the serious detriment which stood to be suffered by some market participants.[195] That is wrong: the LME was well aware that the Decision would prevent some market participants from obtaining large anticipated profits and result in other market participants avoiding large anticipated losses.[196] The evidence is unequivocal on that point.[197] Elliott's real complaint is that the LME did not give this factor decisive weight. That is not the basis for a relevancy challenge: it is an indirect attempt to invite the court to retake the Decision on the merits, and should be rejected.

Considering logical consistency

110. Elliott contends that it was "irrelevant" for the LME to consider the logical consistency of its decision to suspend and its decision to wind back the clock.[198] This is put on the basis that a suspension and cancellation are different in kind: the former is prospective, the latter retrospective. That misses the point. The relevant consistency lies in the basis upon which the two decisions were reached. The market was suspended because, in the LME's view, trading became disorderly on 8 March and posed a systemic risk to the market (see ¶¶41-50 above). In determining whether those arrangements should be upheld, it was plainly relevant that they were entered into during a period in which the market became disorderly.

Considering the "unclear" notion of market disorderliness

111. Elliott challenges the LME's reliance on the allegedly "unclear" concept of disorderliness.[199] Whilst this is advanced under the rubric of relevant considerations, it is unclear whether Elliott seriously contends that the LME should not have addressed its mind to that concept at all. If so, the argument is untenable, since maintaining market order is one of the LME's statutory objectives, and the notion of orderliness is woven into the

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194 Chamberlain ¶¶276, 282.

195 Elliott SFG, ¶59.

196 See ¶¶61 and 118(4) above and below and the passages of evidence referred to therein.

197 Chamberlain ¶¶226-227.

198 Elliott SFG, ¶60.

199 Elliott SFG, ¶62.

regulatory regime. In reality, Elliott is seeking to challenge the cogency of Mr. Chamberlain's expert judgment-call under cover of a complaint about "*relevant considerations*". The attempt fails. There were clear and cogent reasons for finding that the market had become disorderly on 8 March, as described at ¶¶41-50 above.

112. Further, Elliott makes an opportunistic attempt to suggest (based on the wording of Notice 22/057) that the LME never actually reached a concluded view that the market was disorderly.[200] That is untrue. It was clear from the terms of the Suspension Notice (which stated that the decision to suspend was taken "*on orderly market grounds*") that the LME had reached a clear decision that the market was disorderly; this was reflected in Notice 22/057 and is confirmed in Mr Chamberlain's evidence.[201]

Considering knock-on effect in other metals markets and the wider global financial system

113. Elliott "*do not accept*" that the LME was entitled to take into account the knock-on effects in other metals markets and in the wider global financial system of the unprecedented events in the nickel market on 8 March.[202] It is difficult to see how Elliott can seriously maintain that it would have been unlawful to consider this factor. In the event, Mr. Chamberlain did consider it relevant that disorder in the nickel market could have knock on effects in the LME's other metals markets.[203] He did not, at the time, have in mind risks to the wider financial system, nor (for the avoidance of doubt) was he obliged to do so. However, he is clear that had he considered these risks they would only have supported the Decision.[204] These risks had occurred to Mr. Farnham, but he was not the decision-maker in respect of the Decision.[205] Subsequent consideration of the matter has confirmed that there was a "contagion" risk in respect of the wider metals, commodities and derivatives markets.[206]

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200 Elliott SFG, ¶¶ 62.5-63.

201 Chamberlain ¶¶5, 139, 214, 220.

202 Elliott SFG, ¶64.

203 Chamberlain, ¶205(e).

204 Chamberlain, ¶205(f).

205 Farnham, ¶¶114-115, 128.

206 Regulators have confirmed the linkages between commodity derivative markets, wider commodity markets and the wider economy, and the potential for disorder in a single commodity derivative market to cause contagion effects: see the Bank of England's Financial Stability Report in July 2022, which highlights the "*interconnections between commodity markets and with the wider financial system*" [CJ1/1/68], meaning that "*shocks can propagate quickly*" [CJ1/1/70], and explains that increased liquidity demands in commodity

Considering the impact on the Defendants' own funds being depleted

114. Elliott repackages its case on bias as an argument on irrelevant considerations.[207] The point has already been addressed at ¶¶82-87 above and it goes nowhere. It was the LME (not LME Clear) that decided to suspend the market and wind back the clock. The LME's financial position was not impacted by those decisions. Furthermore, neither Defendant was influenced by the commitment of LME Clear's funds to the Default Waterfall: they were concerned by the market interest and the regulatory objectives they were mandated to pursue.[208] The Claimant cannot establish a case to the contrary by simply pointing to the fact that LME Clear contributes to the Default Waterfall. This would mean that a threshold case of irrelevance could be made out by the mere existence of mandatory features of the statutory regime. The proposition is absurd.

Improper purpose

115. This ground adds nothing – it simply repackages as improper purposes some of the matters on which the Claimants attempt to rely as irrelevant considerations.[209] The ground therefore fails for the reasons given above, which are not repeated here: see ¶¶99-114.

Insufficient inquiry

116. The Claimants' contend that the LME failed to take reasonable steps to acquaint itself with the relevant information required to take the Decision.[210] This is wrong, in law and fact.

117. As to the law, it is for a public body to decide on the manner and intensity of any factual inquiry (subject only to a *Wednesbury* challenge).[211] The court will not intervene because it considers that further inquiries would have been sensible or desirable: it will do so only

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markets "*may cause contagion to a broader range of markets and investors*", and that "*Commodity market volatility can indirectly affect the financial system through its significant impact on both the UK and global real economy*" [CJ1/1/67]. Further, the IMF's *Global Financial Stability Report* (April 2022), noted (when commenting on the LME's actions on 8 March 2022) that "*strains in derivatives markets may create liquidity stress and concerns about counterparty risk that may spill over to other corners of the financial system*" see Jones, ¶57 and [CJ1/3/152]. See also the FCA's *Regulating the commodity markets: a guide to the role of the FCA* (2014), ¶1 [DB/8/910].

207 Elliott SFG, ¶¶65-7.

208 See ¶¶82-87, 49-50 above.

209 In particular, the Claimants impugn as improper purposes, an alleged desire (a) to protect particular market participants (Jane Street SFG, ¶¶35.2-3; Elliott SFG, ¶¶68-9); (b) to protect the financial interest of LME Members or the Defendants themselves (Elliott SFG, ¶68); and (c) to prevent "*knock-on effects*" in other metals markets or the wider global financial system (*ibid*).

210 Elliott SFG, ¶¶70-77; Jane Street SFG, ¶¶48-50.

211 *R. (Balajigari) v. Home Secretary* [2019] EWCA Civ 673; [2019] 1 WLR 4647, at [70].

if no reasonable authority could have been satisfied that it possessed the information necessary for its decision. The Claimants' complaints do not begin to reach that level.

118. As to the facts:

(1) The Claimants contend that there was a failure to inquire into the detriment to third parties and market confidence, which arguments repeat their allegations under failure to seek representations and have already been addressed above: see ¶¶75-81.

(2) The Claimants contend that the LME failed to carry out a proper inquiry into the risk of defaults and did not obtain data regarding the amounts of money that would be obtained or lost if the trades were cancelled.[212] That is unsustainable. As explained in the evidence of Mr. Farnham, LME Clear continually monitors margin positions and makes individualised assessments of the financial position of Clearing Members which inform the level at which it sets their Initial Margin.[213] When margin requirements increased rapidly on 7 March 2022, it was contacted by a number of Members who identified liquidity difficulties in meeting those requirements. Those concerns were not accepted uncritically. Further, prior to the decision to suspend, the LME and LME Clear executives were provided with calculations of the intra-day margin requirement of $19.75bn based on the current pricing on 8 March 2022. In their expert and informed judgement, it was obvious that this wholly unprecedented figure (being ten times higher than – and coming in addition to – the record set on 4 March, which was itself 40% higher than previous records) posed a serious risk of multiple defaults and systemic disruption. The Defendants did not think that it was necessary or possible to obtain further information and the Claimants cannot begin to show this was *Wednesbury* unreasonable. Mr. Chamberlain also explains that he considered the risk of defaults based on (a) his knowledge and understanding of the LME's markets, (b) the conversations he had, or had been told about, with Members who were struggling with margin payments, and (c) the spreadsheets prepared by Mr. Kirkwood that showed the extreme increases in margin payments that would be required if the Tuesday Trades were upheld.[214] He also considered the dire consequences of multiple defaults occurring.[215]

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212 Elliott SFG, ¶74; Jane Street SFG, ¶50.1

213 Farnham, ¶¶14-17; Jones, ¶¶25-30.

214 See ¶¶47-48, 57 above and Chamberlain ¶¶179-182, 184, 205.

215 See ¶¶47-48 above, and Chamberlain ¶¶185.

(3) The Claimants contend that the LME was obliged to ask Members to disclose all OTC positions before making its Decision.[216] It would have been wholly impracticable to obtain such information, let alone analyse it, given the urgency of the situation.[217] In any event, as Mr. Chamberlain explains, he did not need this information to determine whether the market was in fact disorderly and what to do about it.[218]

(4) The Claimants contend that the Defendants failed to carry out a proper inquiry into whether the market was in fact disorderly.[219] This repeats the allegations that are dealt with in ¶¶111-112 above. Insofar as it is suggested that the LME never reached a concluded view that the market had become disorderly, that argument is directly contradicted by Mr. Chamberlain's evidence.[220] Elliott also contends that the LME ought to have balanced the systemic risks to the market against the risk to market confidence posed by the cancellation of trades, and contends that the Defendants mistakenly considered the impact of the Decision to be irrelevant.[221] However, Mr Chamberlain was acutely conscious of the magnitude of the Decision and the fact that its impact would be felt by some market participants more than others; he nevertheless concluded that these considerations did not outweigh the clear justification for taking it.[222]

Unreasonableness/irrationality

119. The irrationality standard imposes a "*high threshold*",[223] and when assessing a "*complex evaluative judgement*" the Court will afford the decision-maker a "*wide margin of appreciation*".[224] This is particularly so in the context of "*complex economic issues … because such issues are often both technical and open-textured and because the primary decision-maker is likely to have developed an expertise on those issues.*"[225] The Court's

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216 Elliott SFG, ¶¶74, 76.

217 Chamberlain ¶¶63-66, 71-73 and 285.

218 Chamberlain ¶¶229.

219 Elliott SFG, ¶75; Jane Street SFG, ¶50.2.

220 Chamberlain ¶¶5, 139, 214, 220.

221 Elliott SFG ¶73.

222 Chamberlain, ¶¶223.

223 *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [66] (Lord Carnwath and Lord Mance).

224 *Mauritius v CT Power Ltd* [2019] UKPC 27, [47] (Lord Sales).

225 *R (ABS Financial Planning Ltd) v Financial Services Compensation Scheme* [2011] EWHC 18 (Admin); *R (Get Real Marketing Company Limited) v Culture Recovery Board, Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 1137 (Admin), [30(iii)].

respect for the judgment of an expert regulator applies *a fortiori* where (as in the present case) the Decision was made with urgency in response to unprecedented and fast-moving events.

120. The decisions first to suspend the market and then to wind back the clock were quintessentially of this type. The rationale for the Decision has already been summarised above: see ¶¶4, 56-60. In short, the LME decided to suspend the market because it had become disorderly. This followed unprecedented and inexplicable price convulsions, which were liable to result in vast margin calls, the default of multiple Members and systemic risks to the market as a whole. The LME next considered what to do in respect of the trades that had already been arranged before the suspension. It considered, but excluded, a number of options other than cancellation, and in doing so, took into account the prejudice to those who stood to profit from the Tuesday Trades and the interests of the market as a whole, concluding that the former did not outweigh the latter. The Decision was plainly both reasonable and proportionate.

121. The Claimants have not come close to satisfying the high irrationality threshold. The points they make repeat the points already made as regards relevant considerations, departure from policies, proper purposes and sufficient inquiry. Insofar as Jane Street contends that it was irrational to place weight on the objective of avoiding defaults by market participants,[226] that is untenable in circumstances where such defaults posed a systemic risk to the market and in light of the LME's regulatory obligations. Elliott further seek to contend that the Decision was irrational by virtue of the supposed alternative options set out by Mr. Houlbrook (for Elliott) and Mr Brown (for Jane Street) respectively.[227] These do not establish that the LME acted irrationally:

(1) As to declaring a "*fast market*", imposing a "*circuit breaker*", increasing trade fees or imposing price limits, none of these options addresses the question of what to do with trades that had already been Executed or arranged. Nor would any of these options have remedied the disorderliness in the market.[228] On the contrary, declaring a fast market would have indicated to market participants that the market was <u>*orderly*</u>.

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226 Jane Street SFG ¶51.2.

227 Elliott SFG, ¶81; Witness Statement of Thomas Hugh Houlbrook ("**Houlbrook**"), ¶¶71-92; Witness Statement of Ariel Bentsion Brown ("**Brown**"), ¶45.

228 Chamberlain, ¶¶300-326.

(2) As to the suggestion that margin requirements could have been relaxed by giving Members more time to meet margin calls or permitting margin calls to be met with alternative types of collateral,[229] neither of these options was viable, given the extent of the margin calls at issue.[230] In any event, the suggestion that some different (unspecified) form of margin could have been obtained is un-particularised.

(3) As for upholding the Tuesday Trades while the market was margined to the Monday Closing Price, this was properly rejected for the reasons set out above.[231]

(4) As for suspending trading for "*approximately a week*" to permit default auctions to occur,[232] this is completely unrealistic. Not only would it have been impossible to find a Member willing to take on such large loss-making short positions in the disorderly market conditions, but this option would have entailed upholding the Tuesday Trades whilst margining by reference to the price of those trades or the Monday Closing Price, presenting the same issues as Option 1A and Option 1B respectively.[233]

F. <u>The HRA claim</u>

Possessions

122. The first question in respect of the Claimants' HRA claim is whether they had any relevant "*possessions*" within A1P1. The Defendant accepts that the Contracts which Jane Street Executed on 8 March before the suspension constituted possessions. Elliott's position is different. On 8 March, Elliott attempted to enter into LME trades through three separate Members. First, it attempted to sell nickel to its Clearing Member, JP Morgan Securities Plc ("**JPM**"). Second, it attempted to trade with Goldman Sachs International ("**GS**") and Sigma Broking Ltd ("**Sigma**") respectively, neither of which were Clearing Members for Elliott. As a result, the so-called "*Elliott Trades*" entered into with GS and Sigma had to be effected by means of a "*give-up*" arrangement with JPM.[234]

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229 Elliott SFG, ¶83.

230 Chamberlain, ¶¶316-318; Farnham, ¶143.

231 *Pace* Elliott SFG ¶83.

232 Brown ¶45.

233 Chamberlain ¶325.

234 Chamberlain, ¶270(b)-(c).

123. It is common ground that none of the Elliott Trades ever became binding Client Contracts under the LME Rulebook.[235] Even if (which is not admitted) the Elliott Trades constituted Agreed Trades and/or Contingent Agreements to Trade, these are, by their nature, not possessions. First, Agreed Trades are pre-contractual arrangements containing the terms of a prospective Contract. Pre-contractual arrangements do not constitute possessions.[236] Second, where Agreed Trades result in Contingent Agreements to Trades, the latter may give rise to contingent obligations (as between the Client and the Member) to take steps towards Execution (e.g. inputting orders into LMEsmart); however, they do not have any marketable or realisable value, which is an established *indicium* of a possession.[237] Third, there are a number of reasons why an Agreed Trade might fail to result in a Cleared Contract.[238] It is well established that a possibility (however likely) of acquiring future profit does not constitute a possession.[239] Elliott's reliance upon case-law establishing that a legitimate expectation can be a possession is misplaced: conditional claims to property cannot constitute possessions.[240] Fourth, treating an Agreed Trade (or a Contingent Agreement to Trade) as a possession would run contrary to the rule-based framework within which Elliott had elected to operate: it is a cardinal tenet of the open-offer structure that no contract incepts until it is Executed.

124. There are two further points which are specific to the alleged trades entered into by Elliott.[241]

125. First, none of the relevant trade halves were submitted to LMEsmart before the LME suspended trading at 08:15.[242] There can have been no legitimate expectation that trade halves entered post-suspension would result in Contracts in circumstances where market participants had been instructed not to book inter-office trades at that time.[243]

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235 Chamberlain, ¶272; Houlbrook, ¶¶18-46.

236 *Breyer Group Plc v. Department of Energy and Climate Change* [2014] EWHC 2257 (QB), [60A].

237 *Murungaru v. Secretary of State for the Home Department* [2008] EWCA Civ 1015, at [58].

238 Cressy, ¶17.

239 *Kopecký v. Slovakia* (2005) 41 EHRR 43, [35(c)].

240 *Breyer Group Plc v. Department of Energy and Climate Change* [2014] EWHC 2257 (QB), [100]-[103].

241 There may be further points arising out of Elliott's responses ("**Elliott's First RFI Response**") to the first Request for Further Information served upon them by the Defendants on 28 October 2022.

242 Elliott SFG, ¶89; Elliott's First RFI Response, Appendix 3; Chamberlain, ¶¶272. This is subject to one exception, namely a trade half entered by Sigma at 8:07; however, this was cancelled by Sigma itself at 9:08 and only re-booked after suspension: Chamberlain, ¶272 (fn3).

243 *Pace* Elliott SFG ¶¶88, 91.

126. Second, in relation to Elliott's give-up arrangements, GS and Sigma entered trade halves (albeit after suspension); however, Elliott has confirmed that GS and Sigma were "waiting on JPM PLC as Give-Up Clearer / Clearing Member to accept the give-up".[244] In the absence of such acceptance, no Cleared Contract could be formed, since acceptance by JPM was a necessary precondition to the creation of a Cleared Contract between JPM and LME Clear, and, in turn, a back-to-back Client Contract between JPM and Elliott. Accordingly, the alleged sale to GS was nothing more than a possibility of acquiring future profit, contingent upon the actions of JPM. Furthermore, Elliott has not established that JPM was contractually obliged to accept the give-up. Whilst the contractual documentation provided by Elliott establishes that JPM was "*responsible for*" give-up trades, it nevertheless contemplates that JPM may refuse to accept give-up trades; indeed, it specifically provides for the Give-Up Executor (i.e. GS or Sigma) to set in motion alternative give-up arrangements if JPM should refuse to accept a give-up "*for any reason*".[245] Nor do the give-up arrangements give rise to Agreed Trades between Elliott and GS or Sigma, since an Agreed Trade contains the terms of a proposed transaction between the parties to the proposed Contracts (at least one of whom must be the relevant Clearing Member): neither GS nor Sigma were responsible for clearing Agreed Trades for Elliott.[246]

Interference

127. To the extent that the Claimants had "*possessions*", the next question is whether the Decision represented any relevant "*interference*". It did not. Any arrangements made on the inter-office market (whether Contracts, Agreed Trades or Contingent Agreements to Trade) are made subject always to the LME Rulebook, and all such arrangements are defeasible pursuant to TR 22.1 (unless and until any Executed Contract is settled by the parties). As such, it was an inherent quality of the Tuesday Trades that they may be cancelled by action taken by the LME. Accordingly, the Decision did not constitute any form of extraneous "*interference*".[247] Rather, it involved the defeasance of an interest which

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244 Houlbrook, ¶¶31-32, 39.

245 International Uniform Brokerage Execution Services ("Give-Up") Agreement: LME Trader Version (3) 2017, Cl. 7 (enclosed with Elliott's First RFI Response) (Elliott entered identical agreements with GS and Sigma) see e.g. [DB/9/919].

246 This reasoning is fortified by TR 2.11.2(b) which states that "*the acceptance of a give-up shall … be deemed to result in the Execution of an Agreed Trade between the Clearing Member and the Client*" [MC1/11/262]. JPM is "*responsible for clearing all executed orders transmitted to it by*" GS and Sigma: see Houlbrook ¶32.

247 See by analogy *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [107]-[109]; *Sims v Dacorum BC* [2014] UKSC 63, [15].

was inherently defeasible under the regime pursuant to which it came into existence. The Claimants cannot succeed in establishing that there was any "*interference*" unless they demonstrate (which they cannot) that the Decision involved a departure from the LME Rulebook.

Justification

128. If, which is denied, the Decision constituted an interference, it was plainly justified, being (a) subject to conditions provided for by law; (b) in pursuit of a legitimate objective; (c) appropriate for achieving that objective; and (d) consistent with achieving a fair balance.[248]

Lawfulness

129. The Claimants' allegations of A1P1 unlawfulness substantially reproduce the allegations of common law unlawfulness which have been answered above. Those allegations are not improved by being repackaged as complaints under A1P1. Further:

(1) As to accessibility, precision and foreseeability: A1P1 does not require absolute certainty. The Decision was taken in precisely the kind of exceptional circumstances contemplated by TR 22.1, MiFID II, Art. 48(5) and ¶3B (1) of Part 1 of the Schedule to the Recognition Requirement Regulations. The points made in ¶¶67-74 are repeated.

(2) Elliott contends that there were insufficient procedural guarantees to satisfy the requirement of lawfulness.[249] That is a hopeless point: the justification for not inviting representations from the Claimants has been addressed at ¶¶76-81 above. The availability of judicial review is sufficient to satisfy the procedural dimension of A1P1.[250] The case-law cited by Elliott addresses the sufficiency of judicial review as a means of challenging a "*determination*" of a "*civil right*" within the meaning of Art6(1) ECHR.[251] Art.6(1) does not apply where "*organisational, social and economic considerations justify a decision-making process of a less judicial and formal kind*".[252] That is plainly the case here. Elliott's contrary argument is an extreme one: if accepted,

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248 This being the test for determining whether an interference with "*possessions*" is justified: *Bank Mellat (No 2)* [2014] AC 700, [20] (Lord Sumption).

249 Elliott SFG, ¶¶99-100.

250 *Air Canada v United Kingdom* (1995) 20 EHRR 150, [46]; *Global Knafaim Leasing v The Civil Aviation Authority* [2010] EWHC 1348 (Admin), [51].

251 Elliott SFG ¶99 (*Ali v United Kingdom* (2016) 63 EHRR 20).

252 *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36, [23] Neuberger LJ citing *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, 443 and declining to follow the decision in *Ali v UK* (2016) 63 EHRR 20.

it would mean that no exchange or regulator could suspend a market in response to a crisis, however urgent, without first engaging in a process of market-wide consultation.

Legitimate aim

130. As summarised above, the Decision was taken by the LME in the interests of protecting market stability and integrity. There can be no serious challenge to that objective.

131. Elliott contends that there has been some inconsistency in the LME's subsequent explanation of the objective it was seeking to pursue.[253] That contention is misplaced. As noted above, references by the LME to matters such as the need to avoid the risk of multiple defaults are merely references to specific aspects of market stability and integrity: they do not represent separate or different objectives. Similarly, the Claimants' suggestion that the LME was seeking to "*protect one cohort of market participants*" is simply a repetition of the erroneous point which has already been answered above in relation to both bias and irrelevant considerations: see ¶¶85-86, 104-108 above.[254]

Appropriate measures

132. The Claimants contend that the Decision was not an appropriate way of protecting market stability and integrity.[255] This goes nowhere: for all the reasons given above, the aim of protecting market stability and integrity was served by the Decision: ¶¶53-60, 120.

Fair balance

133. The Claimants' arguments under this heading are little more than an impermissible attempt to appeal the substantive merits of the LME's Decision before this Court.[256]

134. Since this was a decision involving an exercise of "*experienced judgment*", the LME is entitled to a "*wide margin of discretion*" in the assessment of whether the Decision strikes a fair balance between the competing rights and interests at stake.[257] This is particularly true where (as is in the present case) (i) the legal provisions pursuant to which the Decision

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253 Elliott SFG, ¶102.

254 Elliott SFG, ¶103; Jane Street SFG, ¶58.2.

255 Elliott SFG, ¶¶105-6; Jane Street SFG, ¶58.

256 Elliott SFG, ¶¶107-114; Jane Street SFG, ¶58.3.

257 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, [21] (Lord Sumption)

was made are imprecise as to the relevant criteria,[258] and (ii) the decision-maker addressed its mind to the values or interests which, under the ECHR, are relevant to striking a fair balance.[259] As to the second factor, Elliott is wrong to suggest that the LME gave no consideration to the seriousness of cancelling the trades or to the relative impacts of its Decision.[260] Nor is Jane Street right to say that the LME gave no thought to less intrusive measures: a series of alternative options was specifically considered.[261]

135. Each of the points set out above in response to the Claimants' rationality arguments applies *mutatis mutandis* to the fair balance assessment.[262] The following points bear emphasis.

136. First, none of the less intrusive measures suggested by the Claimants were appropriate: as set out above, the only appropriate response was to wind back the clock.[263]

137. Second, allowing multiple simultaneous defaults to occur posed an unacceptable risk to market stability.[264] Indeed, subsequent consideration demonstrates that the scale of the risk to the markets was even greater than the LME was able to appreciate at the time:

(1) If the Tuesday Trades had been allowed to stand, LME Clear would have proceeded to issue intra-day margin calls in order to ensure it was adequately collateralised. It is likely that seven Clearing Members (rather than five, as had been anticipated by Mr. Farnham and Mr. Chamberlain) would have defaulted on their obligations to LME Clear.[265] As Mr. Jones explains, no clearing house has ever faced such a prospect.[266]

(2) In Mr. Jones' view, it would have been inconsistent with LME Clear's regulatory obligations to allow those seven Clearing Members to keep their positions open despite being in default.[267] LME Clear would have been required to "*step into the shoes*" of the seven defaulting Clearing Members (a concept explained above at ¶19). This would have entailed LME Clear taking on a large short nickel position (approximately 11,248

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258 *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [63]

259 *R(A) v Chief Constable of Kent* [2013] EWCA Civ 1706, [39].

260 Elliott SFG, ¶108; Jane Street SFG, ¶58.3.1. See above, ¶109.

261 See ¶¶56-60 above.

262 See above at ¶120.

263 See ¶60 above; *c.f.* Elliott SFG, ¶110.

264 See ¶57 above; *c.f.* Elliott SFG, ¶111; Jane Street's Reply to the Defendants' Summary Grounds, ¶6.

265 Jones, ¶¶36-44 (in particular ¶44).

266 Jones, ¶42.

267 Jones, ¶42.

lots of nickel fixed at a price below the prevailing market price).[268] That short position, when marked-to-market at the price of $81,000p/t (the prevailing price at the time the market was suspended) would have resulted in LME Clear incurring a loss of $2.6bn.[269]

(3) This loss would have exceeded LME Clear's default fund (comprised of contributions from defaulting and non-defaulting Clearing Members and LME Clear's Dedicated Own Resources) by $220m.[270] LME Clear would therefore have sought contributions (totalling at least $1.22bn) from non-defaulting Clearing Members in order to (a) eliminate the excess loss and (b) replenish the default fund to restore it to a level not below that required under UK EMIR.[271]

(4) These contributions would have placed those Clearing Members who had not yet defaulted under further stress, making it likely that at least five more Clearing Members would have defaulted when further intra-day margin calls were made.[272] This would have required LME Clear to step into the shoes of those additional defaulting Clearing Members, assuming an additional short position of 17,627 lots of nickel with a loss value of $170 million.[273] LME Clear would also have adopted the defaulting Clearing Members' positions across other LME metals markets on 8 March, which would have led to LME Clear adopting a number of significantly large net short positions in other metals.[274]

(5) This cascade of defaults would have caused unprecedented market crisis, resulting in the LME being unable to function as a venue for non-ferrous metals markets, and posing a significant systemic risk to the wider financial system.[275]

138. Third, Elliott's reliance on the lack of compensation offered is misconceived.[276] That may have some significance in situations where a public authority compulsorily acquires

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268 Chris Jones ¶49.

269 Jones, ¶49.

270 Jones, ¶50. The default fund is large enough two absorb the default of the two largest Clearing Members under extreme but plausible market conditions: UK EMIR Article 43(2).

271 Jones, ¶¶48, 51; Default-Specific Replenishment Notices (Rule 10.10.1(e)) [AF1/2/150] and Stabilisation Replenishment Notices (Rule 10.10.5) [AF1/2/154];

272 Jones, ¶55.

273 Jones, ¶55.

274 Jones, ¶55.

275 Jones, ¶¶56-57.

276 Elliott SFG, ¶¶112-3.

privately-owned property. However, it has no relevant application where a trader is denied speculative trading profits secured in the very conditions of market disorder which it was in the public interest to prevent. This is *a fortiori* within a statutory framework in which there is no statutory compensation fund nor any mechanism for mutualising losses resulting from cancellation by levying contributions from the market. There was, and is, therefore, no basis upon which the LME could have provided compensation. The regulatory framework proceeds, instead, on the basis that, if trades are cancelled, the relevant profits are foregone. That is a feature of the market which all participants accept. In any event, the availability or absence of compensation is not legally determinative of proportionality.

G. Relief

No relief should be granted

SCA, s. 31(2A)

Legal principles

139. Section 3l(2A) of the SCA provides that the Court must refuse to grant relief (including any monetary relief claimed under the HRA)[277] in circumstances where "*it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*".[278]

140. The provision is capable of applying not only to procedural errors but also where a decision is found to be unlawful by reason of a substantive error.[279] In either case, the court must undertake its own "*objective assessment*" of the decision-making process and what the result would have been if the decision-maker had not erred in law.[280] Its conclusion may be based on evidence, such as in the form of a witness statement, as to how the decision-making process would have been approached if the identified errors had not occurred.[281]

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277 See s.31(2A)(b), which provides that the Court "*may not make an award under subsection (4)*". Subsection (4) is the power permitting the Court to award damages in judicial review, including under the HRA. This is supported by the cases: *Aviva Insurance v SSWP* [2021] EWHC 30 (Admin) (Henshaw J held that s.31(2A) applied in principle to claim for damages for breach of A1P1); *Leigh v Commissioner of Police of the Metropolis* [2022] EWHC 527 (Warby LJ proceeded on the premise that s.31(2A) was capable in principle of barring HRA damages claim).

278 SCA, s.31(2A)(a)-(b).

279 *R (Goring-on-Thames) v South Oxfordshire District Council* [2018] EWCA Civ 860, [47].

280 *R (Gathercole) v Suffolk County Council)* [2020] EWCA Civ 1179, [40] (Coulson LJ).

281 *R (Cava Bien Limited v Milton Keynes Council)* [2021] EWHC 3003 (Admin), [52(x)].

141. Out of completeness, it is submitted that the same result arises by application of the principles of just satisfaction. There is no automatic right to damages under the HRA or the ECHR. Rather, the court must consider whether damages are "*necessary*" to remedy the interference with an individual's Convention rights (HRA, s.8(3)) and it must be "*just and appropriate*" to award them (HRA, s.8(1)). The assessment of any HRA damages award is an "*equitable one*", involving an inquiry into "*what is just, fair and reasonable in all the circumstances of the case*".[282] The "*just satisfaction*" analysis therefore incorporates similar considerations to those which are relevant to the analysis under s. 31(2A) of the SCA. In particular, the Court may refuse to award damages, or reduce the quantum of any award of damages, on the basis of "*reasons of equity*" which include where "*the violation found was of a minor or of a conditional nature"*.[283] Accordingly, the Court will refuse to award damages in circumstances where the outcome for the Claimant would have been the same notwithstanding any breach of the Claimants' human rights.[284]

Application to these claims

142. If (which is denied) the Decision was affected by some form of unlawfulness, the Defendants submit that (a) it is (at least) highly likely the LME (and, if relevant, LME Clear) would still have wound back the clock if the unlawful conduct had not occurred; (b) as such, it is highly likely that the outcome for the Claimants would not have been substantially different; and (c) it follows relief must be refused pursuant to s. 31(2A) and/or because no award of damages is necessary to grant just satisfaction for the purposes of the HRA.

143. The points on which the LME will rely include the following:

(1) If the Decision was unlawful because the LME did not sufficiently address its mind to the existence of its powers (see ¶70 above), such consideration would have made no difference to the Decision.[285]

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282 *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406**,** at [65]-[66].

283 ECHR Practice Direction on Just Satisfaction Claims, at [4]. These considerations are applicable to claims for pecuniary loss: [8]-[9].

284 ECHR Practice Direction on Just Satisfaction Claims at [9]; *Beyeler v Italy (No.2)* (2003) 36 E.H.R.R. 5, [20]; *Wilkinson v Revenue Commissioners* [2005] 1 W.L.R. 1718 (HL), [27]; *ML v London Borough of Newham v Secretary of State for Education* [2011] EWHC 1890 (Admin), [14]-[15]; and *Re P* [2007] EWCA Civ 2, [54].

285 As set out at ¶70(2) above, Mr. Chamberlain had in mind the relevant powers.

(2) Had the LME consulted the Claimants or obtained further information as the Claimants allege it should have done (¶75 and 116-118 above), it would have made no difference to the Decision in light of the compelling need for action as described above. It was entirely predictable that those who stood to lose profits would oppose the Decision and nothing they may have said to that effect would have influenced the LME's thinking.[286]

(3) If the LME's policies[287] applied to the Decision and/or were mandatory relevant considerations and/or the LME was departing from its policies, then any failure to appreciate that and/or to consider them made no difference. It is fanciful to suggest that the Decision would have been deterred by any, or any further, consideration of those policies. Those policies were consistent with the cancellations which occurred. In the alternative, if the Decision involved any departure from those policies, then, had that been appreciated, the LME could, and would, have proceeded in any event, on the basis that the departure was justified by the circumstances.[288]

(4) If the Claimants succeed in showing that TR 13.1 applied and was not satisfied because the LME did not cancel in accordance with procedures established by Notice, this also made no difference. Had it been appreciated that the LME needed a policy providing for all possible circumstances in which it would exercise the TR 22.1 power, that policy would have been drafted so as to permit cancellation in exceptional circumstances, such as those that arose on 8 March, reflecting the powers the LME was obliged to be capable of exercising. If it were necessary for cancellations to be embodied within a Notice, the Cancellation Notice would have been drafted so as to encompass other trading activity, in addition to Contracts, and to give effect to the Decision.[289]

(5) If the LME took into account any irrelevant considerations and/or failed to consider any relevant considerations as alleged by the Claimants, in light of the other relevant and overwhelming factors justifying cancellation, it is highly likely that the Decision would have been reached even if those irrelevant factors had not been taken into account. In particular, the alleged failure to take account of the <u>extent</u> of the profits which these particular Claimants may have realised under the Tuesday Trades would

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286 Chamberlain ¶¶229.

287 In particular the Error Trades Policy [MC1/18/1406], Cancellation Policy [MC1/17/1400] or Fast Trade Policy [MC1/16/1397].

288 Chamberlain ¶231(c).

289 Chamberlain ¶231(c).

not have altered Mr Chamberlain's conviction that cancellation was the only appropriate option. Mr Chamberlain was aware that some market participants stood to lose potentially very large profits, and that the impact of the Decision would be measurable in billions of dollars.[290] The Decision was motivated by a concern to protect the market as a whole. Whilst Mr Chamberlain was not (and could not have been) aware of the identities of each entity that stood to lose profits (or the exact amount of such prospective profits), it is highly likely that he would have taken the Decision in any event, had he known the identities of the affected market participants and the value of their affected trading activity.[291]

(6) If the LME was for any reason not able to exercise its power to cancel under TR 22.1, Mr Farnham has "*absolutely no doubt*" that he would have decided to exercise LME Clear's own power to cancel in r. 6.15.1 of the LME Clear Rules (see ¶25 above).[292]

Causation & Quantum

144. Elliott seeks to recover the difference between the agreed sale price under the alleged Elliott Trades and what the sale price alleged would have been on 22 March. They maintain this case: "*[i]rrespective of whether [Elliott] actually sold the Nickel on that date*".[293] By contrast, Jane Street seeks to recover the proceeds which it would (but for the Decision) have received on 8 March (at the high prices then prevailing), less the cost of "*closing out*" its trades, which it calculates by reference to a volume weighted average price of nickel during a five day period from 22-28 March.[294] Neither approach is correct in fact or law.

145. First, as a matter of law, the Claimants are not entitled to compensation for loss which they could reasonably have avoided.[295] Nor can the Defendants be held liable for the Claimants' choices not to enter into the same or similar transactions ("**Replacement Trades**") on an "*available market*" at the first opportunity.[296]

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290 Chamberlain ¶¶226-227.

291 Chamberlain ¶227.

292 Farnham, ¶146. See also Chamberlain, ¶223.

293 Elliott SFG ¶ ¶115-117.

294 Jane Street SFG ¶ ¶ 60-62; Brown ¶¶68-69.

295 *Thai Airways International Public Company Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [32]. This principle applies in the human rights context: *R (Infinis Plc) v Gas and Electricity Markets Authority* [2011] EWHC 1873 (Admin), [47] and [107].

296 *Bunge SA v Nidera BV* [2015] UKSC 43, [78].

146. Second, during the period when the LME nickel market was suspended (the "**Suspension Period**"), trading in nickel continued on the OTC market.[297] Parties to trades agreed in the OTC market can agree to convert them into LME trades.[298] Accordingly, the Claimants could have entered into Replacement Trades on the OTC market during the Suspension Period. The LME necessarily does not know the full extent of the buying interest on the OTC market at any given time. However, the existence of the Claimants' Tuesday Trades, of itself, demonstrates that, on 8 March 2022, there were counterparties willing to buy nickel from the Claimants, meaning that it is for the Claimants to show why their losses could not have been extinguished by entering into Replacement Trades on the OTC market.[299]

147. Further evidence of buying interest is provided by the fact that when, on 10 March, the LME proposed a "*netting-off*" arrangement (see above at ¶110), the LME received interest from ten market participants with short positions in an aggregate amount of 2,028 lots seeking to close out at the price of $52,885p/t. This is indicative of an interest that the Claimants could have exploited through the OTC market. Yet, Elliott did not undertake a single OTC trade during this period, and only raised the possibility of OTC trades with a single broker briefly on a single occasion on 8 March itself.[300] It appears to have made no further effort to pursue OTC trading whatsoever. Had Elliott entered into OTC Replacement Trades at that price, its total losses would be less than half the sum it now claims.[301] Jane Street, for its part, has simply refused to confirm whether it entered into OTC Replacement Trades, despite the Defendants' request for this information.[302] If Jane Street had replaced its Net Affected Sales Contracts at this price, it would have received $29,510,276.40. Taking Jane Street's own methodology for calculating its close-out costs

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297 Cressy, ¶103-9.

298 Cressy, ¶104(c).

299 Cressy, ¶¶105(c)(i)-106. Further, when OTC trades are brought onto the LME market, they become visible to the LME. Between 14-23 March, a total volume of some 9,551 lots of nickel sold OTC were converted to LME nickel trades (which is vastly more than the 1,703 lots that were the subject of the Claimants' Tuesday Trades) having been sold at prices of up to $48,201 p/t (significantly higher than the circa. $28,000p/t for which Elliott gives credit): Cressy, ¶¶102, 105(c)(i). The Defendants also understand that 2,898 lots of nickel were traded on the OTC market on 11 March at prices between $39,448-$40,000p/t. See Cressy, ¶105(c)(ii).

300 Elliott's Response ("**Elliott's Second RFI Response**") to the RFI served on them by the Defendants on 10 November 2022, ¶7.

301 Cressy ¶108(a).

302 See Jane Street's Response ("**JS RFI Response**") to the RFI served on them by Defendants on 10 November 2022 and in particular Jane Street's response to Request 4.

(premised on Jane Street closing-out on the LME during a five day period from 22 March), the sum total of Jane Street's loss had it acted reasonably would be $3,144,003.30.[303]

148. Elliott states that "*as a result of the Defendants' actions, there was no OTC trading available in respect of the Elliott Trades*".[304] If Elliott means to say that there was no OTC buying interest during the Suspension Period, that is plainly wrong. If it intends to assert that it could not have entered into trades for exactly the same volume or price as the Elliott Trades, then (a) that fact is not established, and Elliott is put to proof; and (b) that is, in any event, no answer to the point: an available market includes a market in which a party can obtain a fair price for the relevant commodities over the course of days or weeks.[305] Plainly, opportunities existed to sell at prices substantially higher than those on 22 March, the date on which each of the Claimants assume an "*available market*" first arose. These opportunities could reasonably have been availed of. The Defendants cannot as a matter of law be liable for a greater sum of damages in light of the Claimants' failure to pursue them.

149. Third, the Claimants could have entered into Replacement Trades on the Shanghai Futures Exchange ("**SHFE**"), the second-largest venue globally for the trading of nickel futures contracts.[306] There was a significant volume of trading on the SHFE during the Suspension Period.[307] The fact that the Claimants' Tuesday Trades were LME trades does not imply that no other market represents an "*available market*" in the relevant sense.[308]

150. Fourth, the LME nickel market opened during the period from 16-21 March, during which there was trading at a volume weighted average price of $39,402.18p/t.[309] Trading was subject to certain price limits, but trades falling within those limits were allowed to stand.[310] The Claimants could therefore have replaced some of their Tuesday Trades on the LME during that period. Despite this, Elliott did not even attempt to trade on the LME during this period (nor, it would appear, did Jane Street, though pending the provision of further

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303 Cressy, ¶108(b).

304 Elliott's Second RFI Response, ¶7.

305 *Lakatamia Shipping Co. Ltd v Nobu Su* [2014] EWHC 3611 (Comm), [107].

306 Cressy, ¶109(a).

307 For example, on 9 March, 43,718p/t of nickel futures contracts traded on the SHFE, at a price of approximately $39,500: Cressy, ¶109(a).

308 *Pace* Elliott's Second RFI Response, ¶8(b), a replacement transaction need not be identical to the original, so long as it "*broadly corresponds with*" the original: *SK Shipping Europe plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [315(iii)] (Foxton J).

309 Cressy ¶101.

310 If (as in fact occurred) prices rose or fell by more than a predetermined percentage, the market was suspended for the remainder of the day: Cressy, ¶¶98-99.

information the Defendants do not know).[311] Jane Street contends that when the price limits were hit the LME suspended trading and cancelled all trades agreed during the trading session. That is wrong: as was made clear in market notices (Notice 22/064 and Notice 22/067) trades booked outside price limits were rejected, but the market was not suspended.

151. Fifth, the Claimants could also have entered into economically equivalent transactions in other securities, such as Exchange Traded Funds, providing exposure to the price of nickel.[312] It would appear that none of the Claimants entered into such trades.[313]

152. Sixth, Jane Street contends that it is irrelevant whether it entered into any Replacement Trades, given its role as a "*market maker*" involves "*providing liquidity to meet demand in the market*".[314] However, Jane Street's claim is premised on having been denied the benefit of profitable nickel futures trades. If Jane Street could obtain some or all of that benefit by trading on the LME or other markets, it cannot seek recovery from the Defendants.

Just satisfaction

153. Even if (which is denied) (a) the Decision was unlawful; and (b) it is *not* highly likely that the outcome for the Claimants would have been substantially the same if the unlawfulness had not occurred; and (c) the Claimants can establish some loss directly and demonstrably caused by the alleged unlawfulness, nevertheless no award of damages (alternatively no award in the amounts claimed) is necessary to afford "*just satisfaction*".

154. First, subject to the precise nature of any adverse findings, the Claimants would invite the Court to conclude that the relevant unlawfulness was of a minor or conditional nature, which should not attract an award of damages.[315]

155. Second, the Claimants are extremely sophisticated, well-resourced financial entities which operate as hedge funds or speculative commodity traders. Even if (contrary to the foregoing) the Defendants were unable to prove that, by taking reasonable steps to mitigate, the Claimants could have avoided, or diminished, their alleged losses, the Claimants'

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311 JS RFI Response provides no information about whether Jane Street entered into OTC Replacement Trades.

312 Cressy ¶109(b).

313 Whilst Elliott has confirmed that it did not (Elliott's Second RFI Response, ¶10) Jane Street has refused to state whether it entered into such transactions following the Decision with a view to replacing the trading opportunities it claims to have lost in consequence of the Decision (Jane Street's RFI Response, ¶8).

314 Elliott's Second RFI Response, ¶10.

315 European Court of Human Rights, Practice Direction on Just Satisfaction Claims (June 2022) ("ECHR PD"), ¶4; *Beyeler v Italy (No.2)* (2003) 36 E.H.R.R. 5, [20]; *Yukos v Russia* (2014) 59 E.H.R.R. SE12, [21].

obvious and unreasonable failure in this regard goes to the Court's jurisdiction to withhold or reduce an award on equitable grounds.[316] If corporate traders wish to be compensated for breaches of their "*human rights*", they should take reasonable steps to abate their losses before seeking to recover them from a public body.

156. Third, in any event, damages may be withheld, or reduced, if that is appropriate in the general or specific context of the particular case.[317] This is not a case where there has been expropriation of private property by a public authority. Rather, it is a purely commercial context, in which the decision-maker has no speculative financial interest in the outcome of trading. To the extent that the Claimants establish that they have been unlawfully deprived of profits which they might otherwise have made, those profits would have been made at the expense of contractual counterparties who have been released from the corresponding losses. It would be contrary to principle for the Court to compensate the party who would otherwise have made a gain when their counterparty will not be returned to the position they would have been in had the transactions completed.

157. The Defendants have requested that the Claimants confirm whether, as at 8 March 2022, they held other positions (whether on the LME or other markets) the value of which was affected by the Decision in such a way as to create profits or avert losses. Whilst Elliott has been able to confirm that it did not obtain any countervailing benefits from the Decision, Jane Street have, to date, refused to provide the information requested.[318] Pending the provision of further information by Jane Street, the Defendants reserve their rights to argue that just satisfaction does not require an award of damages to a claimant if its net financial position has actually been improved as a consequence of the relevant decision.

158. The Defendants reserve the right to apply to amend and amplify their case on causation, quantum and just satisfaction following further factual investigation and, if appropriate, expert evidence.[319]

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316 See ECHR PD, ¶¶4 and 9.

317 See ECHR PD, ¶4.

318 Elliott's Second RFI Response, ¶13; Jane Street's RFI Response, ¶¶9-11.

319 The Defendants sought to establish from Elliott at what price it exercised its "*call options*" (referred to at Houlbrook, ¶11). Elliott stated that it exercised the right to acquire 500 lots of nickel at a strike price of $27,000 per ton, being a total of $81,000,000 but that "*[i]t's not possible to identify a date on which these particular lots were subsequently sold.…*": Elliott's Second RFI Response, ¶1. This is not accepted and the Defendants reserve their rights to press Elliott for further disclosure.

H. Conclusion

159. For the reasons given above, the Defendants submit that the claims should be dismissed and no relief should be granted in any event.

JONATHAN CROW KC

4 Stone Buildings

JAMES McCLELLAND KC

EMILY MACKENZIE

ALASTAIR RICHARDSON

Brick Court Chambers

28 November 2022