



# The Russian Sanctions Regime and UK Litigation

With significant sanctions now in force regarding organisations connected with the Russian government, their interpretation as far as UK litigation extends has become a significant concern for many. In this article by Robert Pollock-Hill, partner in Rosling King's Dispute Resolution Group, we take a look at the judgment in the case of PJSC National Bank Trust & Anor and assess its implications.

The Russian sanctions regime and its interpretation in the context of UK litigation, where the claimant is a designated person under the sanctions regime of the Sanctions and Anti-Money Laundering Act 2018 ('SAML') and the Russia (Sanctions) (EU Exit) Regulations 2019 ('RSR'), was the focus of examination in the case of PJSC National Bank Trust & Anor v Mints & Ors [2023] EWHC 118 (Comm).

### Case Summary

In June 2019, the claimant Russian banks, PJSC National Bank Trust ('C1') and PJSC Bank Otkritie Financial Corporation ('C2'), issued proceedings claiming damages of \$850 million from a number of Russian businessmen ('D1-D4'), on the basis that they had conspired with representatives of C1 and C2, to cause the banks to enter into uncommercial transactions (the 'proceedings').

Shortly after Russia's invasion of Ukraine, C2 was placed on the sanctions list by the UK government.

The effect of the sanctions regime is that all the assets or economic resources of a designated person are frozen, and no

one can deal with them. Further, no person may make assets or economic resources available to a designated person. To do either of these things is a criminal offence.

D1-D4 applied to the High Court for the proceedings to be stayed and to be released from various undertakings that they had given in connection with freezing orders made against them on the basis that:

1. The entry of a judgment in favour of a sanctioned claimant would have the effect of making funds available to a designated person and would therefore be unlawful under the RSR.
2. Similarly, it would not be possible for the defendants to satisfy a costs order in favour of C1 or C2 because to do so would also have the effect of making funds available to a designated individual in breach of the RSR.
3. The effect of the RSR was that a sanctioned party was prevented from:
  - a. satisfying an order to pay adverse costs;
  - b. providing security for costs; or
  - c. paying damages in respect of a cross undertaking for damages, because such payments would constitute 'dealing' with frozen assets and such actions did not fall

within the prescribed list of reasons for which a licence could be obtained, so were not permissible under the RSR.

4. Although C1 was not expressly designated as a sanctioned entity, D1-D4 submitted that it should be treated as such because it was 'owned or controlled' within the meaning of the RSR by at least two designated persons; Mr Vladimir Putin and Ms Elvira Nabiullina in their respective capacities as the President of the Russian Federation and the Governor of the Russian Central Bank (the 'control issue').

5. Consequently, D1-D4 claimed that to continue the proceedings would create serious prejudice to them and so the proceedings should be stayed.

## The Decision

Mrs Justice Cockerill rejected each of these grounds and dismissed D1-D4's application. In so doing she held that the entry of judgment in favour of a sanctioned entity is not unlawful. Although SAMLA and the RSR were intended to curtail some fundamental rights (such as the right of peaceful enjoyment of property), they did not, in the absence of clear wording, operate to curtail other fundamental rights such as the right of access to the court. It followed that if a party was entitled to access the court, they were entitled to pursue its case to a judgment.

Although Cockerill J accepted it was arguable when reading certain provisions of the SAMLA and the RSR in isolation that it would be unlawful to enter judgment in favour of C1 and C2, it was also arguable that entering judgment would not be unlawful. However, where the legislation did not clearly express a derogation from the right of access to the court, the principle of legality compelled the answer that judgment can be entered in favour of a sanctioned claimant and that there was no requirement for a licence from the Office for Sanctions Implementation ('OFSI') for the entry of judgment.

The Judge held that payment of an adverse costs order by a sanctioned entity while prima facie in breach of the RSR, was licensable under paragraph 3 of Schedule 5 of the RSR, which provides that licence may be given to enable the payment of reasonable professional fees and expenses associated with the provision of legal expenses.

In particular, Cockerill J observed:

(i) there was nothing in the language of paragraph 3 that limited the availability of a licence to the professional fees of the designated party's own lawyers,;

(ii) the legislators were well aware that payments of adverse costs are a routine and necessary feature of litigation;

(iii) there was no rational reason why a sanctioned entity could not be granted a licence to pay adverse costs where the effect would be to diminish rather than increase their assets;

(iv) OFSI's Guidance clearly stated that adverse costs payments could be licensed under this ground; and

(v) OFSI had in fact issued a licence to enable C1 and C2 to pay a previous adverse costs order.

For similar reasons, it was held that payments by the sanctioned claimant for security for costs were also licensable under paragraph 3 of Schedule 5 of the RSR.

Cockerill J also held that the scope of the wording of paragraph 3 of Schedule 5 is sufficiently wide to extend to not just to the payment of costs by a sanctioned party but also to the payment of costs in their favour. In support of this, she observed that the making of a favourable costs order does not serve to benefit the designated party; merely to put them back in the same position it would have been in costs wise had it not been for the bad point taken by the other side. If such payments were not licensable, it would leave the door open for abusive conduct by non-designated litigants to make unmerited applications against the designated person without

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the risk of being threatened with real-world consequences.

The judge held that a payment for damages on the cross undertakings given in support of a freezing order is licensable within the scope of Schedule 5 paragraph 5 of the RSR, which permits a licence to be given "to enable an extraordinary expense of a designated person to be met". While acknowledging that the payment of damages was a possible outcome arising from a claimant giving a cross undertaking, it only arose after a detailed enquiry by the court, the Judge pointed out that anyone who had been involved in a claim for damages on a cross undertaking would likely regard it as out of the ordinary and not an ordinary or routine cost. She also observed that it was unlikely that OFSI would refuse a licence for the payment of such damages where they had been awarded pursuant to a decision of the English Court and had

the effect of diminishing the designated person's assets.

On the control issue, it was held C1 was not controlled by either Mr Putin or Ms Nabiullina for the purposes of the RSR. While the control issue was no longer live given her decision on the earlier points, Cockerill J considered, albeit tentatively, after a careful review of Regulations 7(2) and 7(4) of the RSR that while control, as defined in the RSR, probably did extend to control exercised by a designated person as an employee or as a corporate officer, it did not extend to control by reason of a designated person's public or political office. Were it to be the case, it would lead to major institutions being sanctioned *"by a sidewind in circumstances where they would have no notice of the sanction and be unable themselves to challenge the designation under s.38 [of the SAMLA]."*

## Commentary

In light of the considerable importance of the matters raised, Mrs Justice Cockerill granted permission to appeal. That appeal has been listed to be heard in early July 2023. Notwithstanding the outcome of that appeal, the judgment provides a detailed and clear analysis of the sanctions legislation framework and its interpretation in the context of litigation where the claimant is a designated person under the RSR.

The decision illustrates (to the relief of sanctioned and non-sanctioned claimants alike) that while the SAMLA and the RSR undoubtedly impact on the conduct of litigation where a party is subject to sanctions, they are not intended to operate as a bar to access to the English Courts, prevent the progress of on-going litigation or prohibit the entry of judgment following trial.



### About Robert Pollock-Hill

Robert Pollock-Hill has more than 15 years' experience advising on a variety of shipping and commercial disputes both in the English High Court and in arbitration. Robert has also acted in arbitration proceedings under the LMAA, LCIA and UNCITRAL rules in relation to a variety of charterparty and other contractual disputes.

### About Rosling King LLP

Rosling King LLP is a London-based law firm specialising in serving the needs of financial institutions, corporates and individuals.



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