

Summary and Comment

The Court of Appeal’s judgment in the *Mints v PJSC National Bank Trust* case clarifies some key aspects of the legal interpretation of the sanctions the UK has applied to Russia – the Russia (Sanctions) (EU Exit) Regulations 2019 (Regulations). In essence, the Court of Appeal has done three things:

- Confirmed that cases involving persons subject to an asset freeze can be heard by the English courts.
- Confirmed that the courts can make judgments and awards (including costs) in cases involving persons subject to an asset freeze, though enforcement of any judgment or award may require Office of Financial Sanctions Implementation (OFSI) licences or delayed payment arrangements.
- Clarified the interpretation of “control” in Regulation 7.

The first two of these are helpful confirmation of the position that many legal practitioners had held to be the case. The third, however, points to a very wide interpretation of “control,” which is not necessarily dependent on ownership but can be summarized as whether a designated person “calls the shots” over the entity in question.

The Court of Appeal acknowledges that this interpretation, given the command nature of the Russia’s public sector, could mean that virtually everything in Russia could be a frozen asset by virtue of the asset freeze applied to President Putin. The court however finds that this is not an issue created by what it holds to be the correct interpretation of the Regulations, but by the government making President Putin subject to an asset freeze without fully considering the effect of doing so.

The government is likely to clarify the application of the “control” tests following the *Mints* judgment. It is to be hoped that the clarification will cover not only state-owned assets – at issue in the *Mints* case – but also the case of companies that are not themselves subject to sanctions but whose key board members are.

Summary of Legal Argument

The first judgment in the English courts to offer a comprehensive overview of the UK-Russia sanctions regime was handed down in the High Court by Mrs. Justice Cockerill in *PJSC National Bank Trust & Anor v Boris Mints & Ors* [2023] EWHC 118 (Comm) on 30 January 2023. An appeal by the four defendants against Mrs. Justice Cockerill’s decision was recently dismissed in *Boris Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132 (*Mints v PJSC National Bank Trust*) by the Court of Appeal, shedding light on significant issues concerning the effect of the UK sanctioning regime on the ability of designated persons to pursue litigation before the English Courts, and on the interpretation of the “control” provisions of the sanctions Regulations.

PJSC National Bank Trust (NBT) and PJSC Bank Okritie Financial Corporation (PJSC Okritie), two state-owned Russian banks, initially claimed against the four appellants (Mints) for US\$850 million, on the basis that they conspired with representatives of the claimant banks to enter into uncommercial transactions with companies connected with the appellants, by which loans were replaced with worthless or near worthless bonds.

After the litigation had commenced, the second claimant, PJSC Okritie, was put on the sanctioned list by the UK government and thus became a “designated person” under the Sanctions and Money Laundering Act 2018 (SAML) and the Regulations, and was subject to an asset freeze. On the other hand, the first claimant, NBT, is a 99% owned subsidiary of the Central Bank of Russia but is not sanctioned as such. However, the appellants argued that NBT was subject to the same asset freeze as PJSC Okritie because it is “owned or controlled” within the meaning of Regulation 7 of the Regulations by at least two designated persons, namely Mr. Putin and Ms. Nabiullina (the President of the Russian Central Bank), emphasizing that any recoveries NBT made in these proceedings would be paid to the Central Bank of Russia, as it is required by Russian law to transfer 75% of its profits to the federal budget of the Russian Federation.

The appellants' claim raised three significant questions regarding the scope of the UK-Russia sanctions regime:

- (a) **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?
- (b) **Licensing issue** – In circumstances where OFSI can license the payment of a designated person's own legal costs, can OFSI also 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?
- (c) **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 they hold at the relevant time?

The Court of Appeal unanimously dismissed the appellants' appeal on the following legal grounds:

In the first place, regarding the entry of judgment issue, the Court of Appeal decided that, applying the principle of legality, the fundamental right of the claimants to access to the courts was not excluded or curtailed by SAMLA. SAMLA and the Regulations were aimed at continuing the EU sanctions regime without any substantive change, and, in this regard, the 2014 EU Regulation is not intended to undermine the right of access to the court for an effective remedy and a fair trial of a civil claim. Moreover, irrespective of the principle of legality, the correct interpretation of the provisions on asset freeze and the prohibition on making funds available to designated persons (Articles 11 and 12 of the Regulations) cannot be construed as prohibiting the entry of a monetary judgment in favour of a designated person. The court notes that the purpose of UK sanctions legislation does not include prohibiting courts from exercising its main function of entering judgment, and, therefore, the appellants claim is considered unarguable.

With regards to the licensing issue, the court decided that through the correct construction of Schedule 5, paragraphs 3 and 5, of the Regulations, which enable the granting of licences for the payment of fees for the provision of legal services or extraordinary expenses, and/or applying the principle of legality, OFSI could issue a licence in each of the scenarios set out in the licensing issue.

Finally, with the court's decision on these two points, it was not necessary for the court to reach a determination on the control issue. Having rejected the appellants' claims on the first two issues, even if NBT was considered a designated person, the court would be able to enter a money judgment in the case that its claim is successful, and the bank would still be entitled to apply for the OFSI licences referred to in the licensing issue. However, the court addressed the control issue and decided that Mr. Putin (as president of the Russian Federation) and/or Ms. Nabiullina (as governor of the Russian Central Bank) were able to exert influence over NBT by virtue of the political office they held, and therefore controlled the bank, which implies the consideration of NBT as a designated entity.

In contrast to Mrs. Justice Cockerill's interpretation in the High Court, by which NBT is not considered a designated entity by concluding that there is a carve-out from the concept of control for political office in Regulation 7 (4), the Court of Appeal considers that the judge had put "an impermissible gloss" on the Regulation's language, because of a concern on her part that, if the appellants were correct about the interpretation of the Regulation, the consequence might well be that every company in Russia was "controlled" by Mr. Putin and hence subject to sanctions. In that case, the Court of Appeal claims that the remedy is for the executive and Parliament to amend the wording of the Regulations, not for the judge to put a gloss on the language to avoid that consequence.

The Court of Appeal holds that there is nothing in the wide wording of Regulation 7(4) to justify the judge's conclusion, since the provision does not include any limit as to the means or mechanism by which a designated person is able to achieve the result of control. The Court of Appeal therefore concluded that NBT is controlled, within the meaning of Regulation 7, by Mr. Putin and Ms. Nabiullina, and that the potential consequences of this interpretation do not derive from the wide meaning of such Regulation but from the designation by the government of Mr. Putin, without having reflected on the consequences of Mr. Putin being at the apex of a command economy.

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