

Companies.

[2025]JCA327

COURT OF APPEAL

15 December 2025

**Before : Sir Richard McMahon, JA, President
Roddy Dunlop KC JA
Angus McCullough KC JA**

Between	RTI Limited	Appellant
And	OWH SE i.L.	Respondent

Advocate W. A. F. Redgrave for the Appellant

Advocate R. S. Christie for the Respondent.

JUDGMENT

THE PRESIDENT and DUNLOP JA

Introduction

1. Having heard the Advocates' submissions during the morning of 27 November 2025, later that afternoon we were able to announce that the Appellant's appeal was dismissed. We indicated that the full reasons for that decision would follow.
2. By a Notice of Appeal dated 19 June 2025, the Appellant appeals against the dismissal by the Royal Court (Commissioner Sir Michael Birt sitting with Jurats Christensen and Berry) of its application to set aside the *ex parte* order of the Bailiff giving leave to the Respondent to enforce an arbitral award dated 25 September 2024 of the London Court of International Arbitration ("LCIA"). The judgment under appeal ("Judgment") was handed down on 22 May 2025 ([2025] JRC 137).
3. The Notice of Appeal contains two grounds. The first is:

“That the Royal Court erred in law by concluding in paragraphs 50 to 60 of the Judgment that retrospective effect should not be given to Article 46A of the Sanctions and Asset-Freezing (Jersey) Law 2019 (the Law) so as to apply to facts occurring in March 2022. In reaching this conclusion, the Court erred as follows:

- a. It failed properly to consider the unfairness of the Appellant’s position in the circumstances of March 2022 when considering the rules of construction that determine whether a provision has retrospective effect; and***
- b. It gave inadequate weight to the Appellant’s argument that even if Article 46A did not itself apply to acts which took place before it came into force on 8 June 2022, it was good evidence of Jersey’s underlying public policy prior to that date (paragraphs 57 and 58 of the Judgment).”***

4. The second ground advanced relates to the suggestion that Article 46A should have been found on the facts which, as Advocate Christie for the Respondent notes, is not relevant if the first ground fails but would also need to be established by the Appellant if the first ground succeeds. This ground is:

“That the Court erred in holding that the defence in Article 46A of the Law was not made out, on the basis that while the Appellant held a subjective belief that it would have been unlawful to pay the margin call in March 2022, its belief was not objectively reasonable (paragraphs 96 to 102 of the Judgment). In reaching this conclusion, it erred as follows:

- a. It gave excessive weight to the BaFin measures in determining whether the Appellant’s decision to default in paying the margin call was objectively reasonable;***
- b. It gave inadequate weight to the guidance given by the English Court of Appeal in the case of Celestial Aviation Services Limited v UniCredit Bank GMBH to “avoid viewing the position with the benefit of hindsight” (paragraph 43); and***

- c. ***In holding that the Appellant's belief was not objectively reasonable based upon a finding that there was no evidence as to the Appellant giving any real consideration to the matters set out in paragraphs 100 and 108, the Court erred by applying a test concerning the Appellant's state of mind (i.e. a subjective test) instead of applying an objective test as to whether making payment to the Respondent would entail the commission of an offence under Article 11 and/or other provisions of the Law in circumstances where the payment would be to a wholly owned subsidiary of a Designated Person, and/or could directly or indirectly benefit a Designated Person (contrary to Article 17 of the Law)."***

Background

5. The Judgment sets out the general factual background by reference to the arbitral award ("the Award"), by which it was ordered that the Appellant pay to the Respondent €213,770,661.77 (although this was said to be over-stated in the Order of Justice by €511.51), resulting in the Respondent seeking to enforce the Award as if it were a judgment given by the Royal Court of Jersey in the sum of €213,770,150.26. Subject to matters that have arisen since the Judgment on 22 May 2025, we adopt the approach taken in the Royal Court's judgment, which we summarise even more briefly, along with the facts set out in more detail between paras 66 and 90.
6. The Respondent ("OWH") is a bank incorporated in Germany, owned as to 99.39% by VTB Russia PJSC ("VTB Russia"). At the relevant time, it was known as VTB Bank (Europe) SE, but it changed its name with effect from 2 January 2024 to OWH and has been in a form of solvent liquidation since 1 April 2023.
7. The Appellant ("RTI") is incorporated in Jersey and forms part of the Rusal Group. The majority of its board of directors were at the material time resident in Gibraltar. Its parent is United Company Rusal, International PJSC ("Rusal"), which had been incorporated in Jersey, but subsequently re-domiciled to Russia. The Rusal Group is involved in the production and sale of aluminium.
8. On 11 September 2019, RTI and OWH entered into a currency swap contract in the form of an ISDA (International Swaps and Derivatives Association) Master Agreement (2002 edition) ("MA"), an ISDA Schedule ("Schedule") and a Credit Support Annex ("CSA") in order to hedge the Rusal Group's exposure to movement in the value of the Russian rouble. Rusal guaranteed RTI's

obligation under a deed of guarantee also dated 11 September 2019. The MA was governed by English law and provided that any dispute should be referred to and finally resolved by arbitration conducted in accordance with the LCIA rules.

9. As shown in the Chronology appended to the Award, between April 2019 and November 2021, RTI and OWH entered into eleven transactions, each evidenced by a separate Confirmation. The earliest of these was subject to a Novation Agreement between RTI, VTB Russia and OWH.
10. Paragraph 10 of the Judgment summarises the effect of the various agreements by reference to paras 164 to 173 in the Award, which are also cited in the Appellant's Contentions and which we adopt in their entirety without repeating them in this judgment.
11. On 24 February 2022, Russia invaded Ukraine. Sanctions were imposed that day in the United Kingdom on VTB Russia making it a Designated Person, which meant that VTB Russia also became a Designated Person under the relevant Jersey legislation (and also in Gibraltar). The US sanctions authority ("OFAC") added VTB Russia and OWH to its list of Specially Designated Nationals and Blocked Persons. The German federal financial supervisory authority ("BaFin") issued an order banning OWH from making detrimental payments or asset transfers to VTB Russia or VTB Group companies. (BaFin had on 17 February 2022 appointed a special representative from Deloitte to monitor OWH's payment decisions.)
12. Following the invasion, the rouble suffered a steep fall. This caused OWH to issue a margin call to RTI on 25 February 2022 requiring payment of US\$ 43.5 million. The due date was 28 February, but RTI did not pay the margin call because it had concerns about US secondary sanctions. OWH issued a further 18 margin calls between 25 February 2022 and 24 March 2022, which RTI did not pay.
13. As explained in paragraph 68 of the Judgment, on which Advocate Redgrave laid particular emphasis:

"There followed many discussions between RTI and OWH as to whether and, if so, how the margin calls could lawfully be paid, with a number of possible solutions being explored. We accept from the evidence that RTI was willing and able to pay the margin calls if it could lawfully do so; it would clearly be less costly than termination at that point and in any event the whole point of margin payments is that they be will returned if the relevant currencies

subsequently move in the opposite directions, as in fact happened in this case.”

14. On 1 March 2022, OWH notified RTI that the failure to pay the margin call was an Event of Default under the MA and reserved its rights. Being unable to obtain advice from its Jersey advocates, Ogier, RTI sought advice from its English lawyers, Cleary Gottlieb Steen and Hamilton LLP (“CG”). On 2 March, RTI queried whether the involvement of BaFin had decreased the risk of US secondary sanctions. The response was that the supervision of OWH by BaFin would not of itself reduce the risk of secondary US sanctions. RTI responded to OWH on 2 March disputing that there had been an Event of Default, adding its concern about breaching applicable sanctions and possible secondary sanctions.
15. Jersey sanctions appear to have been raised for the first time on 4 March 2022. RTI then asked whether it meant it could terminate under the Illegality clause in the MA, but was informed by CG that this was not the case (although paragraph 78 of the Judgment questions this view). There were further exchanges between the parties. An approach was also made to the Minister for External Relations, being the relevant sanctions authority in Jersey, for permission to pay the margin calls, in which there was no reference to the BaFin measures in the letter sent.
16. On 23 March 2022, in view of the failure to pay, OWH sent RTI a Notice of Early Termination for an Event of Default (“the Termination Notice”), by which it designated 25 March as the Early Termination Date. On 31 March RTI responded disagreeing that an Event of Default had occurred or that OWH was entitled to designate an Early Termination Date, repeating that payments to OWH would risk breaching the sanctions regime or attracting secondary sanctions under US law.
17. On 24 June 2022, RTI filed a request for arbitration asserting that the Termination Notice was invalid and that it was not liable to pay the termination amount.
18. The Tribunal sat for five days in July 2024 and made its Award on 25 September 2024. In respect of the two issues mentioned in paras 18 and 19 of the Judgment, paras 20 and 21 state that:

“20. The Tribunal held that RTI could not rely on a Relevant Sanctions Event as preventing it from performing its obligations for a number of reasons, including that the sanction authorities of Jersey and Gibraltar (where the majority of the board of

directors of RTI were resident) were not Sanctions Authorities listed in the Schedule as being persons whose measures would count for the purposes of giving rise to a Relevant Sanctions Event.

- 21. As to the second issue, the Tribunal held that it was a condition precedent to RTI being able to rely on Illegality that it gave notice of Illegality “promptly” in accordance with the Agreement. It found that RTI had not given such notice promptly and accordingly could not rely on Illegality. It followed that the Termination Notice was valid and that early termination of all outstanding transactions took place in accordance with the Termination Notice.”**

Further materials

19. There were applications by both the Appellant and the Respondent to refer to material that was not before the Royal Court. We deal with the Appellant’s application as part of our consideration of the alternative ground of appeal on public policy, but will address the Respondent’s application here.
20. By an application dated 18 November 2025, Advocate Christie sought permission to rely on the affidavit of James Pirie, sworn the same day. Mr Pirie is one of the two provisional liquidators appointed in respect of RTI as a result of Representation of OWH SE i.L. v RTI Limited [2025] JRC 204. The provisional liquidators were appointed on 17 July 2025.
21. The application to rely on additional evidence was made pursuant to rule 12(1) of the Court of Appeal (Civil) Rules 1964 and we were referred to how this Court approaches such applications as set out in Aston Martin Lagonda Ltd v Ferguson and Ors [2024] JCA 071.
22. Whilst we accept that what has taken place since the hearing in the Royal Court could not have been available at that time, we recognised that what Mr Pirie’s affidavit encouraged us to do was to reach a decision as quickly as possible. By announcing the outcome of the appeal later on the same day as the hearing meant that we did not need to have regard to his affidavit. In any event, we agree with how it was put by Advocate Christie that this affidavit has nothing to do directly with the appeal and so consider that it fails the second element of the test in that it did not relate to the issues needing to be addressed to determine the appeal. We did not, therefore, grant leave to rely on this fresh evidence because it was unnecessary to do so.

23. We are, though, entitled to take into account the fact that provisional liquidators have been appointed in respect of RTI and the reasons why those appointments were made, as set out in the judgment ([2025] JRC 204), without permitting Mr Pirie's affidavit to be relied on. We were also provided with a response sent by Advocate Heywood on behalf of the director of RTI to Mr Pirie dated 24 November 2025, which was forwarded by Advocate Redgrave. However, nothing turns on any of this material in relation to our decision.

Legislative framework

24. The first applicable measure is the Arbitration (Jersey) Law 1998. It is common ground that the Award is a "**Convention award**", being an award made in a territory of a State which is a party to the New York Convention, in this instance the United Kingdom. Accordingly, pursuant to Article 42(1), a Convention award can be enforceable in Jersey:

"An award on an arbitration agreement may, by leave of the Court on an application made ex parte, be enforced in the same manner as a judgment or order to the same effect; and, where leave is so granted, the act of court shall specify the manner of enforcement."

25. Refusal of enforcement can follow under Article 44, which provides:

"(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this Article.

(2) [Inapplicable]

(3) Enforcement of a Convention award may also be refused if ... it would be contrary to public policy to enforce the award ..."

26. The sole ground relied on by RTI both before the Royal Court and this Court is found in Article 44(3).
27. The second applicable measure is the Sanctions and Asset-Freezing (Jersey) Law 2019 ("the Sanctions Law"). By Article 11 of the Sanctions Law, it is a criminal offence to make funds or financial services available to a Designated Person:

“(1) A person (“P”) must not make funds or financial services available (directly or indirectly) to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds or financial services so available.

(2) A person who contravenes paragraph (1) commits an offence and is liable to imprisonment for a term of seven years and to a fine.”

By Article 45(1)(b), such an offence **“may be constituted by conduct (including acts and omissions) wholly or partly outside Jersey by ... a person incorporated or constituted under the law of Jersey.”**

28. Before the Royal Court and also this Court, RTI relies on Article 46A of the Sanctions Law. Article 46A was inserted into the Sanctions Law by Article 19 of the Sanctions and Asset-Freezing (Amendment No. 2) (Jersey) Law 2022, which was brought into effect by ministerial order from 8 June 2022. Article 46A is headed “Civil immunity” and provides:

“(1) A person is not liable to any civil proceedings to which that person would, in the absence of this Article, have been liable in respect of an act, if at the time of the act the person reasonably believed that the act was necessary to comply with an obligation or prohibition imposed –

(a) by this Law;

(b) by an enactment under this Law; or

(c) by a direction or other instruction given under this Law or under an enactment under this Law.

(2) Nothing in paragraph (1) limits any other ground on which, in the absence of this Article, the person may claim not to be liable for an act.”

29. In the Judgment, reference was made to the *travaux préparatoires* accompanying the draft Law before it was enacted. Paragraphs 40 and 41 quoted several paragraphs from that report:

“1.2 The draft Sanctions and Asset-Freezing (Amendment No. 2) (Jersey) Law 202- (the “draft Law”) to the Sanctions Law forms part of the preparation for the Island’s assessment by the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). The MONEYVAL assessment will evaluate the Island’s compliance with and effectiveness against the FATF Recommendations. The Island will be assessed both against its “Technical Compliance” (“TC”) with the 40 FATF Recommendations, and its effectiveness in implementing the recommendations against 11 “Immediate Outcomes” (“ICs”).

1.3 The Sanctions Law has been reviewed against the current FATF methodology for assessing the Technical Compliance (“TC”) requirements of Recommendation 6 (“R.6”) and Recommendation 7 (“R.7”), which concern targeted financial sanctions related to terrorism, and targeted financial sanctions related to the financing of weapons of mass destruction proliferation, respectively.

1.4 Most of the changes that would be introduced by the draft Law would improve Jersey’s compliance with the TC requirements of R.6 and R.7, either through amendments to existing provisions or by adding new provisions ...

2.3.1 A new Article 46A would be inserted, which protects persons acting in good faith to comply with a sanction’s obligation or prohibition from civil proceedings. These provisions are needed to comply with R.6 and R.7, which require explicit protections for third parties implementing their sanctions obligations.”

30. Paragraph 42 quoted what the Economic and International Affairs Scrutiny Panel had commented on about the proposed insertion of Article 46A:

“A new Article would be inserted, which protects persons acting in good faith to comply with a sanction’s obligation or prohibition from civil proceedings.

The Panel learned that the UK had recently been criticised in a MONEYVAL Report for not having a specific provision setting this out and this stressed the importance of Jersey meeting the FATF requirements.”

This led the Royal Court to conclude that Article 46A “**was specifically intended to ensure that the Island complies with the technical requirements of Recommendations 6 and 7 of the FATF Recommendations**” and that “**the proper construction of Article 46A is that it applies not only to payments under a transaction which is governed by Jersey law but also to payments by a Jersey company or from Jersey in respect of transactions governed by some other proper law.**”

The first ground of appeal

31. On behalf of the Appellant, Advocate Redgrave challenges the conclusion reached in paragraphs 50 to 60 of the Judgment that retrospective effect should not be given to Article 46A. In doing so, he refers to two decisions in England and Wales decided after the hearing before the Royal Court. The first is Adriatic Land 5 Limited v Long Leaseholders at Hippersley Point [2025] EWCA Civ 856 and the second is the Supreme Court’s decision in URS Corporation Ltd v BDW Trading Ltd [2025] 2 WLR 1095, which is referred to in Adriatic. Both decisions relate to provisions found in the Building Safety Act 2022.
32. Advocate Redgrave argues that it would be appropriate, because the circumstances were sufficiently serious and unusual, to afford Article 46A retrospective effect, at least back to March 2022, being just three months before it entered into force. The policy goal of ensuring proper compliance with sanctions is important enough to justify retrospectivity and avoid there being an unfair windfall payment to OWH. The Royal Court failed to consider properly the unfairness of RTI’s position in March 2022, being a time when it was unable to obtain Jersey legal advice.
33. In his oral submissions, Advocate Redgrave pointed out the manner in which different tenses are used in Article 46A. In particular, the reference therein to “would ... have been” demonstrates that the Court could construe it as capable of having retrospective effect.
34. In response, Advocate Christie relies on the cases mentioned in the Judgment as indicative of the approach in Jersey law to questions of retrospectivity of legislation. By reference to the 2022 Amendment Law, which inserted Article 46A, the materials show that this was forward-looking. If Article 46A were given retrospective effect, it would afford defendants a defence to legitimate and lawful claims that they did not have when the relevant liability arose. He also refers to the well-known maxim that “**la convention fait la loi des parties**”.
35. In respect of the two recent decisions, Advocate Christie submits that neither assists the Appellant. In URS Corporation Ltd v BDW Trading Ltd, there was no dispute that section 135 of the 2022 Act was intended to have retrospective effect (see, eg, para 124). In any event, Lord

Hamblen and Lord Burrows JJSC gave the leading judgment on ground 2 (or, as Lord Leggatt JSC put it in para 170, Issue 2, on which he concurred), whereas Lord Leggatt gave the leading judgment on ground (or Issue) 4, with which the other Justices agreed (para 162). In Adriatic Land 5 Ltd, it was not difficult to see why the conclusion was reached that Schedule 8 to the 2022 Act was also intended to have retrospective effect.

36. We have noted that the first ground of appeal splits into two elements. The first relates to the unfairness of the Appellant's position without applying a retrospective construction, and the second relates to there being evidence of Jersey's underlying public policy before Article 46A entered into force. We propose to deal with each element in turn.
37. We consider that it is appropriate first to refer to the way that retrospectivity was covered in the Judgment before turning to the more recent cases from England and Wales.
38. In paragraph 51 of the Judgment, para 11 of the judgment of Sumption JA in Warren v Attorney General [2009] JCA 175 was quoted (omitting the emphasis that was added):

“The starting point is that an enactment is presumed, unless a different intention appears, to apply from the time when it comes into force. The strength of that presumption varies with the circumstances, and it is fair to say that it is not normally regarded as applicable to purely procedural provisions. ... The real basis of the distinction [between substantive and procedural provisions] is that the presumption against retroactive effect is designed to protect accrued rights or obligation[s] from retrospective alteration, unless it is sufficiently clear as a matter of construction that such an alteration was intended. It is conceived to be unjust to derive substantive rights or obligations from a person's conduct or from some other state of affairs, by reference to a rule of statute law which did not exist at the time, because it is by then too late for him to act differently. By comparison, applying a procedural provision to current proceedings will not normally involve any element of retrospectivity at all. A change in the procedural law of the court is not being applied retrospectively, simply because the proceedings are themselves concerned with things that happened long ago. The new procedural rule is being applied to what the court is doing now to discover the facts, and not to the facts themselves. To put the point another way, no accrued rights or obligations of a litigant are engaged by the Court's decision to apply its current procedure to current proceedings. When a person commits an offence, he does not thereupon become entitled to a trial in accordance with the procedural rules which then existed. His rights under the procedural law of

the court arise only when he is in before the court, and they necessarily depend on how that law stands at that time.”

Advocate Redgrave accepted that this was the appropriate starting point.

39. In Re Tantular [2020] JCA 013, similar comments are found between paragraphs 32 and 49, as explained in para 52 of the Judgment. Indeed, part of the passage just cited from Warren v Attorney General is quoted in para 41. There was a similar reliance on unfairness, advanced in that case on behalf of the Attorney General, as the International Co-operation (Protection from Liability) (Jersey) Law 2018 had been registered by the Royal Court on 19 October 2018 but did not become operative until brought into force on 18 June 2019. That date was after the Summons dated 16 April 2019, which had been heard on 28 May 2019, with judgment circulated in draft on 10 June and handed down on 18 June 2019 (see para 37). This led to the conclusion in para 49 that ***“there is no compelling reason to confer retrospective effect upon the 2018 Law”***. The explanation for that conclusion stems from para 42, which states:

“As regards the costs of litigation, absent special circumstances, a party to litigation enjoys, from the outset of the litigation, a right to seek costs in respect of participation in the litigation either as a whole or in respect of individual element. Similarly, and again absent special provisions, a party to a litigation is taken to be aware from the outset that there is a potential liability for costs. Whilst, in practice successful parties often recover little more than half to two-thirds of actual expenditure, the discretion given to the court to award costs is part and parcel of the overall fairness of the system of civil litigation in a jurisdiction such as Jersey.”

When read with para 46 (***“A specific right had accrued and the construction contended for by the Attorney General would deprive the Appellants of that right”***), it was the loss of such an accrued right that pointed away from giving the 2018 Law retrospective effect.

40. This led to the conclusion in the Royal Court’s Judgment in this case (at paras 54 to 56):

“54. In our judgment, there is nothing in the statute introducing Article 46A (or for that matter in the accompanying reports) to suggest that it was intended that Article 46A should apply to acts or omissions carried out before the date on which the Article came into effect. There is nothing therefore to rebut the normal presumption. Furthermore, to give the Article

retrospective effect would clearly alter accrued rights or obligations. Thus, taking the facts of the present case, pursuant to the Award (ignoring Article 46A), RTI was liable to pay the Termination Amount because its failure to pay the margin call amounted to an Event of Default and accordingly a breach of contract. If Article 46A is given retrospective effect, as RTI suggests, this will retrospectively alter the accrued rights and obligations of the parties.

55. *Furthermore, the clear purpose of Article 46A is to influence a payer's conduct by making it more likely that he will refuse to pay if he reasonably believes that payment would be in breach of Jersey sanctions. Until Article 46A was enacted, it could not have had any such influence. This further militates against a construction of the statute with retrospective effect.*

56. *We have no hesitation in concluding that Article 46A was not intended to have retrospective effect and applies only to acts carried out after the Article came into force on 8 June 2022.*

41. Against the way the Royal Court addressed this issue, we turn to the basis on which Advocate Redgrave suggests this was an error of law. He refers to section 44 of the Sanctions and Anti-Money Laundering Act 2018, which was in force in the United Kingdom from later that year, being in similar terms to Article 46A. It provides:

“(1) This section applies to an act done in the reasonable belief that the act is in compliance with–

(a) regulations under section 1, or

(b) directions given by virtue of section 6 or 7.

(2) A person is not liable to any civil proceedings to which that person would, in the absence of this section, have been liable in respect of the act.

(3) In this section “act” includes an omission.”

42. This section was dealt with in Celestial Aviation Services Limited v UniCredit Bank GmbH [2024] EWCA Civ 628, as mentioned in paragraph 43 of the Royal Court's Judgment. We consider that quoting the entirety of paragraph 87 of the judgment of Falk LJ is appropriate:

“The evident purpose of s.44 is to ensure that a person is not pressurized into doing something that risks breaching sanctions by a fear of being exposed to civil claims. The section is concerned to protect against a liability which is created as a result of something done (or not done) in the reasonable belief that it is in compliance with a sanctions regulation. It is not concerned to protect against pre-existing liabilities.”

43. In the light of that last sentence and also the approach taken in the Award, Advocate Redgrave did not draw to our attention any decision that suggests that section 44 of the 2018 Act was afforded retrospective effect. In those circumstances, referring to the similarities between the two provisions does not, in our view, assist the Appellant to explain why Article 46A should be given any retrospective effect.
44. In relation to the two recent decisions on which Advocate Redgrave relies in his written argument (although in his oral submissions Advocate Redgrave did not raise anything from URS Corporation Ltd v BDW Trading Ltd) we propose to take them in chronological order and will consider URS first, in which judgment was given by the Supreme Court after the hearing in Adriatic but before the Court of Appeal had handed down its decision. In doing so, we are conscious that in Adriatic, Nugee LJ did not adjust his view about the outcome to take into account the judgments in the Supreme Court's decision (para 205), whereas Newey LJ, in the minority, did (see, especially, para 87 *et seq*).
45. Advocate Redgrave relies in particular on paras 273 and 274 in the judgment of Lord Leggatt:

“273. What Lindley LJ in this passage referred to as a “subordinate rule” is important. The presumption against retrospective operation of a statute does not cease to apply just because the statute is plainly intended to have some retrospective effect. A statute can be retrospective in some respects but not others. Retrospective effect can be a matter of degree. The basic principle requires a court “in a case where some retrospective operation was clearly intended, equally to presume that the retrospective operation of the statute extends no further than is necessary to give effect either to its clear language or to its manifest purpose”: Arnold v Central Electricity Generating Board [1988] AC 228, 275B (Lord Bridge). See also the statement of Bowen LJ in Reid v Reid (1886) 31 Ch D 402, 409, that “you ought not to give a larger

retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant”.

274. The presumption against retrospective operation of a statute is, nonetheless, only a presumption. Sometimes the unfairness to potential defendants of reviving expired rights and corresponding liabilities may be considered by the legislature to be a necessary price of achieving an important policy goal.”

46. Against those principles, Advocate Redgrave submits that there was a policy goal of ensuring proper compliance with sanctions, which was important enough to justify the retrospectivity of Article 46A being sought. The adherence in the Judgment to **“well-established rules of construction”** at the end of paragraph 53 overlooks the more flexible approach indicated in the judgment of Lord Leggatt.
47. Advocate Christie on the other hand points out that Lord Leggatt’s judgment must be read in the context of the majority decision of Lords Hamblen and Burrows. Paragraph 124 states:

“There is no question that section 135 does apply retrospectively. The issue is as to how it so applies. URS submitted that there is a presumption that such retrospective operation extends no further than is necessary – see, for example, Arnold v Central Electricity Generating Board [1988] AC 228, 275B, per Lord Bridge of Harwich. Assuming that to be so, in order to achieve its purpose of holding those responsible for building safety defects to account, it is necessary to interpret the general wording under in section 135(3) as being applicable to claims such as those made in the present case.”

48. Section 135(1) of the Building Safety Act 2022 inserted section 4B into the Limitation Act 1980, providing a special time limit for certain actions in respect of damage or defects in relation to buildings. By inserted section 4B(4), where **“a person became entitled, before the commencement date, to bring an action against any other person”**, the time limit of 15 years was extended to 30 years. Section 135(3) of the 2022 Act provides:

“The amendment made by subsection (1) in relation to an action by virtue of section 1 of the Defective Premises Act 1972 is to be treated as always having been in force.”

49. The majority of the Justices chose to follow what had been stated in News Corp UK & Ireland Ltd v Revenue and Customs Comrs [2024] AC 89, at para 27 (see para 95):

“... the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of the words used in a statute in light of their context and the purpose of the statutory provision: see, eg, R (Quintaville) v Secretary of State for Health [2003] 2 AC 687, para. 8 (per Lord Bingham of Cornhill); Uber BV v Aslam [2021] ICR 657, para 70; Rittson-Thomas v Oxfordshire County Council [2022] AC 129, para 33; R (O) v Secretary of State for the Home Department [2023] AC 255, paras 28-29.”

50. The conclusion of the majority was that restricting the effect of section 135(3) to actions under section 1 of the 1972 Act would seriously undermine the purpose of Part 5 of the 2022 Act (para 107) meaning that, ***“whether direct claims under the DPA or claims in negligence or for contribution that depend on the DPA, turn on the application of the new DPA retrospective 30-year limitation period”*** (para 111). Accordingly, their conclusion in para 125 was that ***“there was no relevant time bar at the time that the repair costs were incurred.”***
51. Turning to the judgment of Nugee LJ in the Adriatic Land 5 Limited case, with which Holgate LJ agreed (para 206), differing from the disposal that Newey LJ favoured (para 132), Advocate Redgrave refers to paras 136 to 139, which appear under the heading “The presumption against retrospectivity”:

“136. Second, it has long been recognized that the question is not a simple one of asking whether a statute is retrospective or not; there are degrees of retrospectivity, and the greater the degree of retrospection and the more unfairness involved, the more potent the presumption becomes: see the passage cited by Newey LJ at paragraph 54 above from the judgment of Staughton LJ in Tunncliffe. The actual decision in Tunncliffe was later overruled in Plewa v Chief Adjudication Officer [1995] 1 AC 249, but Staughton LJ’s statement of principle has been cited with approval several times in the House of Lords: see L’Office Cherifien at 525D per Lord Mustill, Wilson at paragraph 19 per Lord Nicholls and at paragraph 200 per Lord Roger, and Odelola at paragraph 57 per Lord Neuberger.)

137. Similarly Patten LJ referred in Granada to a “spectrum” of retrospective effect at paragraph 57 as follows:

“In approaching this issue, the courts have avoided adopting a rigid or mechanistic rule for determining whether the legislation in question is to be treated as retrospective. Instead, they have recognized the various forms and degrees of retrospective effect which can be incorporated into legislation as a spectrum, and have approached the issues of construction by reference to the degree of unfairness which the particular measure may produce. This is necessarily and objective question which falls to be determined by looking at the legislation and its potential effects in general terms.”

138. *Third, the presumption “may be overcome not only by express words in the Act but also by circumstances sufficiently strong to displace it”:* *Sunshine Porcelain Potteries Pty Ltd v Nash* [1961] AC 927 at 938 per Lord Reid.

139. *Fourth, there is, as Newey LJ has referred to, a well-recognised distinction between the laws which alter for the future rights and obligations arising from existing legal relationships and laws which affect existing rights and obligations: see paragraphs 57 to 59 above. Lord Reed referred to this distinction in Axa (at paragraph 121), but he went on to say:*

“To the extent that laws of the latter kind may undermine legal certainty more severely, they may be more difficult to justify, but there can be no doubt that justification for such laws sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As Fuller remarked, at p 53:

“It is when things go wrong that the retroactive statute becomes indispensable as a curative measure, though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.””

He stressed that para 138 formed the basis for the circumstances in the present case to be regarded as sufficiently strong to displace the usual presumption. As in that case, there is an overwhelming public policy relating to sanctions to follow the example described there. Article 46A of the Sanctions Law is analogous because the conclusion reached by Nugee LJ was that the service charge in question, just like the civil immunity, would not otherwise be payable.

52. The passage referred to in para 136 is from Secretary of State for Social Security v Tunncliffe [1991] 2 All ER 712, at 724:

“... the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

53. Advocate Redgrave submits that the circumstances of the Award were sufficiently serious and unusual that the retrospective effect back to March 2022 would be appropriate. The degree of retrospectivity required is quite limited and the insertion of Article 46A should be considered as the form of curative measure designed to give remedial effect to a deficiency that was identified in the sanctions regime. Doing so would address the unfairness of the Appellant’s position.
54. Advocate Christie has referred to some different passages in the judgment of Nugee LJ. He starts with paras 152 to 154, setting out the purpose of the provisions found in Part 5 of the 2022 Act:

“152. The background to the remediation provisions in Part 5 of the BSA has been referred to by Newey LJ at paragraphs 27 to 29 above. I think it helpful to expand a little on this, with the help of Mr Murphy’s evidence, as follows. The Grenfell Tower tragedy exposed a fundamental flaw in the assumptions behind the design of blocks of flats. Most had been designed on the assumption that in the case of fire each flat would operate as a self-contained unit and hence the occupants of other flats would not be affected (and so could safely stay put). The Grenfell Tower fire demonstrated that this assumption was disastrously and tragically wrong if the building was clad in flammable cladding such as the aluminium composite material (“ACM”) cladding in that case. Any such building was therefore unsafe and the occupants at serious risk.

153. That led to a need to identify and remedy buildings with unsafe cladding, in the first instance those with ACM cladding, although subsequently other types of unsafe non-ACM cladding were also

identified. In due course other fire safety effects (such as lack of compartmentalisation between flats, flammable balconies, and ineffective fire safety doors) were identified; and buildings were also found to suffer from various structural defects.

154. Over time the scale of the crisis expanded, and very large numbers of flats were found to be affected. In September 2024 the Department estimated that there were 260,000 dwellings in the occupied private and social sector in residential buildings over 11m tall with unsafe cladding that it was monitoring, of which an estimated 116,000 dwellings were in buildings that had not started remediation.”

55. Advocate Christie has also referred to the conclusions, noting in para 201 that Nugee LJ accepted that the text in schedule 8 to the 2022 Act **“would be a slender basis on which to decide that Parliament had intended to deprive landlords of their accrued rights”** before continuing:

“202. ... As set out above, the scheme of schedule 8 is to provide a raft of protections for leaseholders, in the case of paragraph 2 for all leaseholders, and in the case of the other paragraphs for leaseholders with qualifying leases. The evident purpose of doing so is, in the case of paragraph 2, to ensure that costs are met by those responsible for the defects rather than anyone else; and, in the case of the other paragraphs, to provide relief for leaseholders facing unprecedentedly large and very often unaffordable service charges. But on either of Mr Allison’s interpretations this would not happen for many leaseholders for a wholly unpredictable time. Leaseholders whose landlords were, or were connected with, the original developers would still have to pay for remediation, and leaseholders with qualifying leases would still face, and still have to meet, bills for remediation, so long as in each case costs had been incurred, or service charges had fallen due, before 28 June 2022. Such bills could be very large. That would to my mind cut across the evident legislative purpose of relieving leaseholders from their immediate predicament of facing large and often unaffordable bills; it would also I think tend to prevent the market from being freed up as intended. It would mean that far from leaseholders not having to pay a penny for cladding remediation, they might have to pay many thousands of pounds. It would not put an end

to questions being raised by MPs with ministers, or sorties in the press about leaseholders facing ruin. In short I do not think it would achieve what can be seen to be the legislative purpose of addressing the immediate crisis of leaseholders trapped in their flats facing ruinously expensive bills.

203. In those circumstances I consider that Parliament cannot have intended that leaseholders should still continue to face the uncertainties and difficulties of the large and unaffordable bills that the legislation was designed to address. The only way to give effect to the Parliamentary intention of breaking the logjam and protecting leaseholders is to my mind to interpret the provisions that “no service charge is payable” as meaning what they appear to say, namely that from the date of such provisions coming into force no such service charge is indeed payable.”

56. The scheme of the 2022 Act is, Advocate Christie submits, quite different from the insertion of Article 46A into the 2019 Law, which is not to alleviate hardship that would otherwise be experienced by the leaseholders affected. Instead, the approach taken in the Judgment should be endorsed as the correct application of the presumption against retrospective effect.
57. Advocate Christie also drew our attention to para 2.4.2 in the *travaux préparatoires*, which had been lodged au Greffe on 9 March 2022, which referred to a different change to be made to the Sanctions Law, affecting Article 3, which explained that ***“they cannot be retrospective”***, as indicating that there was an express reference to the notion of retrospectivity, yet no one had seen fit to propose any amendment to the wording to be inserted as Article 46A.
58. Against that background, we accept that fairness, as it is expressed in these decisions, has a part to play in deciding whether Article 46A should be given retrospective effect. However, unlike with the provisions of Part 5 of the 2022 Act (including schedule 8) as addressed in the *Adriatic* case, we consider that the question of fairness was properly addressed at para 53 of the Judgment:

“Advocate Redgrave prayed in aid the unfairness of what had occurred. As the Award stated at para 64, the effect of early termination might favour one party or the other depending upon the state of the market at the time of termination. On the facts of this case, early termination in March 2022 in the aftermath of the invasion of Ukraine and the consequent collapse of the rouble favoured OWH and substantially disfavoured RTI. However, by October 2022, the market had moved, with the consequence that early termination of all

outstanding transactions would have substantially favoured RTI and disfavoured OWH. Advocate Redgrave submitted that the consequence for RTI of its proper and reasonable response to the imposition of sanctions had been that an enormous windfall had arisen in favour of a party that RTI reasonable believed was sanctioned under Jersey sanctions. However, this matter has to be approached as one of principle in accordance with well-established rules of construction.”

59. These same arguments have been run before this Court on the same element of fairness. Apart from the recent decisions to which Advocate Redgrave now also refers, we are of the view that they do not assist in how to construe Article 46A.
60. Moreover, we agree with Advocate Christie that the notion of fairness (a) has to be considered from both ends of the telescope, and (b) cannot be looked at on the facts of this case alone. The first of these arises from the fact that justice must be even-handed: whilst someone in the dilemma in which RTI found itself might be said to have been treated “unfairly”, the same could be said of a reading which retrospectively cut down accrued contractual rights. The second arises from the fact that a statute either applies retrospectively (in all cases) or it does not (in any case). That being so, it is of little assistance, when considering this first question, to look at the specific matters said to create unfairness in this particular case.
61. The starting point has to be to consider the words used in the Sanctions Law. Consideration can also be given to the terms of the ministerial order bringing Article 46A into effect. There is nothing, in our view, on the face of either measure that indicates that it was envisaged that Article 46A would have retrospective effect. In particular, unlike in the 2022 Act, there is no provision such as section 135(3) which is clearly intended to have retrospective effect. We agree with Advocate Christie’s submission that, for the reasons given in the Judgment, the proper approach to inserted Article 46A is to view it as not having retrospective effect. This is consistent with previous decisions of this Court in Warren v Attorney General and Re Tantular. Even the analysis of Nugee LJ in the Adriatic case does not, in our judgment, assist the Appellant, whether by reference to degrees of unfairness or a spectrum.
62. Nugee LJ preferred the construction offered by Sir James Eadie over that of Mr Allison. This related in particular to para 9 of schedule 8 to the 2022 Act (repeated in paragraph 179), which set out in sub-paragraph (1):

“No service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect.”

63. The construction proposed by Sir James Eadie is found in para 181:

“From 28 June 2022, no service charge is payable under a qualifying lease in respect of legal or other professional services relating to the liability (or potential liability) of any person incurred as a result of a relevant defect whether such services have been provided and billed for, or any service charge demanded or fallen due, before or after 28 June 2022.”

64. The alternative constructions from Mr Allison, which were rejected by Nugee LJ, are in para 183.

65. As para 194 of the judgment of Nugee LJ explains, adopting Sir James Eadie’s construction results in a line being drawn when Part 5, which includes schedule 8, was brought into force on 28 June 2022, meaning that any ***“service charges paid before that date are unaffected by the legislation; but from that date no further service charges of the relevant type are payable, whether the underlying costs have been incurred, or service charges have been demanded or fallen due.”*** This is also consistent with what Lord Leggatt stated in para 301 of his judgment in URS Corporation Ltd v BDW Trading Ltd ***“that a statute, even though intended to have retrospective effect, should not be construed as having any greater retrospective effect than is clearly necessary.”***

66. We also find support for this view in what Lord Mustill stated in L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, 525:

“Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will be the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the

question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.”

67. However, the basic principles of construction are not, in our view, displaced by any possible unfairness to RTI. We remind ourselves that Article 44(3) of the 1998 Law enables a Court to refuse enforcement of a Convention award if it would be contrary to public policy. As set out in para 27 of the Judgment, referring to Tepe Insaat Sanayii AS v Boru Hatlari Iie Petrol Tasima AS 2016 (1) JLR 218, the Royal Court ***adopts “a pro-enforcement approach to arbitration awards”, meaning that “a refusal on grounds of public policy should be approached with extreme caution ...”***. In the absence of any previous Jersey authority (para 28), the Royal Court described the approach taken in England and Wales in a number of cases which we do not need to repeat, because they are set out in the Judgment, resulting in the conclusion found in para 46:

“Accordingly, subject to the qualification described in the following paragraphs [about retrospectivity], we find that enforcement of an arbitration award against a party under an obligation to effect a payment he reasonably believes would be in breach of Jersey sanctions provisions in circumstances where the award has given no consideration to whether the defence provided by Article 46A is available on the facts and where the court finds that it is so available, would fall within the public policy exception and such an award should not be enforced.”

68. As a result, in our view fairness is different from the public policy exception found in Article 44(3) of the 1998 Law. Fairness under the first element of ground 1 relates to whether or not Article 46A of the Sanctions Law should be afforded any retrospective effect. In accordance with the maxim ***“la convention fait la loi des parties”***, we have to recognize that RTI and OWH chose to enter into the MA and the various other agreements, understanding what could follow by way of arbitration. As also reflected in the Award, we consider that the submissions of Advocate Redgrave focused too much on the position of RTI rather than the manner in which Article 46A would operate generally. If Article 46A was to be given retrospective effect, it would have to be of general application. We are not persuaded that there is any basis for departing from the well-established principles of construction against retrospectivity in this case. Where there is nothing indicating that Article 46A was intended to have any retrospective effect, the general approach would be not to give Article 46A any retrospective effect. This seems to be the same approach as has been applied by the Court of Appeal in England and Wales for the similarly worded section 44 of the 2018 Act, in Celestial Aviation.

69. In our view, in the absence of any basis for affording Article 46A retrospective effect, there is no need to consider the extent to which it should be given, whether by reference to degrees of retrospectivity or on a spectrum, neither of which applies if no retrospective effect is demonstrated. For these reasons, we reject the first element of ground 1, adopting the reasons given in para 53 of the Judgment.
70. The alternative basis in the second element of ground 1 relies on there being good evidence of Jersey's underlying public policy prior to the insertion of Article 46A into the Sanctions Law.
71. This involves us having to consider what use can be made of the Second Affidavit of James Wood, which he swore on 11 November 2025, the exhibit to which contains a Supplementary Note dated 7 November 2025 relating to previous civil immunity provisions in Jersey Law prepared by Advocate Redgrave. The Court invited the parties to address the relevant principles prior to the hearing, which was done by Advocate Redgrave on 18 November 2025 with a response by Advocate Christie dated 20 November 2025. The Court is grateful to them both for their written submissions at short notice.
72. We are minded to agree with Advocate Christie that it is surprising that these materials were not put before the Royal Court to support the alternative argument that is dealt with in paras 57 to 60 of the Judgment. Looking at the position relating to sanctions before Article 46A was inserted into the Sanctions Law strikes us as being something that Advocate Redgrave, or those assisting him, should have considered. However, that is not determinative as to whether we should permit the second element of ground 1 to be expanded in this manner.
73. We disagree with the suggestion from Advocate Redgrave that rule 6(1) of the 1964 Rules assists, because there has been no amendment to the Notice of Appeal. Just because a supplementary notice served at least 14 days before the hearing of the appeal means that no leave of this Court is required to amend a notice of appeal, does not mean that notifying the Respondent within the same timeframe that material not placed before the Royal Court can be relied on before this Court should be allowed. Instead, we find the submissions of Advocate Christie on this issue of more assistance.
74. As a matter of Jersey law, new arguments in support of a ground of appeal have been accepted previously. This is shown by Reg's Skips Limited v Yates and Yates 2008 JLR 191, addressed between paragraphs 75 and 79, and FG Hemisphere Associates LLC v Democratic Republic of Congo 2011 JLR 486. We have also considered the cases from England and Wales, culminating in Rhine Shipping v Vitol [2024] EWCA Civ 580, drawing on what had been stated in Singh v Dass [2019] EWCA Civ 360 about the need for caution where a point has not been raised in the

court below, but noting that the previous Jersey legislation to which Advocate Redgrave wishes to refer is more about the legislative framework prior to Article 46A being inserted into the Sanctions Law, which appears to be a pure point of law, where we are satisfied that the Respondent has had the opportunity to deal with the issues raised, there has been no reliance to the Respondent's detriment on the faith of the earlier omission to raise it below and this can be adequately protected in costs.

75. We agree with Advocate Redgrave that this does not involve relying on any new factual issue. These are issues that relate to what the law of Jersey was before Article 46A was brought into force on 8 June 2022. The issues relating to rule 12 are, in our view, not engaged (so the Aston Martin Lagonda case is irrelevant).
76. Despite being troubled that these materials were not before the Royal Court, we are prepared to consider what is set out in Mr Wood's Second Affidavit and its exhibit. We accept Advocate Redgrave's submission that this Court should be prepared to consider the state of law prior to 8 June 2022 in order to consider fully Jersey's underlying public policy prior to that date. For these reasons, the ability of the Appellant to refer to the materials exhibited to Mr Wood's Second Affidavit is granted.
77. There is comparatively little said in the Appellant's Contentions about the second element of ground 1, as noted by Advocate Christie (para 39 of his Contentions). He goes on to quote what is set out in the Judgment on this issue:

“57. As an alternative argument, Advocate Redgrave submitted that, even if Article 46A did not itself apply to acts which took place before 8 June 2022, it was good evidence of Jersey's underlying public policy prior to that date. In other words, given that an identical provision had been in force in the United Kingdom for a number of years and that the Article was needed to comply with the relevant FATF Recommendations, the court should find that there was a pre-existing public policy to the same effect as Article 46A.

58. We cannot accept this argument. Article 46A provides a defence to a claim in circumstances where liability would otherwise exist. It is not open to the courts of this jurisdiction to invent such a defence merely because the defence exists pursuant to a statute in the United Kingdom or because the FATF Recommendations

require it. In an entirely domestic (i.e. Jersey) context, if before 8 June 2022, a plaintiff had sued a defendant in the Royal Court for breach of contract because a defendant had failed to pay a contractual sum merely because he reasonably believed that sanctions prevented him from doing so, the court would have had no option but to find the defendant liable.”

78. The Appellant now seeks to refer to the position in Jersey law before June 2022, by reference to what happened following the invasion by Russia of the Crimea in 2014. At that time, the European Union Legislation (Implementation) (Jersey) Law, 2014 enabled the Minister for External Relations by order to give effect to EU sanctions. This was done in December 2014 by the EU Legislation (Sanctions – Ukraine) (Jersey) Order 2014, implementing Regulation (EU) No 208/2014 and Regulation (EU) No 269/2014. Article 10(1) of both Regulations provided:

“The freezing of funds and economic resources or the refusal to make funds or economic resources available, carried out in good faith on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person or entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence.”

79. The United Kingdom left the European Union at the end of January 2020. Orders were made under Articles 3 and 4 of the Sanctions Law up to 11 February 2021, which included orders giving effect to Article 10(1) of the two Regulations implemented by the 2014 Order.
80. However, from 12 February 2021, the manner in which Jersey implemented sanctions changed. Instead of following EU sanctions, Jersey moved to implementing UK sanctions. This was done under the Sanctions and Asset-Freezing (Implementation of External Sanctions) (Jersey) Order 2021. By implementing UK sanctions which did not contain civil immunity provisions within the regulations made, regard had to be had to section 44 of the 2018 Act, which is where the civil immunity provision is found. This left a lacuna in Jersey law that was filled by Article 46A being inserted into the Sanctions Law. As Advocate Redgrave submitted, Jersey chose to deal with Brexit differently.
81. Advocate Christie points out that the Note exhibited to Mr Wood’s Second Affidavit is incomplete. Whilst the 2014 Jersey Order implemented the two Regulations mentioned, it also implemented Regulation (EU) 692/2014, which did not contain any equivalent immunity provision. Similarly, Regulation (EU) 833/2014 was another Russia-related sanctions measure, which did not include

an equivalent immunity provision. He also points out that the United Nations Financial Sanctions (Jersey) Law 2017, enabling a different set of sanctions to be implemented domestically, did not on its face contain any equivalent immunity provision prior to its repeal by the Sanctions Law.

82. In any event, Article 46A as inserted into the Sanctions Law was in different language to the type of immunity provision found in the EU Regulations. It was envisaged as a new provision. At best, what the material exhibited by Mr Wood demonstrates is that historically Jersey implemented some measures in which there was an immunity provision. However, this was not uniform and there was nothing in primary legislation, until Article 46A was inserted into the Sanctions Law, giving the same level of protection as section 44 of the 2018 Act.

83. We take the view that what was set out in para 58 of the Judgment is unaffected by Advocate Redgrave's ability at this late stage to seek to identify a pre-existing public policy in Jersey of affording some level of civil immunity when implementing sanctions. The comment made in the Judgment about an action before the Royal Court for breach of contract prior to 8 June 2022 but after 12 February 2021 holds good, with the defendant still needing to be found liable. This arises because the opportunity was not taken when the Sanctions and Asset-Freezing (Implementation of External Sanctions) (Jersey) Order 2021 was made on 29 January 2021 to have effect from 12 February 2021 to give effect to something along the lines of section 44 of the 2018 Act. That gap was only filled when Article 46A was inserted into the Sanctions Law with effect from 8 June 2022, which we are satisfied does not have retrospective effect.

84. What we think this means is that at the relevant time when sanctions measures were imposed following the invasion of Ukraine by Russia, and which fell to be considered in the Award, is that there was no civil immunity to apply as a matter of Jersey law. Whilst there had been some level of protection from civil actions up to 11 February 2021, although it appears that it was not uniform, which is indicative of the type of public policy that had existed prior to that date, the absence of any civil immunity at the time that the margin calls were made in February and March 2022 is sufficient for us to conclude either that the absence of an immunity provision in the Sanctions Law was deliberate until Article 46A was inserted or that it was an oversight by the Minister not to have included something in the 2021 Order implementing external sanctions, but one for which neither party was responsible. There had been some public policy in Jersey affording civil immunity, but there was an opportunity, which was not taken in 2021, to introduce the equivalent of section 44 of the 2018 Act. Further, there had been an opportunity when Article 46A was inserted into the Sanctions Law to make that provision expressly retrospective, which again had not been taken. In these circumstances, we are not persuaded that there was a uniform public policy to which Advocate Redgrave can point in support of this alternative submission.

85. As a result, we confirm the view taken in the Judgment about the consequences, focusing on the material time, as set out in paras 59 and 60. In particular, the absence of anything affording civil immunity in the months prior to Article 46A being inserted into the Sanctions Law means that it was not contrary to Jersey public policy in according with Article 44(3) of the 2018 Law to refuse enforcement of the Award.
86. In arriving at this conclusion, we are fortified by two further considerations.
87. Firstly, public policy might be said to be informed by the clear state of the law as it stood at the material time. As a general proposition, if payment under a contract would involve the commission of a crime then payment need not be made; but equally the person resisting the need to make payment in such a situation would need to show actual illegality, and not merely a reasonable belief in illegality. That is doubtless why Article 46A of the Sanctions Law was needed in the first place. It is difficult to argue that the consequences of the general law of contract are against public policy.
88. Second, in common with the Royal Court, we find helpful the comments of Sir John Donaldson MR in Deutsche Schachtbau-und Tiefbohrsgesellschaft mbH v R'As al-Khaimah National Oil Co [1986] 3 WLR 1023, 1035D (considering the provisions of the UK arbitration legislation):

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in Richardson v Mellish (1824) 2 Bing. 229, 252, ‘It is never argued at all, but when other points fail.’ It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”

89. We remind ourselves that Burrough J, in the same case cited by the Master of the Rolls, described public policy as ***“a very unruly horse which, when you get astride it, you never know where it will carry you”***. Here, there is no illegality (and if there were then a full defence would have arisen), and we cannot see how enforcement of the Award could be injurious to the public good or offensive to the public. That being so, to give effect to the public policy argument might well, as Burrough J warned, lead to unintended and unwelcome consequences.
90. It follows that both elements of the appeal relating to public policy set out in ground 1 are dismissed. This means that the entire appeal also falls to be dismissed.

The second ground of appeal

91. Accordingly, anything we say on the second ground of appeal has no bearing on the outcome, and anything we do say is no more than of academic interest, but we will deal as briefly as we can with it. In doing so, we approach the issue similarly to the Royal Court, on the basis that if we are wrong to reach the conclusions we have about retrospectivity and this case proceeds, it may assist if we set out our conclusion on this second ground.
92. The second ground of appeal challenges the conclusions in paras 96 to 102 of the Judgment that the belief of RTI was not objectively reasonable. This follows the Royal Court's conclusion that ***"we are persuaded on balance that RTI did subjectively hold the required belief in the period running up to the Termination Notice"*** (para 95, for the reasons expanded on therein).
93. The first element concentrates on the BaFin measures, arguing that excessive weight was given to them by the Royal Court. In his Contentions, Advocate Redgrave set out in detail the various facts that we have summarised earlier in this judgment. He points out that RTI believed that any payment to OWH would amount to making funds available to VTB Russia, which is a Designated Person, thereby contravening Article 11 (or possibly Article 17) of the Sanctions Law. The timing was such that until 9 April 2022, when BaFin prohibited VTB Russia from exercising its voting rights over OWH, it reasonably believed that there might be a breach of the Sanctions Law.
94. In his oral submissions, Advocate Redgrave pointed out that BaFin is not a sanctions authority but a financial regulator. There was a complicated picture at the relevant time, as was explained in the Judgment. The document dated 24 February 2022 imposing a prohibition on making payments to Group companies included within its reasoning that funds would be siphoned away. When read with the document dated 28 February 2022 relating to loans, little further information was provided. This created a difficult position for RTI and its lawyers. As a result, the Royal Court set the test to apply at too high a level. There was evidence of RTI and Rusal taking advice, including whether it was permissible to pay the margin call, and it was odd that the Royal Court accepted that there was a subjective belief based on taking legal advice, but went on to find it not objectively reasonable. He acknowledged that lawyers may get things wrong and no allowance was made in the Judgment for that possibility. He questioned what more RTI and Rusal could have done in those circumstances, where the alternative was to pay and risk imprisonment for breaching sanctions.
95. In response, Advocate Christie has referred to the test for appealing against an evaluative judgment found in paragraph 62 of Booth (A.P.) v Viscount and Anor [2022] JCA 200:

“Irrespective of whether the Royal Court was exercising a discretion or forming an evaluative judgment, the applicable test in this court will be that outlined in para. 38 of Financial Technology Ventures II (Q) LP v ETFS Capital Limited [2021] JCA 176: this court will only intervene if the court below has erred in law, or it has failed to take into account a sufficiently material factor or taken into account a sufficiently immaterial factor, or if it has reached a decision which is plainly wrong (i.e. one that is irrational, in the sense that no reasonable decision-maker could have reached it).”

96. Advocate Christie also points out that OWH itself was not a Designated Person, so making funds available to it, where the BaFin measures were known to those at Rusal, such as Ms Oganian, could not have violated the provisions in the Sanctions Law. He added that the Royal Court had conducted a two-day hearing, including hearing from Ms Oganian, who was cross-examined, referring us to some passages from the transcript showing how she answered that Rusal had no concerns about the BaFin measures.

97. The view of the Royal Court is set out in para. 97 of the Judgment:

“In our judgment, the obvious question for RTI to consider at that time was whether the BaFin measures and the subsequent suggestion by OWH of payment to a special account held with the Bundesbank were sufficient to mean that payment to OWH would not result in funds being made available (directly or indirectly) to VTB Russia as a Designated Person under the Jersey sanctions legislation. In our view, particularly for a large commercial organisation such as RTI, a belief that such measures were insufficient would not be a reasonable belief unless proper steps were taken to investigate whether the measures would negate the risk of margin call payments being made available to VTB Russia.”

98. The conclusion in the following paragraph is that ***“no such steps were ever taken”***. Moreover, in para 99:

“There was never any specific request from RTI for advice from CG as to whether the BaFin measures and the suggestion of the account at the Bundesbank would negate the risk of any payments becoming available to VTB Russia. Indeed, in the letter of 5 March to OWH (drafted by CG) there is no mention or consideration of the BaFin measures in connection with the assertion that Article 11 effectively prevented the suggested payment. Furthermore, RTI’s letter to the Minister makes no mention of the BaFin

measures, which were clearly a potentially significant matter for the Minister to consider. Similarly, in its email of advice on 10 March advising that OWH's view as to Jersey sanctions was incorrect, no consideration was given by CG to the BaFin measures."

99. Bearing in mind the way that the Royal Court has approached the BaFin measures and the test for interfering with an evaluative judgment, we are not persuaded that the test has been satisfied. The conclusion reached in respect of the BaFin measures is not in our view plainly wrong, in the sense of being irrational. The references made to the reasonableness of the way in which RTI considered the BaFin measures, as set out in the Judgment, seems to us to have been appropriate.
100. Moreover, we also remind ourselves that the Royal Court was immersed in the evidence in a way that this Court, on appeal, cannot be. As Lewison LJ memorably said in Fage UK Ltd v Chobani UK Ltd [2014] FSR 29, para 114, the Royal Court will have had regard to "***the whole of the sea of evidence presented to [it] whereas an appellate court will only be island hopping***". The "island hopping" on which we have been taken does not convince us that the Royal Court was plainly wrong. Accordingly, we reject the first element of the appeal on the second ground, being satisfied that the way the Royal Court dealt with it is sustainable.
101. The second element returns to the English Court of Appeal's decision in Celestial Aviation Services Limited v UniCredit Bank GmbH. It refers to what Falk LJ said in para 73 (cited in paragraph 101 of the Judgment, and not para 43 as set out in the Notice of Appeal) about the need to "***avoid viewing the position with the benefit of hindsight***".
102. Advocate Redgrave submits that the Royal Court fell into the trap of considering matters with the benefit of hindsight and gave the guidance in Celestial Aviation insufficient weight. Section 44 of the 2018 Act was engaged in that case, which is in similar terms to Article 46A of the 2019 Law. He refers to the following passage:

"72. As to whether the belief held was reasonable, it clearly was. I reject the suggestion that UniCredit needed to "show its workings", and the suggestion that its view was unreasonable because its real reason for not paying was a concern about its cashflow. The latter point is really a further challenge to whether UniCredit had a genuine belief that the sanctions regime applied, which I have already addressed. The former is wrong in principle. Having established a subjective belief that non-payment under the LCs was in compliance

with the UK Regulations, the question whether that belief was reasonable is an objective one.

73. As indicated above, I have concluded that UniCredit's belief about reg. 28(3) was correct. But even if I had reached a different view I would still have disagreed with the judge about whether UniCredit's belief was a reasonable one. UniCredit was required to form a view about new legislation at short notice. There is no doubt that the literal words appear to catch payments under the LCs. That is why Celestial and Constitution have focused so much on purposive interpretation. It is important to avoid viewing the position with the benefit of hindsight, having heard argument from well-prepared leading Counsel and with the benefit of judicial consideration that might ultimately appear to make clear what was in fact not at all clear at the relevant time.

74. Accordingly, I would agree with UniCredit's ground (2). UniCredit had the requisite reasonable belief and accordingly could have relied on s.44 until it received licences from ECJU and OFSI."

Advocate Redgrave has placed emphasis on the final sentence in para 73.

103. Advocate Christie submits that it is apparent that the Royal Court quoted para 73 from the judgment of Falk LJ, demonstrating that the Court was alive to this issue. Moreover, the first instance judge in Celestial had failed to apply an objective test. What the Royal Court did in respect of the guidance in this case was to consider whether RTI had asked the right questions and concluded that it had not. Because RTI had failed to seek advice on the correct questions, especially as they related to the BaFin measures and also whether it could give a notice of illegality, rather than just defaulting on paying the margin calls, the conclusion reached cannot be said to be plainly wrong.

104. We agree that the approach taken by the Royal Court was an appropriate one. As set out at the end of para 102 of the Judgment:

"... The failure by RTI even to investigate or consider the question properly, despite being a substantial commercial operation with appropriate resources at its disposal, means that its belief that it was necessary to default in making the margin payments to avoid a breach of Article 11 of the Sanctions Law, was not objectively a reasonable one."

105. We are satisfied that this was not improperly judging the position with any sense of hindsight. The focus of the Royal Court was on whether the correct questions had been asked at the relevant time, namely in February and March 2022. This was, of course, before Article 46A was inserted into the Sanctions Law, where this issue arose as how it would have operated had it had retrospective effect. We consider that the Royal Court could approach this question by having regard to the resources at the disposal of RTI and the wider Rusal Group. As Advocate Christie has also pointed out, OWH itself was not a Designated Person. The Designated Person was VTB Russia, and the BaFin measures prevented OWH paying away to VTB Russia. RTI had options, but chose not to take them. We are persuaded that the decision of the Royal Court on the second element should also be rejected.

106. The third element of the second ground suggests that the Royal Court applied a subjective test to RTI's state of mind rather than the objective test required. This element refers to paragraphs 100 and 108 of the Judgment.

107. Paragraph 100 is part of the Royal Court's consideration of the BaFin measures. It states:

“In summary, there is no evidence that RTI or its advisers ever gave any real consideration to whether the BaFin’s measures and/or the suggestion of the Bundesbank account negated the risk of payment of the margin amounting to a breach of Article 11 of the Sanctions Law.”

108. Paragraph 108 states:

“In our judgment, there is no evidence that RTI or its advisers ever gave proper consideration to whether RTI could give a notice of illegality rather than simply defaulting in payment, thereby giving OWH the ability to terminate on the ground of an Event of Default.”

109. It is not apparent to us that either of these paragraphs in the Judgment indicate that the Royal Court fell into error. Paragraph 64 of the Judgment sets out what fell to be considered if RTI were to bring itself within Article 46A of the Sanctions Law:

“In order to bring itself within Article 46A, RTI needs to show that (i) it believed that paying the margin call to OWH would make the funds available indirectly to VTB Russia as a Designated Person, so that it was ‘necessary’ to act in breach of contract by not making the payment; and (ii) this belief was

reasonable. The first requirement is a question of RTI's subjective belief; the second requirement is an objective test of reasonableness."

110. This was mentioned again in para 91 before turning to whether RTI had the necessary subjective belief, which the Royal Court "**on balance**" was persuaded of for the summary given in para 95, which included at (iv) accepting "**that RTI's belief would be much influenced by the advice it was receiving from its lawyers.**" Putting the whole Judgment into its proper context, we are not persuaded that there is any error that the Appellant can identify in what is found in paras 100 and 108. It is clear to us that the Royal Court was properly applying an objective test.
111. Paragraph 108 relates to the option that RTI had of giving a notice of Illegality. Whilst Advocate Redgrave notes that this would have led to pretty much the same consequences of the Event of Default that followed, because it would still have been an early termination, he argues that it was plainly wrong. However, as Advocate Christie points out, the terms of the MA were clear when the parties entered into it, which is a further consequence of the maxim "**la convention fait la loi des parties**". These were sophisticated business people who must have understood the consequences of what was being executed. There were inhouse lawyers at Rusal who could and should have asked the relevant questions. We agree with this assessment and we regard the maxim as applying to these parties.
112. As a result, we would also have rejected the third element of the second ground of appeal for the reasons given. We do not consider that the Royal Court erred in applying a subjective test, when it is clear from the Judgment that an objective test of reasonableness fell to be applied. The option of giving a notice of Illegality existed but, as the Award shows, this was not done promptly.
113. The consequence is that, had we needed to form a view on the second ground of appeal, as with the Royal Court's Judgment, we would have dismissed it for the reasons we have summarised as briefly as possible.

Conclusion

114. For the reasons we have given, the appeal was dismissed by reference to the first ground of appeal, where we were not persuaded that Article 46A of the Sanctions Law has retrospective effect and there was a gap in any previous public policy in the Island which could have been filled at the time or by making Article 46A expressly retrospective. Although it has no bearing on the outcome, we have added our comments about the second ground of appeal in case they are of assistance.

MCCULLOUGH JA

115. I agree that the appeal should be dismissed on Ground 1 for the reasons set out in the judgment given by the President and Dunlop JA. As noted, that is sufficient to dispose of the appeal and renders Ground 2 academic. I confess to having found that Ground 2 more troubling than Ground 1.
116. At paragraph 95 of its judgment the Royal Court set out its reasons for accepting that RTI had a genuine belief that payment of the margin calls would amount to a breach of Jersey sanctions and it was therefore “necessary” to default in making those payments. The basis of that belief included that it “would be much influenced by the advice it was receiving from its lawyers ... to the effect that payment of the margin calls to OWH would amount to a breach of Article 11 of the Sanctions Law” [95(iii) and (iv)]. It is apparent that the advice from lawyers was principally from an external firm, Cleary Gottlieb Steen and Hamilton LLP (‘CG’) as set out in the recital of the facts in the judgment from [69] onwards.
117. The Royal Court nevertheless held that this genuine belief would not have been objectively “reasonable” for the purposes of Article 46A, if that provision had been applicable. Both in relation to (a) the possibility that the effect of the BaFin measures was to negate the risk of a breach of sanctions law; and (b) consideration of service of a notice of illegality, as provided for under the contract, which might mean that it was not “necessary” to commit a breach of contract, it was held that there was “no evidence that RTI or its advisers” ever gave proper consideration to these points: see [100] and [108]. Taking account of the reliance on external legal advice, the matters covered by that advice, and the circumstances as they existed as at March 2022, it seems to me that in challenging this conclusion Advocate Redgrave’s submissions on Ground 2 may have some force. That is so, even recognising the high hurdle for disturbing evaluative findings on appeal. Ultimately, however, having agreed that the appeal should be dismissed on Ground 1, I do not express any concluded view on Ground 2.

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