

Court of Appeal Gives Judgment on Effect of Russia Sanctions on Pending Litigation

October 23, 2023

In June 2019, PJSC National Bank Trust (the “**First Claimant**”) and PJSC Bank Otkritie Financial Corporation (the “**Second Claimant**”) commenced litigation in the English High Court, claiming substantial damages on basis of alleged conspiracies resulting in uncommercial transactions whereby loans were replaced with worthless or near worthless bonds.

Following the designation of the Second Claimant for purposes of the UK’s Russia-related sanctions regime, the Defendants applied to the court for a stay of proceedings. On 27 January 2023, that application was dismissed in the High Court.¹

The First to Fourth Defendants brought an appeal against the High Court’s decision which, on October 6, 2023, the Court of Appeal (the “**Court**”) dismissed.²

This memorandum explores the reasoning of the Court’s judgment and its wider implications.

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¹ *PJSC National Bank Trust & Anor v Boris Mints & Ors* [2023] EWHC 118 (Comm), accessible [here](#).

² *Boris Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132, accessible [here](#).



I. Factual Background

The Court's judgment arises in the context of ongoing litigation in the Commercial Court commenced in June 2019, in which the claimant banks claim against the Defendants damages of approximately USD 850 million. These claims are brought on the basis that the Defendants allegedly conspired with representatives of the claimant banks to enter into uncommercial transactions with companies connected with the Defendants by which loans were replaced with worthless or near worthless bonds. The Claimants obtained freezing orders against the Defendants.

Following commencement of the litigation, the Second Claimant became a designated person under the Russia (Sanctions) (EU Exit) Regulations 2019 (the "**Regulations**"), i.e., subject to freezing sanctions. On the First to Fourth Defendants' case, the First Claimant should also be deemed sanctioned.

Against this background, the Defendants brought an application seeking, amongst other things, a stay of the proceedings.

Rejecting the Defendants' arguments, Mrs Justice Cockerill, at first instance, dismissed the application for a stay of proceedings, finding that:

1. judgment can lawfully be entered in favour of a designated person and is not a licensable activity;
2. OFSI can license the payment of a costs order (both where in favour of the Claimants and where in favour of the Defendants), the satisfaction of an order for security for costs, and the payment of damages in respect of a cross-undertaking;
3. With regard to the sanctions status of the First Claimant, the First Claimant was not 'owned or controlled' by Mr Putin, the Russian President, or Ms Nabiullina, the Head of the Central Bank of Russia, for purposes of the Regulations.

II. Issues on Appeal

Following the decision in the High Court, the First to Fourth Defendants brought an appeal. On appeal, the following issues needed to be determined:

1. **Entry-of-judgment issue:** Can a judgment be lawfully entered for a designated person by the English court following a trial at which it has been established that the designated person has a valid cause of action?
2. **Licensing issue:** can OFSI license (i) the payment by a designated person of an adverse costs order; (ii) the satisfaction by a designated person of an order for security for costs; (iii) the payment by a designated person of damages pursuant to a cross-undertaking in an injunction and (iv) the payment of a costs order in favour of a designated person?
3. **Control issue:** Does a designated person '*control*' an entity within the meaning of Regulation 7 where the entity is not a personal asset of the designated person but the designated person is able to exert influence over it by virtue of the political office that he or she holds at the relevant time?

III. Judgment at the Court of Appeal

The Court dismissed the appeal, finding for the Claimants/Respondents on the first two issues. On the third issue, the Court found for the Defendants/Appellants, although this did not affect the outcome (i.e., dismissal) of the appeal.

Entry-of-judgment issue

On the first issue, the Court held that judgment could be lawfully entered by a court in favour of a designated person.

In arriving at that conclusion, the Court first reiterated, or established, a number of fundamental points:

1. The right of access to the court - encompassing not only "the right to open the court door by commencing proceedings" but also the right to have a claim adjudicated (i.e., to obtain judgment where the cause of action is a valid one) - is a fundamental common law right, not limited to litigants of whom

the court approves or who satisfy some objective moral standard.³

2. The principle of legality is a principle of statutory construction under which fundamental common law rights (such as the right of access to the court) can only be curtailed if that is clearly authorised by primary legislation, i.e., by clear and ambiguous express language or necessary implication.⁴ Moreover, the principle mandates *minimum* required interference, meaning that, even where a statute contains a provision authorising intrusion on a fundamental right, such provision will be interpreted as authorising only such intrusion as is reasonably necessary to fulfil the objective of the provision in question.⁵ The Court further held that the principle of legality applied to the case before it.⁶
3. Sanctions and Anti-Money Laundering Act 2018 (“SAML A”) and the regulations made under it were intended to continue the EU sanctions regime without any substantive change, notwithstanding that there are differences between the respective legislative frameworks in terms of wording and complexity.⁷⁸ Importantly, in light of that continuity, the fact that Article 7(2)(c) of the Council Regulation (EU) No 269/2014 (the “**2014 EU Regulations**”) was not transposed into SAML A/the Regulations was not considered to represent any substantive change,⁹ but an omission probably due to the view that that article would be redundant.¹⁰
4. A claim or cause of action is properly characterised as an ‘economic resource’ but not a ‘fund’, given that ‘funds’ tend to be financial assets and benefits

“with an intrinsic value”, usually for a definite sum.¹¹

With those points in mind, the Court reached the conclusion that, as a matter of construction, judgment can be lawfully entered for a designated person. Specifically:

1. Entering judgment is not prohibited by regulation 12 of the Regulations (i.e., the prohibition against making funds available to designated person).¹² This is primarily because entering a judgment, one of the courts’ prime judicial functions in administering justice, cannot properly be described with the words “making funds available”. The Court also noted that regulation 58(5) of the Regulations (the “prior obligations” exception), which should be construed as permitting *payment* into a frozen account of the amount of a money judgment in respect of a pre-designation obligation, necessarily implies that *entering of a judgment* in respect of a pre-designation obligation is not prohibited.¹³
2. Entering judgment is equally not prohibited by regulation 11 of the Regulations (i.e., the asset-freeze), on the basis that entering judgment does not involve any relevant ‘dealing’ (for the purposes of regulations 11(1) and (5) of the Regulations).¹⁴ Specifically, entry of a judgment does not involve an ‘exchange’ of an economic resource for funds, given that, upon entry of the judgment, the cause of action ceases to exist (rather than being handed over in return for funds). Nor does it entail the ‘use’ of an economic resource, given that the concept of use contemplates retention of the asset, whereas the cause of action is not retained upon entry of judgment. Further, no breach of regulation 11(5)

³ At [178].

⁴ At [179].

⁵ At [180].

⁶ At [187].

⁷ Article 7(2)(c) of the 2014 EU Regulations provides that the prohibition against making funds or economic resources available to a designated person shall not apply to the addition to frozen accounts of payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State

concerned, provided that any such payments are frozen in accordance with the asset-freeze requirement.

⁸ At [189].

⁹ At [193].

¹⁰ At [195].

¹¹ At [197]-[199].

¹² At [202].

¹³ At [202].

¹⁴ At [206].

would be committed by a *court*, given that the statutory wording of “dealing with economic resources” is not apt to describe the judicial function of entering judgment.¹⁵

The Court reached these conclusions purely as a matter of statutory construction, irrespective of the application of the principle of legality. However, it noted that, as the principle of legality is in fact applicable, the Defendants’/Appellants’ position that judgment cannot lawfully be entered in favour of designated persons was considered “unarguable”.¹⁶ One consideration in this respect was that, even if it were the case that entry of a money judgment was prohibited, the principle of legality required *minimum* intrusion necessary to fulfil the objective of the provision in question, so that the proper interpretation would be to limit available remedies to declaratory judgments or a judgment on liability with quantum deferred, rather than a complete stay of proceedings.¹⁷

Licensing Issue

The Court dismissed the appeal also in respect of the second issue, holding that the various acts in question can be licensed by HM Treasury’s Office of Financial Sanctions Implementation (“**OFSI**”).

With regard to the discharge of costs orders made against a designated person, the Court held that the licensing ground “*to enable the payment of...reasonable professional fees for the provision of legal services*”¹⁸ was broad enough to cover adverse costs orders. This is on the basis that (unlike, for example, in respect of legal fees in the context of correspondent bank relationships¹⁹) the statutory wording was neutral as to whether the legal services are being provided to the designated person or to another party.²⁰ In connection with this part of its decision, the Court noted that costs orders are a normal feature of

complex commercial litigation, and that, if they could not be licensed (and, hence, not paid), that would eventually result in a stay of the litigation. This, in turn, would frustrate the right of access to the court.²¹

The Court also held that discharge of security-for-costs orders could be licensed by OFSI, on the basis of the same reasoning as applies in respect of adverse costs orders.²²

Regarding costs orders in favour of designated persons, the Court held that these too could be licensed. This was based on the rationale that, if a licence could permit a designated person to pay their legal fees, a licence could also permit non-designated persons to pay a designated person’s legal fees. The Court considered that this would not represent a net gain to the designated person’s funds, and, moreover, that if no such licence could be granted, a non-designated person could take every unmeritorious point in litigation without having to take into account costs consequences.²³

Lastly, the Court held that OFSI could license the payment of damages on the cross-undertaking for damages, relying on the ‘extraordinary expenses’²⁴ licensing ground.²⁵ This was on the basis that courts award damages on a cross-undertaking only in few instances and relatively extraordinary circumstances.

Control Issue

Whilst, due to the Court’s findings on the entry-of-judgment and licensing issues, the appeal was ultimately dismissed, the Court found for the Appellants/Defendants on the third issue. In other words, the Court found that the First Claimant was owned or controlled by a designated person within the meaning of regulation 7 of the Regulations as a consequence of the control that Mr Putin and/or Ms Nabiullina exercise over the First Claimant by virtue of their political office.²⁶

¹⁵ At [208].

¹⁶ At [203] and [209].

¹⁷ At [212].

¹⁸ Regulations, Schedule 5, paragraph 3.

¹⁹ Regulations, Schedule 5, paragraph 9M.

²⁰ At [216].

²¹ At [215].

²² At [222].

²³ At [222].

²⁴ Regulations, Schedule 5, paragraph 5.

²⁵ At [223].

²⁶ At [225].

According to regulation 7(1) of the Regulations, an entity will be deemed “owned or controlled directly or indirectly” by another person if either/both of the two conditions in regulations 7(2) or 7(4) of the Regulations is met.

The **first condition** is met where a person holds directly or indirectly either (a) more than 50% of the shares in the relevant entity; (b) more than 50% of the voting rights in the relevant entity, or (c) the right to appoint or remove a majority of the board of directors of the relevant entity.²⁷

The Court found that that condition, while primarily concerned with ownership, also deals with holding a right through control (irrespective of ownership).²⁸

In arriving at this conclusion, the Court referred to paragraph 9(3)(d) of Schedule 1 to the Regulations,²⁹ which provides that, for the purposes of holding shares ‘indirectly’, a person has a ‘majority stake’ in an entity where it has the right to exercise, or actually exercises, dominant influence or control over the entity.³⁰ The Court also noted paragraphs 11 and 12 of Schedule 1, which it considered apt to catch a designated person who, without being an owner, has sufficient influence of power to control the exercise of a right held by another.³¹

The **second condition** is met where it is reasonable, having regard to all the circumstances, to expect that a person would (if they chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of an entity are conducted in accordance with their wishes.³²

The Court held that this provision – phrased in terms such as “*in all the circumstances*” and “*by whatever means*” - does not have any limit as to the means or mechanism by which a designated person is able to

achieve the result of control.³³ In particular, the Court rejected the Respondents’/Claimants’ argument that the second condition was limited to cases where designated persons act in a ‘personal capacity’ (*i.e.*, excluding state officials in an official capacity).³⁴

The Court seemed to acknowledge that this conclusion may lead to “*absurd consequences*”, given that “*Mr Putin is at the apex of a command economy*” and, as such, “*in a very real sense (and certainly in the sense of Regulation 7(4)) could be deemed to control everything in Russia*”.³⁵ However, the Court considered that these consequences arose not from giving the Regulations their clear meaning, but from the subsequent designation by the Government of Mr Putin. As such, it was not for the judge to “*put a gloss*” on the statutory language in order to avoid such consequences, but for the executive and Parliament to amend the wording of the Regulations to avoid such consequences.³⁶

IV. Implications

While the positions taken by the Court on the first and the second issues align with the careful reading and interpretation of the regulations and the precedents, the position on the control issue clearly creates undesirable uncertainty.

Already the Court’s interpretation of the first condition in regulation 7 of the Regulations might be seen as overly broad. In particular, given that the second condition takes into account the notion of control (and that it suffices for either one of the two conditions to be satisfied in order to establish that an entity is ‘owned or controlled’ by another person), it is not immediately obvious why the concept of ‘holding shares indirectly’ in the first condition should be construed expansively to cover non-ownership-related influence or control to such an extent.

²⁷ Regulation 7(2) of the Regulations.

²⁸ At [228].

²⁹ As provided for in regulation 7(3) of the Regulations, (3) Schedule 1 to the Regulations contains provision applying for the purpose of interpreting paragraph (2).

³⁰ Regulations, Schedule 1, paragraph 9(3)(d).

³¹ At [227].

³² Regulation 7(4) of the Regulations.

³³ At [229].

³⁴ At [230].

³⁵ At [233].

³⁶ At [225].

More problematic even is the Court’s approach to the second condition. Pending definitive and authoritative clarification from the Government (or by another court), that part of the judgment could, at face value, be seen as meaning that all Russian legal entities, state-owned and privately owned, could be deemed controlled by a designated person and, accordingly, their assets frozen.

However, such view would seem unlikely to gain much traction in practice. First, that part of the Court’s judgment constitutes *obiter dicta* and is, as such, not binding on other courts. More importantly, on October 16, 2023, the Foreign, Commonwealth and Development Office (the “**FCDO**”) issued a public statement, noting (i) that, if the FCDO considered that an official which is being designated exercises control over a public body, the FCDO would look to designate such public body as well; (ii) that “[t]here is no presumption on the part of the Government that a private entity based in or incorporated in Russia or any jurisdiction in which a public official is designated is in itself sufficient evidence to demonstrate that the relevant official exercises control over that entity”; and (iii) that, “[i]n the interests of reducing any uncertainty, [the FCDO is] exploring the options available to the Government in clarifying this position further”. This statement is supported by OFSI. It appears, therefore, that the Court’s overly broad conception of ‘control’ (and the “*absurd consequences*” the Court acknowledged its position might have) was not the intended reading of the regulations.

As such, while due to the current uncertainty it may be prudent for counterparties to perhaps conduct extra diligence when dealing with any persons connected with Russia (which has been the practice so far in any event), the Court’s judgment may be unlikely in itself to effect a change the UK’s sanctions framework.

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