

Tuesday, October 17, 2023

Ownership and control in UK financial sanctions after *Mints v National Bank Trust*

Issues regarding potential ownership or control of corporations by sanctioned persons are an extremely common problem for businesses and their legal advisors.

UK financial sanctions are a particularly good example of the problem. Under regulation 7 of the Russia (Sanctions) (EU Exit) Regulations 2019 (“the **Regulations**”), as well as the well-known and predictable tests for majority shareholder voting rights and board appointments, a sanctioned person may be deemed to control a corporation if ‘it is reasonable, having regard to all the circumstances, to expect that he would (if he 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 corporation are conducted in accordance with his wishes’ (regulation 7(4)).

Recent comments from the English Court of Appeal in *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132 have confirmed, and indeed emphasised, that regulation 7(4) is extremely broad, and that therefore an extremely careful approach must continue to be taken when assessing the potential for deemed control of corporations by sanctioned persons. It will make it even harder to do business for or with persons who are Russian-incorporated or who have Russian persons in their ownership or directorship structures: and banks and other asset-custodians will want to review the status of asset-freezing. The UK government may also want to consider whether reform of regulation 7(4) is advisable, in light of the critical comments of the Court of Appeal about the provision.

The control issues arose in the context NBT (a Russian bank) and another bank claiming, in the High Court in London, large damages against Boris Mints and other defendants resulting from an alleged conspiracy. NBT is not sanctioned, but is owned by the Central Bank of Russia which is sanctioned. The defendants’ case was that NBT was nonetheless subject to asset freeze because it is owned or controlled within the meaning of Regulation 7 by Vladimir Putin, President of Russia, and Elena Nabiullina, the governor of the Central Bank of Russia, who are sanctioned in the UK. For this and other reasons, the defendants argued that the claim against them should be stayed.

At first instance, Justice Sara Cockerill (sitting in the Commercial Court) found, at ¶¶246 and 247, that Regulation 7(4) did not cover control through political office, and therefore NBT was not controlled by sanctioned persons. The defendants appealed on the issue of ownership and control and other issues.

The Court of Appeal dismissed the appeal, but in doing so disagreed with Justice Cockerill’s decision on ownership and control i.e., finding for the defendants on this point. In particular, the Court of Appeal (Julian Flaux, Chancellor, giving the judgment of the court) found that:

- Regulation 7(4) does not place “any limit as to the means or mechanism by which a designated person is able to achieve the result of control” (at ¶ 229),
- There was no justification for a political carve-out in the wording of the Regulation, as the Regulation does not distinguish between different forms of non-ownership control.
- On that basis, NBT conceded that it could be deemed to be controlled by either Mr Putin or Ms Nabiullina, since they “could exercise influence over it in significant respects”.
- The prohibitions on dealing with funds owned by, or making funds available to, a designated person, extends to entities that are “owned or controlled directly or indirectly”, by virtue of political office.

The Court of Appeal accepted the defendants' arguments that Vladimir Putin is "at the apex of a command economy" and, consequently, "**could** be deemed to control everything in Russia" (emphasis added).

The Court did not say "should" be deemed, and the remarks should be read in context. The Court was rejecting NBT's submission that the language of Regulation 7(4) should be constrained to prevent it being unworkable or absurd: the Court appeared to direct its criticism at the UK government, saying that "absurd consequences arise not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences".

The issue of the legal meaning and extent of control in the sanctions context is likely to be developed by the English courts in future cases on different facts. The Court of Appeal's judgment on the 'control' issue does not represent the final work – it does not bind lower courts but will be viewed as persuasive. It seems most unlikely that the UK government will either take Vladimir Putin off the sanctions list, or materially narrow the scope of Regulation 7. The UK's FCDO – the UK government department with responsibility for the sanctions legislative program – has since publicly clarified that there is no presumption on the part of the UK 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. OFSI (which implements and enforces UK financial sanctions) may in due course issue some further guidance on the point.

What about non-Russian companies which are owned or controlled by private (i.e. non-state) Russian businesses or Russian-resident individuals? Under regulation 7(4), it must be reasonable, having regard to all the circumstances, to expect that the sanctioned person would if he chose to be able to achieve the result that the company's affairs are conducted in accordance with his wishes. While a future English court may be willing to accept the argument that President Putin could if he chose control the decisions of any private Russian business or individual as to their foreign business interests, it will not be reasonable to expect that he would in every case. There are rational limits. The Courts are in our view likely to be dismissive of Orwellian fantasies and dystopian visions of a 'command' economy. OFSI should be too. We venture to suggest that a laundry business in Bedford will not reasonably be of any interest to the Kremlin: an AI research business in Cambridge might well be, though.

For further information, please feel free to contact us at: lsaa@candey.com

Duncan Henderson
Rohan Clarke, Ph.D