

UK High Court Issues Key Decision Considering UK Sanctions 'Ownership and Control' Test

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On 27 January 2023, Mrs Justice Cockerill handed down judgment in the case of *PJSC National Bank Trust and another v Mints and others* [2023] EWHC 118 (Comm). This is one of the first judgments in the English courts to consider certain key elements of the post-Brexit autonomous UK sanctions regimes and the substantive impact of sanctions on litigation following the Russian invasion of Ukraine in March 2022.

The underlying proceedings, which were commenced in June 2019, involve claims brought by two Russian banks for US\$ 850 million on the basis that the Defendants conspired with representatives of the Claimants to enter into uncommercial transactions with companies connected with the Defendants. On 28 February 2022, shortly after the Russian invasion of Ukraine, the Second Claimant—Bank Otkritie—was targeted by UK sanctions measures and became a 'designated person' for the purpose of the UK sanctions regime in respect of Russia. The Defendants subsequently brought applications seeking a stay of the proceedings and release from undertakings that they had given the Court in connection with the freezing orders obtained against them. The judgment handed down on 27 January 2023 concerns those applications.

The Defendants argued that the applications should be granted on the basis that (i) the entry of any judgment in favour of the Claimants would in itself be a breach of sanctions measures and (ii) various interlocutory stages could not be completed without a licence from the UK sanctions regulator, OFSI, which OFSI did not have the power to grant. In particular, the Defendants argued that OFSI could not license a number of standard litigation steps including the satisfaction of adverse costs orders, the provision of security for costs or the payment of any damages on the Claimants' cross-undertaking. Finally, the Defendants argued that the First Claimant should be treated as a designated person on the basis that it is owned or controlled by a designated person.

The judgment can be broken down into three key issues:

- **The judgment issue:** Can a judgment lawfully be entered in favour of a designated person?

- **The licensing issue:** Can OFSI license certain activities (including in relation to adverse costs orders, security for costs etc.)?
- **The control issue:** Is the First Claimant owned or controlled by a designated person?

THE JUDGMENT ISSUE

The judgment issue is an important one that has troubled sanctions and litigation practitioners for some time. The question was whether the English courts could enter a judgment in favour of a designated person without breaching applicable sanctions prohibitions. In particular, the Defendants argued that entry of a judgment, and the ensuing judgment debt, would breach one of two prohibitions: (i) the prohibition on “dealing” in the funds or economic resources of a designated person; and/or (ii) the prohibition on “making available” funds to a designated person. The Court therefore considered the relevant provisions of the statutory framework under the Sanctions and Anti-Money Laundering Act 2018 (“SAML A”).

The first sub-issue in this regard was whether a judgment debt constituted a “fund” or an “economic resource” for the purpose of the applicable sanctions prohibitions. Ultimately, the Court concluded that a judgment debt is a “fund” on the basis that the term is intended to be construed broadly and a judgment debt is similar in nature to other types of assets classified as funds, such as debts and debt obligations.

The second sub-issue was whether entering judgment in favour of a designated person would amount to “dealing” with the funds of, or “making available” funds to, a designated person. The determination of this sub-issue hinged on the application of the principle of legality to the statutory framework under SAML A. Essentially, the issue was whether a prohibition on the Court entering judgment would infringe the right of access to courts, and whether any such infringement was clearly intended by SAML A. The Claimants argued, and Mrs Justice Cockerill ultimately agreed, that the prohibition would infringe the right of access to the courts, and that there was no clear legislative intention to derogate from that right. In the absence of any such clear intent, the principle of legality operated in this context to preclude an interpretation of SAML A that would prohibit the Court from entering judgment in favour of a designated person. In short, the Court found that the relevant sanctions measures did not prohibit the Court from entering judgment in favour of a designated person.

This interpretation of the relevant sanctions provisions builds on an interpretation advanced by the Court of Appeal in the case of *R v R* [2016] Fam 153. In that case, Lady

Justice Arden (as she then was) drew a distinction between the making of a court order and the enforcement or satisfaction of that order. Mrs Justice Cockerill referred to that decision and tentatively approved the distinction that was drawn. In other words, the entry of a judgment in favour of a designated person is not the same as the payment of any judgment debt. While the latter is clearly a breach of the prohibition on “dealing”, the former is not.

THE LICENSING ISSUE

It was common ground between the parties that the applicable sanctions prohibitions prevented designated persons from doing three acts that are essential to conducting litigation in the English courts: (i) paying adverse costs orders; (ii) providing security for costs; and (iii) paying damages on a cross-undertaking. The Defendants argued, moreover, that OFSI did not have the power to grant a licence to designated persons allowing them to do these things.

The Court found that all three acts were licensable under SAMLA. In relation to the payment of adverse costs orders, the Court found that this was covered by the licensing ground relating to the payment of “*reasonable expenses associated with the provision of legal services*”. The Judge held that the payment of adverse costs orders “*are a routine and necessary feature of adversarial litigation*”. As a result, an absolute prohibition would cut across the designated person’s right of access to the courts. Moreover, the payment of costs orders *by* a designated person aligned in any event with the overall scheme and purpose of SAMLA and other relevant sanctions legislation. Broadly the same reasoning applied in respect of security for costs.

The Court’s approach to damages on the cross-undertaking was slightly different. The Judge considered the licensing ground that exists “*to enable an extraordinary expense of a designated person to be met*” and found that it covered the cross-undertaking in damages. The Judge noted that the cross-undertaking in damages was “*not an ordinary or routine cost*” and occurs only after an inquiry as to whether there should be liability. On that basis, the relevant licensing ground covers a much broader range of circumstances (anything ‘not ordinary’) than was previously thought to be the case. Further, the Judge’s approach to the “*extraordinary expense*” licensing ground (Schedule 5, paragraph 5) could be applied by analogy to the “*extraordinary situation*” licensing ground (Schedule 5, paragraph 7). This development could therefore have a significant impact on the approach to licensing under Schedule 5 of the Russia Regulations.

THE CONTROL ISSUE

The third issue concerned the much-debated problem of how to interpret and apply the ‘ownership or control’ provisions in UK sanctions law. These provisions state that if a person is owned or controlled directly or indirectly by a designated person, then that person should also be treated as a designated person. The applicable regulations then set out two conditions for determining ‘ownership or control’: (i) where the designated person holds more than 50% of the shares or voting rights in an entity (or holds the right to appoint or remove a majority of the board of directors (the “first condition”)); or (ii) where it is reasonable, having regard to all the circumstances, to expect that the designated person would be able to achieve the result that the entity’s affairs are conducted in accordance with its wishes (the “second condition”).

The specific question in the context of the case was whether the First Claimant—PJSC National Bank Trust (“NBT”)—was owned or controlled by one or both of two designated persons: Vladimir Putin, the Russian President, and Elvira Nabiullina, the head of the Central Bank of Russia. Given that the issue had no practical effect in light of the Judge’s conclusions on the first two issues, the Judge addressed it “*briefly and somewhat tentatively*”. The Judge did not, therefore, make a binding determination on the issue, which means this is not necessarily the final word. As a starting point, the Judge accepted that, for the purpose of the second condition, it was reasonable to expect that Mr Putin would be able to achieve the result that NBT’s affairs be conducted in accordance with his wishes. However, the Judge found that that was not the intention of the relevant legislation, including for the following reasons:

- **First**, the second condition was essentially “backstopping” any form of ownership and control that falls slightly outside of the first condition. For example, a situation where a designated person has established a discretionary trust where the companies within the trust are owned by other trustees but where the designated person ultimately retains effective control of the companies within the trust.
- **Second**, the United Kingdom’s sanctions regime in respect of Russia does not take aim directly at the Russian state or its main entities, but rather targets individuals and entities “*at a personal level*”.
- **Third**, it would be ‘odd’ if major entities (such as NBT or Gazprom) were intended to be “*sanctioned by a sidewind, in circumstances where they would have no notice of the sanction and be unable themselves to challenge the designation under section 38 of the Act.*”

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- **Fourth**, there are powerful ‘real world’ reasons for resolving the question by reference to the principle against doubtful penalisation. In particular, the fact that the legislation imposes not insignificant criminal sanctions and “*commercial people also need to know if a particular company ... is sanctioned*”.
 - **Fifth**, the OFSI guidance indicates that the two conditions should be read cohesively and that “*it is not the intent for complex investigations to have to be made or evidence gathered*” in order to resolve the question of ownership or control.

On that basis, the Judge concluded that NBT was not owned or controlled by Mr Putin or Ms Nabiullina. However, on the question of whether office-holders more generally should ever be deemed to ‘control’ the institutions or companies they form part of, the Judge found that this was unclear. Although political office was found to fall outside the ambit of ‘control’, the Judge noted that the same was not necessarily true in respect of corporate office-holders: “[a] *line which included corporate office-holder control but excluded public/government office-holder control would seem however to align with the overall approach of this sanctions regime.*” The issue of whether a corporate office-holder would be deemed to control the company in question was therefore left unresolved.

COMMENTARY

The judgment in *NTB v Mints* is an important first step to achieving some measure of clarity regarding UK sanctions provisions under SAMLA and related secondary legislation. The judgment issue has been definitively resolved for now (subject to appeal): it is not unlawful for a Court to enter judgment in favour of a designated person (nor does the Court require an OFSI licence to do so). Moreover, the general thrust of the decision is that access to the courts should not be precluded in the absence of clear statutory language. In other words, designated persons are still allowed to pursue litigation in the English courts, albeit that there will be some practical difficulties including the need to obtain licences in some circumstances.

On the issue of control, the Judge provided a much-needed indication of how the courts might approach the issue in future proceedings. Based on this decision, it appears that the courts will take a narrow approach to the second condition, emphasising that commercial operators cannot be expected to undertake extensive investigations to determine who should and who should not be treated as a designated person for the purpose of their commercial dealings. Following the approach taken here, it may only be in rare cases that a designated person controls an entity other than via the control mechanisms set out in the first condition. Unfortunately, however, this is not a comprehensive or definitive interpretation of the ‘ownership or control’ test: the

guidance provided by the Judge will therefore only go some way to assuage the practical difficulty of identifying entities controlled by designated persons. Given the importance of the issues in the case, moreover, the Judge granted permission to appeal, which means there will be a reconsideration of some of these issues before the Court of Appeal.

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