Sanctioned Persons Not Prevented From Accessing UK Courts

PJSC National Bank Trust & anor v Mints & ors [2023] EWHC 118 (Comm)

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On 27 January 2023, Mrs Justice Cockerill handed down judgment in PJSC National Bank Trust & anor v Mints & ors [2023] EWHC 118 (Comm) in which she considered the effect of the Russian sanctions regime on commercial litigation involving parties who are designated persons.

Under the Russia (Sanctions) (EU Exit) Regulations 2019 (the "**Regulations**"), all assets of a designated person are frozen, meaning no person may deal in them, and no person may make available any assets to a designated person.

The Second Claimant in the long running litigation, PJSC Bank Otkritie Financial Corporation, had been designated by the Secretary of State and therefore was subject to an asset freeze. The First Claimant, National Bank Trust ("**NBT**"), was said by the Defendants to be "*owned or controlled*" by Vladimir Putin and the Governor of the Central Bank of Russia ("**CBR**"), Ms Elvira Nabiulliana, both of whom are designated persons under the UK Russian sanctions regime. This argument was founded on the fact that NBT is a 99% owned subsidiary of CBR and required to pay 75% of its profits into the federal budget. If NBT was so "*owned or controlled*", then it too was subject to an asset freeze under the Regulations[1].

The Second and Third Defendants sought a stay of the proceedings on the basis that:

(a) The entry of judgment for the Claimants would constitute "dealing in" or "making available" "funds or economic resources" to a designated person and would be unlawful;

(b) The interlocutory stages of the litigation cannot be completed without a licence and there is no applicable licencing ground under the relevant Regulations; and

(c) The continuation of proceedings without a stay would cause serious prejudice to the Defendants as the Claimants could not lawfully pay an adverse costs order, satisfy an order for security for costs and/or pay damages that may be awarded in respect of a cross undertaking previously given.

There were therefore two main issues for determination – (1) the effect of sanctions on the litigation, given that the Second Claimant was a designated person, and (2) whether that question applies to only one of the Claimants or both.

[1] Regs 7 and 11 of The Russia (Sanctions) (EU Exit) Regulations 2019

High Court Decision

When determining if the entering of judgment for the Claimants would be unlawful, Cockerill J held:

(a) A cause of action is an "economic resource" on the basis that it can be used to obtain funds or financial assets and goods and services and a judgment debt amounts to "funds" within the meaning adopted by the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**"). Accordingly, a cause of action and a judgment debt are capable of being caught by the asset freezing provisions in the Russia Regulations.

(b) As a result of that conclusion, it fell to Cockerill J to consider whether the entry of a judgment in favour of a designated person constitutes "dealing" with or "making available" a fund (or economic resource) contrary to the Regulations. For the Court to adopt a reading of legislation which derogates from the fundamental right to access the Courts, it must be sufficiently clear and unambiguous from the wording of the (primary) legislation, in this instance SAMLA, that that was Parliament's intention. Cockerill J held that it was not clear from the language of SAMLA that Parliament had intended that prohibition to restrict access to the Courts.

(c) As it was not sufficiently clear that Parliament had intended to preclude the entry of judgments in favour of designated persons, despite the breadth of the wording in SAMLA and the Regulations, it was not unlawful for the Court to enter judgment on a designated person's claim.

As to the points regarding prejudice to be suffered by the Defendants, the Court held that the Office of Financial Sanctions Implementation ("**OFSI**") is able to provide a license to a designated claimant to enable it to pay an adverse costs order, satisfy an order for security for costs and pay damages awarded in

respect of a cross-undertaking. There was no power to licence the entry of a judgment because it was not necessary.

Of particular note is that Cockerill J then had to determine whether NBT was "owned or controlled" by President Putin or the Governor of the CBR. Cockerill J considered that when one looked at the statutory intention, Regulation 7(4) of the Regulations was concerned with ownership, direct or indirect, and it was not correct that President Putin or the Governor of the CBR owned NBT. Cockerill J also found that it was significant that the Regulations did not appear to take aim directly at the Russian State (in contrast to some other sanctions regimes), but were instead designed to operate at a personal level – as a way of inflicting personal financial pain on those associated with the regime in the hope that it will influence a change in policy. Cockerill J held that it would be rather odd if such large banking institutions 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 28 of SAMLA. On that analysis, she concluded that NBT is not owned or controlled by either the President or the Governor of the CBR.

Notably, the High Court granted permission to appeal. The judgment is accessible **here.**

Commentary

A significant proportion of the Russian banking industry is owned by the Russian State through the CBR. The fact that the High Court has held that state ownership shall not in itself cause an entity to be the subject of financial sanctions is a considerable decision. The conclusion does appear to be at odds with the broad wording in the Regulations which provides for a finding of ownership if: "*it is reasonable, having regard to all the circumstances, to expect that a designated person ("**P**") would (if P 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 the company are conducted in accordance with P's wishes*".

Cockerill J acknowledged the width of the Regulation but stated that it must be looked at in full context – including as against the broader background and having regard to "*real world*" reasons, including that this is legislation that imposes not insignificant criminal sanctions.

Whilst Cockerill J's conclusion is not surprising from a policy perspective, it may add to the growing calls for a tightening of the ownership and control wording in the Regulation itself. As presently drafted, the Regulations place a heavy burden on those seeking to comply with the UK's sanctions regime to make determinations of ownership and control on the basis of information which may not be readily available to them.

Furthermore, the judgment confirms that, subject to OFSI licenses being granted, designated persons can fully avail themselves of the right to access the Courts. Not only are they able to seek a license to pay their lawyers, but they are also entitled to obtain judgment in their claims and can be licensed to pay costs orders, security for costs or damages ordered by the Court.

Find out more

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