



Neutral Citation Number: [2019] EWHC 2718 (Admin)

Case No: CO/313/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2019

Before:

MICHAEL FORDHAM QC, sitting as a Deputy High Court Judge

Between:

R (AGRO FOODS (ASHFORD) LIMITED)

Claimant

- and -

FOOD STANDARDS AGENCY

Defendant

DAVID HERCOCK (instructed by **Roythornes**) for the Claimant
BRENDAN McGURK (instructed by **Flint Bishop LLP**) for the Defendant

Hearing date: 19 September 2019

Judgment Approved by the court
for handing down

MICHAEL FORDHAM QC:

Introduction

1. This case arises in a regulated world where food business operators need statutory approvals and official controls from the defendant (the Agency), in order lawfully to be able to operate establishments such as slaughterhouses. The Agency is permitted, pursuant to regulation 3(4) of the Meat (Official Controls Charges) (England) Regulations 2009 (the 2009 Regulations), to impose and collect charges for providing the official controls. This case is about the scope of the Agency's powers in circumstances where charges have gone unpaid and a court judgment for their recovery has been obtained. The claim is for judicial review. It raises a question of statutory interpretation concerning regulation 4 of the 2009 Regulations, which provides as follows (with underlined emphasis added):

4. Withdrawal of controls

Where the Agency has had judgment entered against an operator of any premises for any sum which is payable to it under regulation 3(4) and the operator fails within a reasonable time thereafter to satisfy the judgment, the Agency may (regardless of any other legal remedy open to it) refuse to exercise any further controls at those premises until the judgment has been satisfied.

The issue which I have to decide is this. Do the words “at those premises” confine the power so that the Agency is entitled to refuse to exercise further controls only at premises where the current operator is the same operator against whom “the judgment” was entered? Or is the power in that respect unconfined so that, in an appropriate case, the Agency is entitled to refuse to exercise further controls even though there is a successor operator against whom no judgment has been entered? I will need to explain later the significance of the phrase “in an appropriate case”.

2. Regulation 2(1) of the 2009 Regulations, which makes reference to the relevant EU legislation and incorporates certain EU definitions (two of which I will interpose here), includes the following interpretative provision:

2.— Interpretation

(1) In these Regulations—

“*accounting period*” means a period of less than a year determined by the Agency;

“*the Agency*” means the Food Standards Agency;

...

“*controls*” means those official controls performed by the Agency—

(a) pursuant to Regulation 854/2004, at slaughterhouses, game-handling establishments and cutting plants, for the verification of compliance with the provisions of Regulation 853/2004 in so far as they apply in relation to meat

of domestic ungulates, meat from poultry and lagomorphs, meat of farmed game and meat of wild game;

(b) pursuant to Regulation 854/2004, at slaughterhouses, for the verification of compliance with the provisions of Council Regulation (EC) No 1099/2009 and the Welfare of Animals at the Time of Killing (England) Regulations 2015 in so far as they apply in relation to animals slaughtered there for human consumption;

(c) in relation to domestic ungulates slaughtered outside the slaughterhouse, pursuant to Chapter VI of Section I of Annex III to Regulation 853/2004;

(d) in relation to poultry slaughtered on farm, pursuant to Chapter VI of Section II of Annex III to Regulation 853/2004; and

(e) in relation to—

(i) farmed ratites,

(ii) farmed game mammals of the family *Cervidae* or the family *Suidae*,
or

(iii) bison,

slaughtered at the place of origin, pursuant to Section III of Annex III to Regulation 853/2004;

“*cutting plant*” means an establishment which is used for boning and/or cutting up fresh meat for placing on the market and which—

(a) is approved or conditionally approved under Article 31.2 of Regulation 882/2004; or

(b) (although lacking the approval or conditional approval that it requires under Article 4.3 of Regulation 853/2004) was, on 31st December 2005, operating as licensed cutting premises under the Fresh Meat (Hygiene and Inspection) Regulations 1995 or the Poultry Meat, Farmed Game Bird Meat and Rabbit Meat (Hygiene and Inspection) Regulations 1995;

...

“*establishment*” has the meaning given to it in Article 2.1(c) of Regulation 852/2004;

[I interpose that Article 2.1(c) provides: “‘*establishment*’ means any unit of a food business”]

...

“*food business operator*” has the meaning given to it in Article 3.3 of Regulation 178/2002;

[I interpose that Article 3.3 provides: “‘*food business operator*’ means the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control”]

...

“*game-handling establishment*” means any establishment in which game and game meat obtained after hunting are prepared for placing on the market and which—

(a) is approved or conditionally approved under Article 31.2 of Regulation 882/2004; or

(b) (although lacking the approval or conditional approval that it requires under Article 4.3 of Regulation 853/2004) was, on 31st December 2005,

operating as a licensed wild game processing facility under the Wild Game (Hygiene and Inspection) Regulations 1995;

...

“*inspector*” means an official veterinarian, an official auxiliary or any other person appointed by the Agency for the purpose of performing controls;

...

“*official controls*” shall be construed in accordance with the definition of “official control” in Article 2.1 of Regulation 882/2004;

“*official controls charge*” means the charge calculated in accordance with Schedule 2 and notified in accordance with regulation 3(1), (2) or (3);

...

“*operator*” means a food business operator who is carrying on a food business at any premises, or his duly authorised representative;

...

“*premises*” means any slaughterhouse, game-handling establishment, cutting plant, place that is outside the slaughterhouse for the purposes of Chapter VI of Section I of Annex III to Regulation 853/2004, farm or place of origin;

“*slaughterhouse*” means an establishment used for slaughtering and dressing animals, the meat of which is intended for human consumption and which—

(a) is approved or conditionally approved under Article 31.2 of Regulation 882/2004; or

(b) (although lacking the approval or conditional approval that it requires under Article 4.3 of Regulation 853/2004) was, on 31st December 2005, operating as a licensed slaughterhouse under the Fresh Meat (Hygiene and Inspection) Regulations 1995 or the Poultry Meat, Farmed Game Bird Meat and Rabbit Meat (Hygiene and Inspection) Regulations 1995

Regulation 3(1) and (4) provide as follows:

3. Charges

(1) The Agency shall, subject to the following provisions of this regulation, notify each operator of any premises at which controls have been exercised in any accounting period of an official controls charge in respect of those controls as soon as practicable after the end of that period.

...

(4) Any charge notified to an operator under paragraph (1), (2) or (3) shall be payable by him to the Agency on demand.

3. This is a ‘phoenix’ operator case. That is a description which I have taken from the judgment of Cranston J in *Allan Rich Seafoods v Lincoln Magistrates Court* [2009] EWHC 3391 (Admin) [2009] CTLC 230. In that case Cranston J described the facts as

follows (at §27): “*there was a new food business operator ..., which like a phoenix arose from the ashes of [the previous corporate entity], albeit that its guiding mind was the same*”. Cranston J was describing events which had taken place in 2000 (see §4), whereby a newly incorporated successor company (“ARS”) had acquired the food business of a predecessor company (“RIS”) which had gone into liquidation. RIS had itself acquired the food business from an original company (“ASL”) which had also gone into liquidation. The same ‘guiding mind’ individual was the principal behind all three companies.

4. The ‘phoenix’ scenario in the present case arises as follows. Charing Meats Ltd (CML), incorporated on 23 November 2015, obtained conditional approval on 2 December 2015 and full approval on 17 March 2016 to operate a slaughterhouse at The Abbatoir, Ashford Road, Charing, Kent. Official controls were provided by the Agency and charges were notified. CML failed to pay and six sets of legal proceedings ensued. On 19 December 2017 a judgment was entered against CML, by consent, in the sum of some £85,000. The judgment included a stay while agreed payments of £2,000 per month of the arrears were made. By March 2018 CML was again in default and the stay was lifted, so that the whole judgment became enforceable. CML ceased trading on 28 March 2018 and the Agency’s solicitors wrote on 4 April 2018 to CML seeking recovery of what was by then in excess of £100,000. Meanwhile, on 22 March 2018 the claimant (Agro Foods (Ashford) Limited) was incorporated, after which the claimant purchased CML’s assets and began trading from the slaughterhouse. CML and the claimant had the same director, Mr Jewel Ahmed. On 28 April 2018 the Agency formally issued notice of regulation 4 withdrawal of official controls at the slaughterhouse, with effect from 27 April 2018. On 1 May 2018, the claimant agreed to pay £1,000 per week off CML’s arrears and official controls were reinstated the next day. The claimant secured conditional approval on 15 May 2018 and full approval on 14 November 2018. CML was placed in voluntary liquidation on 22 June 2018 and Mr Ahmed made a formal statement of affairs in respect of CML on 12 June 2018, referring to the more than £100,000 owing by CML to the Agency. On 29 August 2018 the claimant’s solicitors wrote to the Agency challenging the lawfulness of the collection of CML’s arrears from the claimant. On 12 October 2018 the claimant discontinued the weekly payments of £1,000 from those arrears, having paid some £23,000.
5. Continuing the story, on 14 January 2019 the Agency issued a decision invoking regulation 4 and withdrawing official controls with effect from 21 January 2019, until CML’s arrears of now some £82,000 were paid by the claimant. On 21 January 2019 the claimant commenced these judicial review proceedings, challenging the decision of 14 January 2019 and seeking recovery of the £23,000 as unlawfully levied charges. Having been threatened with an interim relief application the Agency decided to continue ongoing official controls pending resolution of the claim, on the basis that the claimant would continue to pay the charges in respect of ongoing official controls. Permission for judicial review was granted on 29 April 2019. The substantive hearing was subsequently fixed. The pleadings, evidence and skeleton arguments were all filed.

“Establishment” as a three-dimensional entity

6. The *Allan Rich (Lincoln)* case was not a case about charges or official controls. It was, however, a case which addressed the nature of the legal concept of “*establishment*” for the purposes of the same statutory scheme as is in play in this case. It is that concept of “*establishment*”, as analysed in *Allan Rich (Lincoln)*, which is the lynchpin of the claimant’s argument in this case.
7. The analysis in *Allan Rich (Lincoln)* came to this. An “*establishment*” is the ‘unique three-dimensional entity’ which is a combination of ‘where-what-who’ features (I will connote these as X-Y-Z): a particular physical place (X) where a particular business operation (Y) is conducted by a particular operating person (Z). The logic would be that, by changing any one of these features a different ‘unique three-dimensional entity’ is produced. That would mean there is a distinct “*establishment*”, which in principle would then require a distinct approval. The logic allows for the same person (Z) being able to operate more than one “*establishment*”, by operating in parallel in the same way but at distinct locations (which I can connote as X-Y-Z and A-Y-Z). The logic means that a transfer by an operator to a successor, of a particular business at a particular location, in principle produces a new and distinct “*establishment*” (which I can connote as X-Y-Z becoming X-Y-B). That is the idea of “*establishment*”. Cranston J put it in this way:
 46. ... the definition of establishment is clear — a unit of a food business... In my view establishment denotes both premises and the manner in which those premises are being used by the food business operator. Thus approval is required for a food business or unit of a food business and not merely for the premises from which the business is conducted...
 47. ... the guidance is incorrect in suggesting that there is no need for approval if the new operator of an establishment continues the activities for which approval was granted in the past... It may be that the guidance has some application in the case where control changes with an existing food business operator, for example the transfer of ownership of a company with the company remaining as the food business operator. I express no concluded view on that. Here, however, there was a new food business operator, the appellant, which like a phoenix arose from the ashes of Roland International Seafoods Ltd, albeit that its guiding mind was the same, Mr Saldanha. In my judgment ... the appellant would need approval.
8. In the present case it was agreed that this ‘three-dimensional unique entity’ approach to “*establishment*” is correct. Counsel on both sides agreed on the ‘where-what-who’ components of the analysis. Reference was made to the sequel case of *R (Allan Rich Seafoods Ltd) v West Lindsey District Council* [2010] EWHC 1232 (Admin) [2010] CTLC 41 but neither party considered it necessary for me to delve into that or other case-law. In *Allan Rich (Lincoln)* the need to analyse “*establishment*” had arisen because local authority action was being taken against ARS for operating an unapproved establishment. As the judge there explained, the requirement that a food business operator ensure that an establishment is approved by a competent authority was derived from Article 6(3) of Regulation (EC) 852/2004 (see §24). The issue was whether ARS could rely on an

approval originally granted to ASL, to show that ARS had been operating an approved establishment. In other words, ARS was arguing that the three-dimensional entities X-Y-Z and X-Y-B were the same “*establishment*”. Cranston J rejected that argument.

9. On the basis of the agreed understanding of “*establishment*” it was common ground that the claimant would be right on the question of statutory interpretation in this case if the drafter of regulation 4 had used “*establishment*” rather than “*premises*”, so that regulation 4 instead had read:

Where the Agency has had judgment entered against an operator of any ~~premises~~ establishment for any sum which is payable to it under regulation 3(4) and the operator fails within a reasonable time thereafter to satisfy the judgment, the Agency may (regardless of any other legal remedy open to it) refuse to exercise any further controls at ~~those premises~~ that establishment until the judgment has been satisfied.

This wording, it was agreed, would have meant there was a restricted power, in the way that the claimant says regulation 4 is restricted. That is because “*that establishment*” would be apt to describe ‘that same unique three-dimensional entity’ which necessarily had CML as operator, and not the new and distinct entity operated by the claimant.

Four other points of common ground

10. Before turning to analyse the claimant’s argument these further points are worthy of emphasis: First, it is agreed that charges are “*payable ... under regulation 3(4)*” by the operator who operated the premises at the time when the controls were exercised. Counsel were agreed that if there were a change of operator at the same location but midway during an accounting period, each operator would be liable to pay charges, and only in respect of those controls which had been exercised while that operator was the operator of the premises. That, they agreed, is how regulation 3(4) is to be interpreted and applied.
11. Secondly, it is agreed that there is nothing in EU legislation or domestic primary legislation including the Human Rights Act 1998 which requires that the power in the relevant respect be confined rather than unconfined. The drafter of regulation 4 was not required to have the confined power. The claimant accepts that the power could lawfully be unconfined in the relevant sense, if clearly and expressly so designed.
12. Thirdly, it is common ground that if the power was relevantly unconfined so that the Agency had the power (*vires*) to act under regulation 4, it acted lawfully in exercising that power in this case. This is why I used the phrase ‘in an appropriate case’ in describing the position if the power is unconfined. Regulation 4 confers a power to withdraw controls; it does not impose a duty to do so. A statutory power must be exercised fairly and reasonably. Reasonably, in the present context, would in my judgment be likely to include considerations of proportionality. Mr Hercock accepts in the present case that, if the power in principle extends to discontinuing controls in respect of a successor operator at the same location, there is no basis for impugning the fairness,

reasonableness (or proportionality) of the exercise of the power in the present case. In my judgment he is plainly right about that.

13. Fourthly, it was common ground that the statutory scheme confers no power on the Agency to refuse approval or withdraw approval for any establishment or any operator, by reference to unpaid charges, by whomever there has been default in paying charges. Decisions relating to granting, refusing and withdrawing approval are, it was agreed, required to be reached on the hygiene merits. If an establishment meets the applicable standards as to hygiene then an approval cannot be withheld. If an establishment continues to meet the applicable standards as to hygiene then an approval granted cannot be withdrawn. That means an actual or anticipated default in paying charges is no basis, under the statutory scheme as it has been designed, for refusing an approval to a successor company.

The claimant's argument

14. I turn to consider Mr Hercock's argument on behalf of the claimant. I express my gratitude to him and Mr McGurk for the Agency, and to those who instructed them, for their assistance. The claimant's argument really came to this: that "*premises*" in regulation 4 means "*establishment (unit of food business) for which approval has been granted*"; so that "*those premises*" means "*the approved establishment of the operator against whom the judgment was entered*". On that basis, Mr Hercock submits, the power is confined and the Agency is entitled to refuse to exercise further controls only at premises whose current operator is the same operator against whom the judgment was entered; and not if it is a successor operator.
15. The essential steps in this argument, as I saw them, were as follows.
 - i) First, Mr Hercock had these key points regarding the approach to interpretation. Regulation 4 needs to be objectively interpreted (citing *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme* [2001] 2 AC 349 at 396G-H), starting with the ordinary and natural meaning of the words. As a provision which relates to charging, a strict approach is appropriate (citing *R (Jaspers Ltd) v Food Standards Agency* [2013] EWHC 1788 (Admin) [2013] PTSR 1271 at §40); as it should be where the consequences are penalising and intrusive for economic interests. The Court is not concerned with the subjective intention of the drafter, nor is it appropriate to seek to identify the 'mischief' at which regulation 4 was directed by reference to documents which were not in the public domain (citing *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) at §§12-13).
 - ii) Secondly, Mr Hercock had these key points as to the correct interpretation of regulation 4. Regulation 2(1) provides that: "*In these Regulations ... 'premises' means any slaughterhouse ...*"; "*'slaughterhouse' means an establishment ... which ... is approved or conditionally approved*"; and "*'establishment' has the meaning given to it in Article 2.1(c) of Regulation 852/2004 [namely: 'any unit of food business']*". Since these definitions apply "*[i]n these Regulations*", the

definition of “*establishment*” applies within the definition of “*slaughterhouse*”, which in turn applies within the definition of “*premises*”. In consequence, “*premises*” in regulation 4 means “*establishment (unit of food business) for which approval has been granted*”. That is because the true meaning of “*establishment*” in the 2009 Regulations, derived from EU Regulation 852/2004, is the ‘unique three-dimensional entity’ described in *Allan Rich (Lincoln)* case, from which there is no reason to depart. The phrase “*those premises*” is therefore to be read as “*that approved establishment*”, meaning the approved establishment of “*that operator against whom that judgment was entered*’. This is the ordinary and natural meaning of Regulation 4. It is supported by regulation 3(1) under which after the end of any accounting period the Agency has to “*notify each operator of any premises at which controls have been exercised in [that] accounting period*”, which the Agency accepts would mean two different notifications for two different operators were there a change of operator and a new approval during the same accounting period. It is also supported by the phrase “*until the judgment has been satisfied*” in Regulation 4, because the judgment is against the defaulting operator and the drafter should not be taken to have intended that a successor operator could, as a non-party to a “*judgment*”, then ‘*satisfy*’ that judgment entered against its predecessor.

- iii) Thirdly, so far as any question of legal policy is concerned, Mr Hercock submitted as follows. The claimant’s interpretation gives Regulation 4 an identifiable purpose and rationale addressing a discernible mischief (excusing the ongoing provision of official controls for an operator in default of charges leviable against it). So far as the unpaid charges and any defaulting predecessor company are concerned, these are a matter for pursuit under the law applicable to insolvency. Insofar as there are policy reasons to extend regulation 4 to cover the position of a successor company, the answer is that regulation 4 could have been so designed and could be amended for the future. Moreover, to give regulation 4 the Agency’s suggested wider meaning would not be human rights compatible, as applicability to third party successor operators would lack the criteria needed (citing *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 at §119) to protect against arbitrary exercise of power interfering with property rights (citing *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at §§107 and 114).

My Analysis

16. I accept Mr Hercock’s key points at Step i) and have adopted that approach to interpretation, but I cannot accept his interpretation. In my judgment, “*premises*” in regulation 4 is not conceptually identical to “*establishment*”; and “*those premises*” is not conceptually identical to “*that establishment*” being “*the approved establishment of the operator against whom the judgment was entered*”. The power is not confined so as to be available only in respect of the defaulting operator against whom the judgment has been obtained and who has failed to satisfy it. The features which lead me to that conclusion are as follows.

17. First, the ordinary and natural meaning of the words “*any premises*” and “*those premises*” connote the same physical facility where a predecessor operator and a successor operator can each at different times have operated in a way requiring official controls. It is a natural use of language to speak of that as involving the same “*premises*”: “*those premises*”. The facts of the present case powerfully illustrate that. To sell the business and put ‘under new management’ over the door does not connote different “*premises*” as a matter of ordinary language.
18. Secondly, Regulation 4 does not use “*establishment*” and “*that establishment*”. The claimant says that it how it should be read. But the drafter could so easily have said this. The tools were readily to hand. Looking objectively, it is unconvincing to think of the drafter as intending “*establishment*” and then achieving that intention, not by using that word straightforwardly, but through an three-step indirect process of dual incorporation by reference, by providing that “*premises*” means “*slaughterhouse [etc]*”; and then by providing that “*slaughterhouse*” means “*an establishment ... which ... is approved*”. Why not just say “*establishment*” directly?
19. Thirdly, it is right that “*establishment*” has been recognised to be the ‘unique three-dimensional entity’ which I have described above. However, as I have just explained, “*establishment*” was not used in regulation 4; “*premises*” was. The provisions of regulation 2(1) do not, in my judgment, lead to the unqualified proposition that there is a conceptual identity between “*premises*” and “*establishment*”. Regulation 2(1) does not say that. It does not even say “‘*premises*’ means ‘*establishment*’”. In my judgment, the drafter was not displacing the common sense, physical nature of “*premises*”. The correct, objective interpretation is the common sense one. It can be put in this way. We understand that “*premises*” have a nature which is physical. But, under the 2009 Regulations we need to know this: what premises are we talking about? What is the physical entity? What physical entity do we “mean”? The drafter answers that question in regulation 2(1): “‘*premises*’ means *any slaughterhouse ...*”; and in turn “‘*slaughterhouse*’ means *an establishment ...*” This makes sense, but does not require us to forget the physicality which connotes “*premises*”, as a matter of common sense and in this statutory scheme. For “*premises*” is a physical entity: it is the ‘where’. There is another way the same idea can be put. Identifying the “*slaughterhouse*”, which is the “*establishment*”, tells us what the “*premises*” are because it tells us where they are, which is what we need to know.
20. Fourthly, this physical, locational approach to “*premises*” was unmistakably adopted by Cranston J himself in *Allan Rich (Lincoln)*. That, it will be recalled, was the judgment which recognised the ‘unique three-dimensional entity’ approach to “*establishment*”. I therefore return to §46 of Cranston J’s judgment, this time in full, illustrating with my added emphasis how he clearly saw “*premises*” as the physical feature (where) the three-dimensional entity which was “*establishment*”:

46. In my view, whatever the position under the pre-2006 law, “establishment” no longer means premises. It may be that the use of the term “*establishment*” in some parts of the Community instruments, and the Code of Practice, connotes a physical location, premises or, in the case of fishery products, possibly a fishing

vessel. However, the definition of establishment is clear — a unit of a food business. Read in the context of legal instruments designed to further food safety, and which place obligations on food business operators, establishment must mean something more than premises. An assessment merely of the suitability of the premises would not fulfil the food safety purpose of the EC Regulations. In my view establishment denotes both premises and the manner in which those premises are being used by the food business operator. Thus approval is required for a food business or unit of a food business and not merely for the premises from which the business is conducted. If the Community instruments had intended that the suitability of premises should be assessed, in my view they would have said so. There was a clear and intended change in the 2004 Community instruments from the 1991 directive.

21. Fifthly, this understanding of “*premises*” finds reinforcement in the 2009 Regulations themselves. The three-dimensions of “*establishment*” can clearly be seen in regulation 2(1) itself, when it provides that: “‘*operator*’ means a food business operator who is carrying on a food business at any premises ...” It can be seen that “*premises*” is there being used as one of the three dimensions, alongside the other two. It would in my judgment if the word “*premises*” itself connoted “*establishment*” so that it already meant the unique combination of the particular location (where) and the particular “*food business*” (what) and the particular “*operator*” (who). That would also mean that there is no word in the Regulations for the location, because the obvious word – “*premises*” – could not be the right one. “*Premises*” is the place where officials have to go to provide controls; where “*time costs [are] generated by those premises*” (Schedule 2 §1). “*Premises*” is where a demand is to be delivered, or can be affixed (regulation 5(3)). “*Premises*” of an “*operator*” can be occupied or unoccupied, which is why regulation 5(3) speaks of the situation when “*the premises of the operator are unoccupied*”. Regulation 3(1) does not assist the claimant. It provides that, at the end of the accounting period the Agency is considering “*premises at which controls have been exercised during [that] accounting period*” and then has to notify “*each operator of any premises*” of the relevant “*charge in respect of those controls*”. If there have been a predecessor operator and a successor operator during the same accounting period, it is a natural interpretation of this provision that two different notices will be raised, but that is in no way inconsistent with the “*premises*” having been the same. Nor, in my judgment, does the phrase “*until the judgment has been satisfied*” assist the claimant. The drafter is describing the position when the arrears, arising under the judgment, remain unsatisfied. The structure and breadth of the language are in my judgment sufficient to allow for a successor operator to discharge those arrears such that the judgment would be “*satisfied*” for the purposes of lifting the withdrawal of the controls.
22. Sixthly, it is relevant to have in mind the consequences of the competing interpretations. If regulation 4 were confined in its application to cases where the defaulting operator – against whom judgment has been entered – remains in operation and seeks continued official controls, the Agency would be at the mercy of ‘phoenix’ arrangements by which a controlling person behind a corporate entity could acquire a new corporate entity and

insist on continuation – provided only that hygiene standards were met – leaving past charges for official controls unsatisfied. The new off-the-shelf company could have the same directorship and shareholding as the predecessor, and the arrears could be avoided. ‘Phoenix’ successors were a well-recognised phenomenon in this regulated world well before 2009, as can be seen from the *Allan Rich (Lincoln)* case itself. It would be very surprising, looking objectively, if the drafter had intended to leave that problem unaddressed, especially in circumstances where no other provision was available or included within the statutory scheme – such as the power to refuse approval for the ‘phoenix’ company – could be invoked. On the other hand, a drafter who had wanted to include the ‘phoenix’ scenario within the ambit of the power could be expected to use the language “*those premises*”. That is a natural drafting solution which makes good sense.

23. Seventhly, this analysis is not technical legal subtlety; nor is it loose expansionism. It is, in my judgment, the objectively clear and straightforward interpretation, approached with the rigour suitable to a charging provision with penalising and intrusive consequences. It means there is a power, which must be lawfully exercised. It is not, in my judgment, an interpretation which renders the power open to arbitrariness, absent a greater degree of drafting precision in the legislation, whether applying common law standards nor for that matter applying standards of legal certainty found within the ECHR case-law, even assuming that rights under Article 1 of Protocol 1 to the Human Rights Act 1998 are interfered with, which in those circumstances it is unnecessary to decide. The protections against arbitrariness lie in the public law restrictions applicable to the exercise of the power.
24. I cannot therefore accept Mr Hercock’s key points at Steps ii) or iii), and his monetary claim also fails. Inevitably, other points were made by the parties. They included reference to the broader EU and domestic legislative framework; the EU Charter for Fundamental Rights; Explanatory Notes and an Explanatory Memorandum; case-law and textbook commentary on principles of statutory interpretation; materials relevant to just satisfaction under the Human Rights Act 1998. None of these in my judgment took matters any further in either direction, once the essentials were identified and analysed.

Internal documents

25. That leaves two matters with which I should deal. The first is to explain the approach I took to the evidence filed by the Agency. This was relevant to Mr Hercock’s Step i) which, as I have explained, I accepted. On this topic, I adopted the same approach as was articulated by Sales J (as he then was) in *Bogdanic*. He said this:

12. The Secretary of State filed evidence in relation to the preliminary issue in the form of a witness statement of Susan Wale of the Home Office, dated 9 June 2014. Ms Wale provides information about the background to the enactment of the 1999 Act, the 2002 Act, the making of the Commencement Order and the operation of the carriers’ liability regime contained in Part II of the 1999 Act. Since the preliminary issue is an issue of law, turning on the proper interpretation to be given to the Commencement Order, it was not necessary for Ms Wale to give oral evidence. Her evidence was unchallenged.

13. However, to a significant degree, Ms Wale's evidence was irrelevant to the issue of interpretation of the Commencement Order which the court has to determine. Ms Wale set out the background and internal departmental documents which made it clear that the policy intention of the Secretary of State when introducing the 2002 Act amendments of the 1999 Act and then commencing those amendments by the Commencement Order was indeed to continue the application of the carriers' liability regime in relation to immigration control zones in France, as well as in relation to United Kingdom territory. But in construing a legislative instrument such as the Commencement Order, just as in construing a legislative instrument in the form of an Act of Parliament, it is a basic constitutional principle that the citizen or person subject to the relevant law should have the means of access to any material which is said to provide an aid to construction of that instrument. It is only material which is in the public domain and of clear potential relevance to the issue of interpretation of a legislative instrument which can be treated as having any bearing on the proper construction of that instrument: see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 , 614A (Lord Reid), 638D-H (Lord Diplock) and 645C-H (Lord Simon of Glaisdale); *Fothergill v Monarch Airlines Ltd* [1981] AC 251 , 279F-280B (Lord Diplock: "... the need for legal certainty demands that the rules by which a citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible ..."); and *R (Public and Commercial Services Union) v Minister for the Civil Service* [2010] EWHC 1027 (Admin); [2010] ICR 1198 , [53]-[55]. The subjective policy intent of the Secretary of State or of those in his or her department is irrelevant to the question of interpretation before the court.

26. Even if there are cases in which it could be appropriate to have regard to internal documents as being an aid to construction, I am quite satisfied that this is not such a case. Mr McGurk invited me to accept witness statement evidence and accompanying documents as supporting a conclusion that the "*mischief*" at which regulation 4 was aimed was, or included, the 'phoenix' company scenario. I reject that contention. I add this: (1) I regard it as clear from the structure and wording of regulation 4, as well as the obvious significance of a case where the defaulting operator remains in occupation, that the 'phoenix' scenario was not the sole problem addressed by regulation 4 nor could the materials have supported a contrary view; (2) I regard it as clear and supported by the position in the public domain (see *Allan Rich (Lincoln)* itself) that 'phoenix' company scenarios were a real and significant phenomenon providing part of the setting in which regulation 4 was drafted; and (3) The materials in this case would not have supported a smooth and uniform picture, identifiable at the relevant time, even leaving aside the constitutional perils of relying on internal unpublished materials described by Sales J.

Adjournment

27. The other matter with which I must deal is the giving of my reasons relating to requested adjournment of the substantive hearing, which request I refused with reasons to follow.

The position was as follows. The hearing was fixed for Tuesday 17 September 2019. On Friday 13 September 2019 the claimant's solicitors filed a statement of costs, signed by a partner, confirming that the fees for the substantive hearing had been incurred and the claimant was liable to pay them. At 1308 on Monday 16 September 2019 the defendant's solicitors emailed to ask who was funding the litigation, and referring to the possibility of seeking costs against Mr Ahmed personally if the claim was dismissed. That email stated that the claimant was understood no longer to be trading, approval had been withdrawn and an application for approval had been received from a new successor company. At 1832 the claimant's Counsel Mr Hercock emailed me to say that as at Monday afternoon he and his solicitors were without instructions and unable to obtain instructions from 'the claimant', and informing me that it was intended to request an adjournment, but that Mr Hercock would attend and remain to assist the Court if an adjournment were refused.

28. I was not willing to adjourn the hearing. The request was far too late in the day. The hearing had been fixed. There was no proper application and no proper reasons. The costs had all been incurred. The issue was a question of law and both legal teams were in a position to deal with it. Any question as to costs and who should pay them would depend on success or failure in the case and the merits of any application, dealt with in a procedurally proper manner, as and when it arose. The claimant's solicitors were on the record and the claimant's Counsel had been briefed. It would not be in the interests of justice, nor in the public interest, to adjourn. I did not need to conduct an investigation, or allow further time, to make a factual enquiry as to the recent past and the present position. It was relevant for me to know that, on the face of it and by reference to documents in the public domain at Companies House, the claimant had appointed a new director Mr Williams on 2 September 2019 and Mr Ahmed's directorship had been terminated on that same date, 2 weeks before the substantive hearing. I was also shown a copy of what was on its face an application for approval from a new food business operator called Farm Fresh Quality Foods Co Ltd, whose director is said to be a Mr Palekar, at the same location. Concerns were understandably expressed on behalf of the Agency. Their position was that it was in the interests of justice, and the public interest, to hear the argument and determining the question of law. I agree, and that is what I did.
29. Mr McGurk made clear that the Agency accepted that Mr Hercock and his instructing solicitors had acted with candour and propriety in their presentation of the position to the Court, in explaining the circumstances, and in their preparedness to remain to assist the Court so that I could hear the arguments on the point of law and determine it with full assistance. So do I.
30. I was also satisfied that this case had been properly and fully prepared, that it was fully and squarely put in writing and orally, so that there was on the face of it no conceivable disadvantage to the claimant from any discontinuance of communication between it and its lawyers, for whatever reason that position has arisen.

Conclusion

31. For the reasons explained above, the claim for judicial review will be dismissed.