Neutral Citation Number: [2023] EWHC 118 (Comm)

Case No: CL-2019-000412
and
CL-2020-000432

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane
London
EC4A 1NL

27 January 2023

Before :

MRS JUSTICE COCKERILL

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Between:

(1) PJSC NATIONAL BANK TRUST **(2) PJSC BANK OTKRITIE FINANCIAL CORPORATION**	**Claimants**
- and –	
(1) BORIS MINTS **(2) DMITRY MINTS** **(3) ALEXANDER MINTS** **(4) IGOR MINTS** **(5) VADIM BELYAEV** **(6) EVGENY DANKEVICH** **(7) MIKAIL SHISHKHANOV** **(8) MAPLESFS LIMITED** (in its capacity as former trustee of the MF Trust) **(9) MFT (PTC) LIMITED** (in its capacity as the trustee of the MF Trust)	**Defendants**

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Nathan Pillow KC, David Davies KC, and Bibek Mukherjee (instructed by **Steptoe & Johnson UK LLP**) for the **Claimant**
Philip Edey KC and Sarah Tresman (instructed by **Quinn Emanuel Urquhart & Sullivan LLP UK**) for the **First & Fourth Defendant**
Laurence Rabinowitz KC, Simon Paul and Niranjan Venkatesan (instructed by **Enyo Law LLP) for the Second & Third Defendant**
Tom Leary (instructed by **Kennedys**) for the **Sixth Defendant**
Victoria Windle KC (instructed by **Brown Rudnick**) for the **Seventh Defendant**
John Machell KC & James Knott (instructed by **Bird & Bird LLP**) for the **Ninth Defendant**

Hearing dates: 13,14,15, 16 December 2022

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
This judgment was handed down in remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 27 January 2023 at 10:30am.

Mrs Justice Cockerill:

INTRODUCTION

1. The current applications arise out of the situation created by the Russian invasion of Ukraine. They call into question the effects of that event on litigation in the Commercial Court. While the issues are raised in the context of this case, there are implications for a number of other pieces of litigation. The applications are brought by the First to Fourth Defendants, and supported by the Sixth Defendant, and throughout this judgment a reference to "the Defendants" is a reference to those Defendants, unless the context otherwise requires.

2. The litigation in this case was commenced in June 2019. The Claimants claim some US$850 million from some of the Defendants on the basis that the Defendants conspired with representatives of the Claimant banks to enter into uncommercial transactions with companies connected with the Defendants by which loans were replaced by worthless or near worthless bonds. They obtained freezing orders against some of the Defendants. The litigation, which is complex and hard fought, was progressing towards trial at the time of the invasion.

3. As is well known, one response of the UK Government to that invasion was to introduce a range of sanctions. The sanctions regime in the UK has two central features. The first is that all the assets of a designated person are frozen. This means that no person may deal in them. The second is that no person may make available any assets to a designated person. To do either of these things is a criminal offence.

4. Very early on in the timeline, the Secretary of State sanctioned Bank Otkritie, the Second Claimant. In so doing, the Secretary of State was satisfied that Bank Otkritie is "*supporting and obtaining a benefit from the Government of Russia*". Bank Otkritie is thus a "designated person" to use the language of the legislation. Its assets are frozen and dealings in them are prohibited.

5. On the First to Fourth Defendants' case, NBT, the First Claimant, is also subject to the same asset freeze because it is "*owned or controlled*" (within the meaning of the relevant regulations) by at least two designated persons, Mr Vladimir Putin, the President of Russia and Ms Elvira Nabiullina, the governor of the Central Bank of Russia, of which NBT is a 99% owned subsidiary. Mr Putin was sanctioned a day after the invasion. Ms Nabiullina was also sanctioned by the Secretary of State, rather further down the timeline. The First to Fourth Defendants say that the extension of the sanctions to NBT makes sense in that any recoveries NBT may make in these proceedings will thus be paid to the Central Bank, which is in turn required by law to transfer 75% of its profits directly to the federal budget of the Russian Federation.

6. Further the Second and Third Defendants submit that the entry of any judgment for the Claimants on the causes of action they advance would in fact be unlawful and that various interlocutory stages cannot be completed at all because they cannot be completed without a licence, and there is no relevant licensing ground. Specifically it is said that allowing these proceedings to continue while sanctions

remain in force would cause serious prejudice to the Defendants because the Claimants cannot lawfully satisfy adverse costs orders, provide security for costs or pay any damages that may be awarded on their cross-undertaking.

7. The Defendants therefore seek a stay of the proceedings and release from the undertakings which they have given the Court in connection with the freezing orders obtained against them.

8. There are thus two main issues. The first is as to the effect of sanctions on the litigation, given that at least one of the Claimants is a sanctioned person. The second is really about whether that question applies to only one of the Claimants, or to both.

9. The first issue then breaks down into four sub-issues. The first three relate to the ability of a sanctioned claimant to:

    i) Pay an adverse costs order;

    ii) Satisfy an order for security for costs; and

    iii) Pay damages awarded in respect of the cross-undertaking in damages.

10. The fourth sub-issue however concerns the Court itself. The question is whether the Court could properly enter judgment on the sanctioned Claimant's claim. The centre of gravity of the argument before me relates to this point. I will therefore deal with this issue first.

11. The case has (of course) been notably well argued. However the best efforts of a number of talented teams for the various defendants cannot disguise the answer which must be given here. For the reasons set out below it is that:

    i) Judgment can lawfully be entered and is not a licensable activity;

    ii) OFSI can license the remainder of the acts in question;

    iii) Payment to the Claimants of a Favourable Costs Order is licensable;

    iv) The Control Issue does not arise, but is answered in favour of the Claimants.

12. I will deal with the reasoning by which I reach these conclusions under the following headings:

AN OVERVIEW OF THE UK SANCTIONS REGIME

13. The current regime is to be found in the Sanctions and Anti-Money Laundering Act 2018 and regulations made under it. However that legislation is very far from coming into being independently or against the backdrop of a blank slate. Both parties to different extents pray in aid the fact that it represents the continuation of a scheme of sanctions which originated first with the United Nations, and was then picked up by the EU.

14. The Claimant and the Defendants were agreed that in broad terms the UK statute and regulations should be seen as consistent with that history and that ethos (though there are points where the Defendants would say that there has now been a deliberate parting of the ways). It follows that the old law in the form of the UN resolutions and EU Regulations is part of the background against which the 2018 Act falls to be construed.

15. This has an impact on the approach to construction and how that feeds into the basic legal common ground, which is that I am endeavouring to ascertain the intention of the legislator.

The pre-2018 Sanctions Regime

16. The modern law relating to sanctions derives from UN Security Council Resolution 1267 dated 15 October 1999. It thus originates in a different conflict to that which is now in focus. Then the target was the War on Terror. Its focus was the Taliban, Al-Qaida and similar groups. Since then sanctions have been deployed (inter alia) against Russian persons and entities in relation to the invasion of Crimea, and now Ukraine.

17. Resolution 1267 introduced both the asset freeze and bar on dealing which are hallmarks of the current legislation. It required member states to freeze funds and other financial resources and to prohibit anyone from making available funds and financial resources to designated persons.

18. There is a clear statement of intent, on which the Defendants relied, at its heart:

> "The purpose of the assets freeze is to deny listed individuals, groups, undertakings and entities the means to support terrorism. To achieve this it seeks to ensure that no funds, financial assets or economic resources of any kind are available to them for so long as they remain subject to the sanctions measures."

19. Two points come from this. The first is that its target is listed individuals/groups etc. It is they who are to be denied funds and economic resources. That is a point which the Claimants emphasise. Secondly in this context it can be seen that funds and economic resources are used broadly – to cover the whole ground. This is the Defendants' point.

20. Since then, the United Nations Security Council ("UNSC") has adopted various resolutions requiring members to freeze assets of entities designated by the Sanctions Committee.

21. Initially, the UK gave domestic effect to these UN resolutions by orders made under section 1 of the United Nations Act 1946. In 2010, the Supreme Court (in *Ahmed v HM Treasury (Nos 1 and 2)* [2010] 2 AC 534) considered a challenge to orders implementing UN sanctions. This succeeded because the Supreme Court found that they deprived designated persons of an effective judicial remedy, which was not clearly authorised by the relevant primary legislation, and quashed those orders on the ground that they were ultra vires under the 1946 Act.

22. The UK then implemented UN resolutions through EU regulations, starting with Council Regulation 881/2002. That Regulation was itself adopted by the EU to implement UNSC Resolution 1390 (2002) and it used the same language to identify what is to be frozen, namely "*funds and economic resources*" owned by designated persons. This became (and remains) standard wording across EU sanctions regulations. The EU has made clear (see for example European Council Guidelines on Sanctions (15 June 2012), p 22) that standard wording should be used for all relevant legal instruments concerning EU restrictive measures, except if it is necessary to use different wording in order to implement a UN Security

Council Resolution correctly. There is therefore a deliberate decision evidenced in the history to create consistency and a continuum.

23. The approach to sanctions first applied to Russia in relation to Crimea in 2014. The ten-page Council Regulation 269/2014 ("the EU Regulation"[1]) set out, at Article 2, the core approach:

> "1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.
>
> 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

24. That was supplemented by a derogation at Article 5:

> "1. By way of derogation from Article 2, the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, if the following conditions are met:
>
> (a) the funds or economic resources are subject to an arbitral decision rendered prior to the date on which the natural or legal person, entity or body referred to in Article 2 was included in Annex I, or of a judicial or administrative decision rendered in the Union, or a judicial decision enforceable in the Member State concerned, prior to or after that date;
>
> (b) the funds or economic resources will be used exclusively to satisfy claims secured by such a decision or recognised as valid in such a decision, within the limits set by applicable laws and regulations governing the rights of persons having such claims;…"

25. At Article 7 there is an exception:

> "1. Article 2(2) shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties onto the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the relevant competent authority about any such transaction without delay.
>
> 2. Article 2(2) shall not apply to the addition to frozen accounts of:

[1] Within the judgment the EU Regulation references will be given as "Article". In respect of the UK Regulations, references will be to "Regulation".

> (a) interest or other earnings on those accounts;
>
> (b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I; or
>
> (c) payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned;
>
> Provided that any such interest, other earnings and payments are frozen in accordance with Article 2(1)."

26. There are then listed in Annex I a number of individuals. The Government of Russia was not sanctioned. Nor was Mr Putin.

27. Pausing here, it is important to reflect on what the legislative intent of the EU Regulation was as regards the matters which are in play in this case.

28. The first point to note is that there is no express exclusion on entering judgments. It is a matter of debate whether that absence should be regarded as significant. The second is that there is a specific mention within Article 7 of judgments and arbitral awards – albeit in the context of satisfaction not of entry. I pause here to note (as it is relevant at a later stage of the argument) that the drafters bracket the two together.

29. What we learn as to judgments is that on the basis of this wording the satisfaction of a judgment was not a breach of the sanctions – so long as the funds paid were safely frozen. The Claimants would say that on that basis it makes no sense for the entry of a judgment to be precluded and there is no time limitation on the judgment. The Defendants dispute this saying that (i) the entry of a judgment would be a dealing with the underlying cause of action and therefore caught by the Article 2(1) restriction and (ii) the drafters probably did not contemplate anything other than a pre-designation judgment.

30. I do not find the latter argument appealing. If the drafters had intended to make a nice distinction between pre and post designation judgments one would expect to see that made clear – so that the courts would know exactly what they could and could not properly do (since on this view the entry of some but not all judgments would be unlawful). That point is reinforced in circumstances where the timeline of pre and post designation was plainly in the drafters' minds, as is apparent; for example in the terms of Article 6, which states:

> "By way of derogation from Article 2 and provided that a payment by a natural or legal person, entity or body listed in Annex I is due under a contract or agreement that was concluded by, or under an obligation that arose for the natural or legal person, entity or body concerned, before the date on which that natural or legal person, entity or body was included in Annex I, the competent authorities of the Member States may authorise, under such conditions as they deem appropriate,

> the release of certain frozen funds or economic resources, provided that …."

31. There is also Article 7 which permits crediting of frozen accounts in respect of "*payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I.*"

32. Nor is it really credible that it did not occur to the drafters that anyone would try to obtain a post sanction judgment. The presence of Russian litigants in courts within Europe has of recent years been sufficiently high profile that the possibility would be unlikely to be neglected.

33. As to the former argument I disagree with the submission that entering a judgment would contravene the Article 2(1) provision. That provides for freezing; that is not a concept which naturally applies to the entry of a judgment. In order to get to this argument one has to recharacterise the entry of the judgment as a dealing in the underlying cause of action, which is not a characterisation which is apt to the EU Regulation. Nor indeed does it reflect the actual wording of Article 2 which does not mention dealing (in either part). Article 2(1) stipulates "*all funds and resources … shall be frozen*". Even if a judgment creates a fund, entering a judgment has nothing to do with frozen assets. Article 2(2) says that "*no funds or economic resources shall be made available*".

34. Another point made was that there is no EU authority or guidance suggesting that Article 7(2)(c) was intended to enable post-designation judgments to be entered. That is true; but so is the converse. There is no EU authority or guidance suggesting that Article 7(2)(c) was intended only to enable pre-designation judgments to be entered and that it was intended that the entry of post-designation judgments would be unlawful. The point therefore goes nowhere.

35. Further given the need for clarity and the important matters at stake here I would be minded to give more weight to absence of a prohibition than might be usual.

36. Accordingly I would provisionally conclude that the EU Regulation does not preclude - and logically contemplates - the entry of judgments against (and by necessary implication for) a designated person after the imposition against them of sanctions.

37. That preliminary conclusion is strengthened by looking at Article 11 of the EU Regulation. That provides as follows:

> "1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indi-rectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, particularly a claim for extension or payment of a bond, guarantee or indemnity, particularly a

> financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:
>
> (a) designated natural or legal persons, entities or bodies listed in Annex I;
>
> (b) any natural or legal person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a).
>
> 2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the natural or legal person, entity or body seeking the enforcement of that claim.
>
> 3. This Article is without prejudice to the right of natural or legal persons, entities or bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation."

38. That Article on its face imposes a restraint in relation to bringing claims which are affected by sanctions. But the corollary of that is that it does not affect claims which are not related to sanctions – such as pre-existing claims. That provision again has its roots in earlier provisions such as Article 38 of Regulation 267/2012 ("the 2012 Regulation") in relation Security Council Resolution 1737 in 2006 (made in response to Iran's nuclear programme). This is a point made in the case of *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v International Military Services Ltd* [2020] 1 WLR 1726 ("MoDSAF") where at [12] Newey LJ notes that:

> "[t]his … decided, among other things, that all UN member states should freeze funds, financial assets and economic resources of specified persons linked to that programme. Subsequent Security Council resolutions have emphasised "the importance of all States... taking the necessary measures to ensure that no claim shall lie at the instance of" a specified person "in connection with any contract or other transaction where its performance was prevented by reason of the measures imposed by" Resolution 1737 and its successors".

39. That UN approach was then carried over into the EU Regulation 423/2007 ("the Iran Regulation") which was directed towards claims "*in connection with any contract or transaction the performance of which would have been affected, directly or indirectly, wholly or in part, by the measures imposed by this Regulation shall be satisfied.*" Similar wording is then found in the successor 2012 Regulation which was of direct applicability in the UK: *"No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation,…*"

40. Again one sees the specific linkage to contracts effectively caught up in the sanctions – as opposed to pre-existing obligations and disputes.

41. Another point worth noting parenthetically for later argument is that when one looks back to the Iran Regulation and the EU "Common Position" in respect of it, there plainly was an intent to introduce measures which affected the government of Iran:

> "The necessary measures should also be taken to ensure that no compensation is granted to the Government of Iran, or to any person or entity in Iran, or to designated persons or entities, or to any person claiming through or for the benefit of any such person or entity, in connection with any contract or other transaction where its performance was prevented by reason of the measures decided on pursuant to UNSCR 1737 (2006), 1747 (2007) or 1803 (2008),…"

42. That was also made explicit on the face of the regulation. Thus Article 38 of the 2012 Regulation talks of no claims of the defined type being satisfied "*if they are made by: (a) designated persons, entities or bodies listed …; (b) any other Iranian person, entity or body, including the Iranian government*".

43. Turning back to Article 11 itself, the point made by Mr Pillow KC for the Claimants was that Article 11 of the EU Regulation was drafted so as to provide a window for satisfaction of claims, the wording being that "*no judgment shall be satisfied*", but subject to a burden of proof provision which allows the sanctioned person seeking enforcement of the claim to prove that satisfying the claim is not prohibited (in the sense that it relates to "*a contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation*"). As he submitted, a paradigm in which a sanctioned person can seek **enforcement** of a claim logically implies that there are claims which the sanctioned person is allowed to pursue to the point of satisfaction and enforcement, which itself logically predicates a permission to pursue to judgment. That logic appears to be sound. The fact that it is couched in terms of prohibition does not affect the logic inherent in the structure. The further argument advanced for the Defendants that this provision was aimed rather at post sanctions claims seems to be at variance with the language of the provision which seems to be predicated on the list remaining in force.

44. I therefore conclude that the provisional view reached before consideration of Article 11 is only strengthened by a consideration of that Article. It follows that the backdrop to the 2018 Act and the Regulations which I have to construe is one whereby entry of judgment in respect of a pre-existing claim would not be a breach of the relevant regulations.

The 2018 Act

45. Following Brexit, the UK needed a new sanctions regime both to implement UN sanctions and to impose its own. That regime is to be found in the 2018 Act. The Explanatory Notes state that the legislation contains "*the powers that the UK will need to carry on implementing sanctions as it currently does*". It is therefore apparent from this that the basic intention was to continue the approach adopted via the UN and EU. That theme of continuity can also be seen in an answer to a Parliamentary question on the Regulations which states in terms that "*the*

instrument transposes existing EU sanctions regimes; it does not add to or amend them. The process has been to transpose as identically as possible the EU regimes into what will be our law when we leave."

46. There is of course an issue as to whether that intent has been carried through in fact, with the Defendants submitting that the UK regime is in some critical respects stricter than its predecessor. Certainly it is longer – the EU Regulation is 10 pages. The 2018 Act comprises 71 pages. The Regulations made under it run to 364 pages.

47. Section 1(1) of the 2018 Act provides that an appropriate Minister may make regulations which impose "financial sanctions". Under section 3(1) "Financial sanctions" are "*prohibitions or requirements for…freezing funds or economic resources owned, held or controlled by designated persons*".

48. "Funds" and "economic resources" are defined in section 60, as follows;

    i) "Funds" are "*financial assets and benefits of every kind, including…*", among other things, "*cash… balances on accounts, debts and debt obligations…rights of set-off, guarantees…letters of credit…*"

    ii) "Economic resources" are "*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services*".

    iii) It is the Defendants' case that they capture between them all assets of every type, including intangible assets such as causes of action and judgment debts.

49. Section 15 states that regulations made under section 1 may provide for a prohibition imposed by them "*not to apply to anything done under the authority of a licence issued by an appropriate Minister*" and also make provision as to what may, or may not, be authorised by a licence.

50. There are rights under sections 23 and 24 to seek a review of a designation by a Minister, and at section 38 there is a right to apply to the court for a review of such a decision, to be conducted along the lines of a judicial review.

51. Section 44 of the Act provides a defence in respect of acts done "*in the reasonable belief that the act is in compliance with*" the designation provisions.

52. In exercise of the powers conferred by section 1(1), the Secretary of State made the Russia (Sanctions) (EU Exit) Regulations 2019: "the Regulations".

The Regulations

53. Regulation 4 states that the Regulations are made under section 1 of the 2018 Act for the purpose of "*encouraging Russia to cease actions destabilising Ukraine*" or undermining its territorial integrity. Regulation 5 gives the Secretary of State the power to designate persons by name.

54. Regulation 6 contains designation criteria. It provides that:

"(1) The Secretary of State may not designate a person under regulation 5 (power to designate persons) unless the Secretary of State—

(a) has reasonable grounds to suspect that that person is an involved person, and

(b) considers that the designation of that person is appropriate, having regard to—

(i) the purposes stated in regulation 4 (purposes), and

(ii) the likely significant effects of the designation on that person (as they appear to the Secretary of State to be on the basis of the information that the Secretary of State has).

(2) In this regulation, an "involved person" means a person who - ….

(b) is owned or controlled directly or indirectly (within the meaning of regulation 7) by a person who is or has been so involved.

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved…

(4) For the purposes of this regulation, being "involved in obtaining a benefit from or supporting the Government of Russia" means—

(d) owning or controlling directly or indirectly (within the meaning of regulation 7) or working as a director (whether executive or non-executive), trustee, [or other manager' or equivalent, of –

(i) A Government of Russia-affiliated entity;

(7) In this Regulation -

'Government of Russia' means –

a) the Presidency of the Russian Federation

b) public bodies and agencies subordinate to the President of the Russian Federation, including the Administration of the President of the Russian Federation.

c) The Chairman of the Government of the Russian Federation and the deputies of the Chairman of the Government.

d) Any Ministry of Russian Federation".

55. The most important restrictive measures are to be found in Regulations 11, 12 and 14.

56. As to Regulation 11, it states in material part:

> "(1) A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources
>
> (4) For the purposes of paragraph (1) a person "deals with" funds if the person –
>
> uses, moves, transfers or allows access to the funds
>
> deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination.
>
> (5) …. a person "deals with" economic resources if the person
>
> (a) exchanges the economic resources for funds, goods or services or
>
> (b) uses the economic resources in exchange for funds, goods or services (whether by pledging them as security or otherwise)."

57. It is to be noted that Regulation 11 covers both funds and economic resources.

58. Regulation 12(1) by contrast concerns funds only. It states that:

> "(1) A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available….
>
> (4) The reference in paragraph (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person."

59. Regulation 58 sets out some exceptions from prohibitions. In particular it provides that:

> "(1) The prohibition in regulation 11 (asset-freeze in relation to designated persons) is not contravened by an independent person ("P") transferring to another person a legal or equitable interest in funds or economic resources where, immediately before the transfer, the interest—

> (a) is held by P, and
>
> (b) is not held jointly with the designated person.
>
> …
>
> (5) The prohibitions in regulations 12 and 13 are not contravened by the transfer of funds to a relevant institution for crediting to an account held or controlled (directly or indirectly) by a designated person, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person."

60. There are further prohibitions. Regulation 14 contains a similar prohibition on making economic resources directly or indirectly available to a designated person where P knows, or has reasonable cause to suspect both that P is making economic resources so available and that the designated person is likely to exchange or use them for funds, goods or services.

61. Regulations 16 and 17 prohibit dealing in securities issued by a designated person and (in broad terms) making various types of loans to a designated person or as regards a type of loan known as a "category 4 loan" to the Government of Russia.

62. All of these prohibitions apply not only to the assets of designated persons but also to the assets of persons "owned or controlled" by designated persons. Regulation 19 contains a prohibition on circumventing any of the prohibitions in Regulations 11-18. Any person who contravenes the prohibitions summarised above commits an offence. Under section 146(1) of the Policing and Crime Act 2017, the Treasury has power to impose a monetary penalty on the offender; and it is a strict liability offence because there is no requirement that the offender must have known or suspected that he was in breach of the prohibition.

63. Regulations 11-15 do not apply to anything done "*under the authority of a licence issued by the Treasury*" under Regulation 64. Regulation 64(2)(a) states that "*[t]he Treasury may issue a licence which authorises acts by a particular person only … where the Treasury consider that it is appropriate to issue the licence for a purpose set out in Part 1 of Schedule 5*". Part 1 of Schedule 5 then contains certain specific "licensing grounds". There is no power to grant a licence except where one of those licensing grounds applies. The authority within the Treasury that issues these licences is the Office of Financial Sanctions Implementation or "OFSI".

THE LEGAL BACKDROP: STATUTORY INTERPRETATION

64. It is common ground that the Court should have regard to the "ordinary" rules of statutory interpretation, which apply generally. As set out in Bennion on Statutory Interpretation, 8th ed. (2020), paragraph 11-01:

    i) The primary indication of legislative intention is the legislative text, read in context;

ii) Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner; and

iii) The rules, principles, presumptions and canons which govern statutory interpretation are aids to construing the legislative text.

65. The overarching requirement is that a court should give effect to the intention of the legislator as objectively determined, having regard to all relevant indicators and aids to construction: *Bogdanic v SSHD* [2014] EWHC 2872 (QB) at [48].

66. Where the parties part company is in relation to special rules of interpretation. Leaving aside for the moment principles derived from the ECHR, which may or may not be applicable, it is common ground that there is a principle sometimes described as "the principle of legality" – in other words that certain fundamental common law rights will not be treated as curtailed unless this is "clearly authorised" by primary legislation.

67. To the extent that the principle is applicable the right of access to the courts is also accepted to be one of those fundamental common law rights. In *Attorney General v Times Newspapers* [1974] AC 273 (HL) it was held as follows (at 309-310), approved by the Supreme Court in *R (Unison) v Lord Chancellor* [2020] AC 869 at [76]),

> "The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities… to hold a party up to public obloquy for exercising his constitutional right to have recourse to a court of law for the ascertainment and enforcement of his legal rights and obligations is calculated to prejudice the first requirement for the due administration of justice: the unhindered access of all citizens to the established courts of law."

68. However the parties diverge as to its applicability. The Defendants submit that:

i) The principle of legality is a principle of construction designed to ascertain Parliament's intention. It is not an overriding rule of law with which Parliament must comply. As Lord Phillips said in *Ahmed* [117]: "*I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention.*"

ii) If it is clear that the primary legislation in question does make inroads into fundamental common law rights the intent of the legislation trumps the fundamental right.

69. Although the parties came at this line from different directions, and arrive at contrasting outcomes, there was ultimately little between them on the principle. The Defendants prayed in aid in particular *R (Belhaj) v DPP* [2019] AC 593, where the Supreme Court concluded that it was clear from the Justice and Security Act 2013 that Parliament did intend to curtail fundamental common law rights. As Lord Sumption put it at [14]:

> "This leaves little scope for any presumption that Parliament does not intend to curtail fundamental common law rights. Parliament plainly did intend to curtail them in what it conceived to be a wider public interest. The only questions are on what conditions and in what proceedings. Those questions must be answered on ordinary principles of construction, without presumptions in either direction."

70. The Defendants also pointed to *R (Youssef) v Secretary of State* [2022] 1 WLR 2454, where an *Ahmed*-type challenge to orders made under the 2018 Act failed but Garnham J en route to that outcome made the point that clear words need not be express: "*[a]s is apparent, it was critical to the decision of the majority that the 1946 Act did not, either expressly or by necessary implication, circumscribe the common law right of access to the court. The 2018 Act, by contrast, does just that*."

71. Pausing here, these authorities do justify the proposition that an intent to derogate from a fundamental right may be made sufficiently clear implicitly. However the cases relied on were ones where the implicit proposition was clear because it was inescapable. There was no lack of clarity. Thus:

    i) *Belhaj* was all about the closed material procedure and whether it was available in certain judicial review proceedings. That question depended on the construction of the Justice and Security Act 2013, which authorised the use of that procedure in certain circumstances but not others. It was contended that the principle of legality dictated that the Act "s*hould be given the narrowest possible construction*", infringing as it did a fundamental common law right, namely that of open justice. However the derogation was made specifically with reference to "relevant civil proceedings" and, as Lord Sumption noted with safeguards and for an acknowledged purpose. It also concerned a well known process whose effects were never going to "pass unnoticed" to use Lord Hoffmann's words from *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131;

    ii) *Youssef* concerned a challenge similar to the one made in *Ahmed*, but under the 2018 Act which is under consideration here. The 2018 Act, by contrast to the 1946 Act, contains a statutory mechanism for designated persons to challenge in the High Court a decision by the Secretary of State to designate them. The reason why the judge reached the conclusion that this implicitly excluded any other remedy was that:

> "The 2018 Act addresses the question of whether and when a person designated under the 2019 Regulations can seek a remedy in the courts. Sections 25 and 38 provide a mechanism by which a person can seek review by a court of a decision by the Secretary of State not to comply with a request that she uses her best endeavours to secure his removal from the relevant list. It is implicit in that statutory scheme that the person has no other resort to the courts."

> In essence in both cases because there was a direct addressing of the relevant question, the answer was clear, despite the fact that it was not explicitly spelled out in words. The logical correlate of what was done could only be that access to the courts was limited.

72. That is entirely in line with the earlier authorities on exclusion of right of access "by necessary implication" as noted by Laws J in *R v Lord Chancellor, ex p Witham* [1998] QB 575, 585-6:

> "A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In Ex parte Leech [1994] Q.B. 198 the Court of Appeal accepted, as in its view the ratio of their Lordships' decision in Raymond v. Honey [1983] 1 A.C. 1 vouchsafed, that it could also be done by necessary implication."

Laws J indeed noted *obiter* his doubts that such a necessary implication could in practice arise ("*The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.*"). While the cases noted above show that history has demonstrated him to be wrong on this, it underpins the need for caution about necessary implications.

73. Similarly in *R v SSHD ex parte Simms* [2000] 2 AC 115 Lord Hoffmann said at 131E-G: *"In the absence of express language or necessary implication to the contrary, the courts therefore assume that even the most general words were intended to be subject to the basic rights of the individual.*" Alison Young, writing about the principle in "The Jurisprudence of Lord Hoffmann" at p. 130 speaks of "manifestly necessary implication".

74. The Claimants naturally emphasised rather the cases where words were express. They looked further back, to *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 (HL), 286 (but the line discernible is actually the same):

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

75. The theme across all these cases is that Parliament can, if it wishes, plainly make inroads into fundamental rights. Where that is unambiguously done – which will generally be express, but may in certain circumstances be implicit, the courts will uphold that intent. However, because of the importance of those rights, their curtailment or deprivation will not be found unless that result is clearly authorised by the relevant primary legislation. As Scrutton J said in *In Re Boaler* [1915] 1 KB 21, 36:

> "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by

> another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

76. It is not suggested that in this case we are in the territory of a clear express derogation. What is being asserted is a clear implicit derogation, akin to that noted in *Belhaj* and *Youssef*.

SANCTIONS ISSUES

Can judgment lawfully be entered?

77. It was accepted that this is the most important of the questions; effectively the centre of gravity for this bundle of issues. There is no single obvious route for considering this question. The issue here can be posited in two ways. The first is to ask the question broadly, almost as a question of continuity and general principle – in particular that of the right of access to the courts. That is the approach which the Claimants favour.

78. The second is the analytical approach to which I have adverted. The Defendants break down the question into sub-questions:

    i) Do the causes of action advanced by the Claimants constitute "funds or economic resources"?

    ii) If judgment is entered on those causes of action, would the judgment debt constitute "funds or economic resources"?

    iii) If so, does the act of entering judgment amount either to (a) a "dealing" in funds or economic resources; or (b) "making available" funds or economic resources?

79. There is then the further sub-issue, raised by the Claimants: Is the Court a "person" to whom the Regulations apply? I will take this separately, because I conclude that the problems it creates indicate that it is not the correct route through the analysis.

80. At the end of the day both approaches have to be looked at together in the light of the main question: is it clear from the evidence (including both broad and narrow questions) that Parliament intended to make inroads on the right of access to the Courts?

81. That is a question on which the Defendants bear the burden of proof. The best way into the issues is to start by posing their central point, which is that the derogation from the fundamental right is here "clearly authorised" by the 2018 Act. In particular the Defendants submit that section 3(1)(a) of the 2018 Act (and Regulation 12) provides that "*a person must not make funds available … to a designated person*". The Defendants submit that those words cannot, by any

process resembling construction, be read as if it said "*save that a judgment debt may be made available to a designated person.*"

82. This is where the Claimants' broad approach comes into the equation. The Claimants say that the construction of the relevant provisions must be informed by the backdrop and the backdrop makes it either clear that judgments were not intended to be rendered unavailable or adds a factor which prevents the Defendants' approach being clear, such that the principle of legality is not engaged.

83. The Claimants' approach gains some force from the indications to which I have alluded, namely that the pronouncements at the time of the legislation indicated that the Act and Regulations, though obviously appearing rather different from the EU Regulation, were intended to continue the approach.

84. It also appears to take considerable strength from the express consideration of judgments within the EU Regulation and especially Article 7(c) which specifically disapplies the "making available" prohibition to "*payments due under judicial .... decisions rendered in a Member State or enforceable in the Member State concerned…*" and Article 11. I have considered these provisions above and concluded that they do contemplate the entry of judgments.

85. Taken together these seem to provide a background to the Regulations wherein the entry of judgments is not precluded.

86. There is a problem for the Claimants however in the differences in the wording of the Regulations, and particularly in (i) the absence of any precise equivalent to Article 11 and (ii) the wording which carries across Article 7. Indeed the Defendants submitted that one route to the clarity which they seek in order to enable a derogation from the right to access the courts is the way in which the drafting of the EU Regulation was **not** transposed into the Regulations.

87. In this context what we see in Article 7 is summarised below:

EU Regulation	**Regulations**
Article 2(2) [making available funds and economic resources] shall not prevent the crediting of the frozen accounts by financial or credit institutions that receive funds transferred by third parties onto the account of a listed natural or legal person, entity or body, provided that any additions to such accounts will also be frozen. The financial or credit institution shall inform the relevant competent authority about any such transaction without delay.	The prohibitions in regulations 12 and 13 (making funds available to, or for the benefit of, designated persons) are not contravened by a relevant institution crediting a frozen account where it receives funds transferred to that institution for crediting to that account.

Article 2(2) shall not apply to the addition to frozen accounts of: (a) interest or other earnings on those accounts;	The prohibitions in regulations 11 to 13 (asset-freeze in relation to, and making funds available to or for the benefit of, designated persons) are not contravened by a relevant institution crediting a frozen account with interest or other earnings due on the account.
(b) payments due under contracts, agreements or obligations that were concluded or arose before the date on which the natural or legal person, entity or body referred to in Article 2 has been included in Annex I; or (c) payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned; Provided that any such interest, other earnings and payments are frozen in accordance with Article 2(1).”	The prohibitions in regulations 12 and 13 are not contravened by the transfer of funds to a relevant institution for crediting to an account held or controlled (directly or indirectly) by a designated person, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person."

88. The Defendants naturally submitted that the change in the wording – and in particular the omission of specific wording applicable to judgments or arbitral awards - was significant and should be regarded as a deliberate change, so as to effectively stop the Claimants relying on continuity in this respect. It was noted that this approach to the judgments wording was replicated in other post Brexit regulations where the EU forerunners contained an equivalent to Article 7(2)(c) (such as the Cyber Attacks Regulations); and that it thus appears that there was a conscious decision made after Brexit to move away from this wording.

89. Had the change been one limited to the omission of the judgments wording I might have been attracted by this – at least to the extent of accepting the argument on deliberation. Even so, the argument would not be enough to get the Defendants home, because the authorities make clear that the clarity must come from the primary legislation and this point is dependent upon the drafting of the Regulations.

90. But in any event I do not accept that the change of wording is the material help which the Defendants suggest it is. What one sees when looking at the Act and the Regulations, both overall and in this specific instance, is that this is not a case

of replication of wording. The approach taken is different, the resulting documents are (much) longer and there is a good deal of recasting. As for the provision for judgments, it might well be seen as coming within the new wording on the basis that whatever a judgment or award does it effectively enforces an obligation which pre-existed. In other words, the change in wording can at least on one view be seen as a redrafting to remove redundancy (in that a judgment reflects an obligation). It might also reflect a discomfort with a provision which appears to trespass on the court's zone of operations, if it were the case that the legislators took the view that the making of a judgment would not in any event be caught by the Regulations.

91. This is perhaps effectively the point which was made in relation to Article 11 in *R v R* [2016] Fam 153 by Arden LJ at [26]:

> "The UK Regulations do not transpose article 11, and this failure provides a measure of further support for the proposition that what is prohibited is not the making of a court order but the satisfaction of claims. At that latter stage a licence from HM Treasury would be required under regulation 9 of the UK Regulations. There was no need to transpose article 11 if Parliament was content that the making of a court order for the payment of money should not be caught by the measures in the Regulations."

92. While I have a degree of sympathy with the submission that this passage is not quite as clear as it might be, this appears to be the point being made.

93. As to Article 11, there is certainly on one level an oddity that it has no direct equivalent. However one can see from the structure (as well as the bulk of) the Regulations that in pursuing the stated aim of continuation there are marked differences in mechanism. Further there are provisions which only seem to be consistent with the continuing ability of a designated person to pursue at least some claims (such as pre-existing claims). It is plain from Regulation 58 that there is an intent to create exceptions to the sanctions. It is plain from Regulation 58(5) that one exception relates to making funds available where the impetus comes from a pre-existing obligation. Section 44 of the Act - which introduces a statutory defence where someone acts (*ex hypothesi* in breach of the "making available" bar) in the reasonable belief that (in making such funds available) they are complying with the Regulations - also appears logically to proceed from a place where there can be civil claims brought against a person by a designated person. Otherwise the person would not need a defence.

94. I therefore conclude that the language does not provide the clear indication for which the Defendants contend of an intention to move away from continuity in this respect, and to bar entry of judgments.

95. One can perhaps also take as relevant background that the Regulations are aimed at taking the UK into a post-Brexit world. Aside from the express pronouncements as to intent (continuation, replication and so on) it is worth bearing in mind that on the Defendants' approach what would be being done would be to take the UK (a major international legal centre, on any analysis)

fundamentally out of step with the EU in a way which would make the UK a less competent jurisdiction for dispute resolution than the EU. It would also, as Mr Pillow noted in argument, be a change from the situation which reaches back further – for 30 years of sanctions related litigation.

96. For all these reasons I conclude that if such a change had been intended it would have been more clearly signposted. But critically I conclude that it is not clear from this history that there was an intent to preclude the entry of judgments. Further I accept the submission that one has to approach the analytical portion of the construction exercise with a backdrop whereby the EU Regulation did not forbid the entry of judgments and there is no manifested intention to change that state of affairs.

97. Before moving on to the individual questions, it is worth dealing with three other preliminary or background points raised by the Defendants.

98. The first is effectively the "flip side" of the background point – it was submitted that because the Act and the Regulations derive from UN and EU measures the principle of legality (an English Law principle) is not applicable. No authority was cited for this submission and I have no difficulty in concluding that it is wrong. Whatever the origin of the measures, the Act and the Regulations are UK legislation, adapted (as noted above) extensively to reflect the appropriate way to give effect to a sanctions regime in this jurisdiction. There can be no good reason why the usual principles should not apply.

99. The second was that because the 2018 Act plainly does encapsulate an intent to curtail certain fundamental common law rights (in particular the common law rights of peaceful enjoyment of property) in what it conceived to be the wider public interest, it follows that the condition for not applying the principle as regards right of access to the courts is met. I do not find that argument persuasive. It is correct that the 2018 Act does evince a clear intent to curtail or suspend some of designated person's rights to enjoy property, but it does not follow that another fundamental right should be curtailed also without any indication relevant to that right.

100. This argument depends upon what one takes from the passage from Lord Sumption's judgment in *Belhaj*, which I have already cited. The Defendants' argument effectively hinges upon this passage meaning that as soon as you have an established derogation from **any** of the fundamental rights, derogations from **all** must be assumed to be permissible, subject to the question of interpretation. However that approach does not appear to be justified by the passage in its wider context.

101. What was in focus in *Belhaj* was a derogation from the right of access to the courts – and that right only. The passage in question is topped and tailed by specific consideration of the closed material procedure and the right of access to courts. There is no consideration of other rights to which the principle of legality would be applicable. I therefore conclude that while the passage is couched in wide terms which technically enables the argument to be made, the reading asked for is one which effectively takes the quotation out of context. It is also, frankly, illogical. Why should it be the case that a clear intention to restrict a right of

access to the courts should carry with it an intent to restrict another, different, fundamental right (say the right to enjoyment of property)? Answer came there none.

102. A better argument might be said to come from the fact that the 2018 Act does include at least some curtailment of right of access to the courts, in that there is at least on one view such a curtailment in respect of challenge to designation via s. 39(2), which qualifies the remedies available on a challenge to designation, (as explained in *Youssef*).

103. But here we find ourselves back in Lord Sumption's questions as to on what conditions and in what proceedings does the curtailment operate. In my judgment where there is a clear narrow specific derogation, that provides no basis for saying that the right of access is more generally suspended without words or clear implication to justify that wider curtailment. To the extent that this argument hinged on what Garnham J said in *Youssef* at [61] that "*it is implicit in that statutory scheme that the person has no other resort to the courts*" that is (again) a reading out of context. The full passage says this:

> "The 2018 Act addresses the question of whether and when a person designated under the 2019 Regulations can seek a remedy in the courts. Sections 25 and 38 provide a mechanism by which a person can seek review by a court of a decision by the Secretary of State not to comply with a request that she uses her best endeavours to secure his removal from the relevant list. It is implicit in that statutory scheme that the person has no other resort to the courts."

104. What is being said, it is clear, is that in the context of "*whether and when a person designated under the 2019 Regulations can seek a remedy in the courts*" there is a statutory scheme and no other resort to the courts. It is not purporting to deal with other potential forms of access to the court.

105. The third point is that the right of access is solely a right to enter the court door, not a right to a judgment. In this regard the Defendants pointed to *R v Lord Chancellor, ex p Witham* [1998] QB 575, 585H where Laws J described it as a right "*to enter the court door*" and submitted that all of the cases in this area are concerned with restrictions (such as court fees) that prevent or hinder the claimant from entering the court door, not with what happens once it enters.

106. While the point was maintained, Mr Rabinowitz sensibly accepted that there was a degree of illogic about it. I have no difficulty in concluding that it is wrong. The phrase has been taken from a case to do with fees where the very issue was about the right to enter the doors of the court, because that was where the fee operated. But it is not a passage which purports to limit the ambit of the right to access justice; and indeed from the case itself it is manifest that the purpose of entry through the doors is to pursue a purpose which finishes in a judgment – see for example the references to "*access to justice*" and "*seeking redress from the courts*" at 585 F and "*seeking justice from the courts*" at 586F.

107. That conclusion is only reinforced by consideration of some of the other cases in this area – see for example the reference to *"the seat of justice"* in *Aspinall v Sterling Mansell Ltd* [1981] 3 All ER 866 at 867 (cited in Bennion at section 27.10 and judicially approved); or *R (UNISON) v Lord Chancellor (Nos 1 and 2)* [2020] AC 869 which at [2] contextualises the entire dispute in that case (fees for claims in the Employment Tribunal ("ET")) by reference to the ET's job: "*to determine numerous employment related claims*" before going on at a section starting at [30] to survey the results of ET claims.

108. This conclusion is entirely in line with the Article 6 authorities which are more explicit. *Kutić v Croatia*, no. 48778/99 (2002) at [25] refers "not only the right to institute proceedings but also the right to obtain a 'determination' of the dispute by a court". *Běleš & ors v Czech Republic,* no. 47273/99, ECHR 2002-IX at [49] in turn speaks of the right to have an effective judicial remedy enabling a party to assert its civil rights.

109. The Defendants also argued by reference to an article by the then Philip Sales in [2002] 125 LQR 598 that unless Parliament was actually on notice in 2018 that a bar on the entry on judgment would amount to an infringement of the common law right of access to the court, the principle of legality would have no application and indeed relying on it would actually undermine rather than promote Parliament's intention.

110. Yet again this argument appears to be founded on something of an inventive reading of the source material. What the future Lord Sales says in the article is this:

> "First, the question arises when and how fundamental constitutional rights and principles are to be identified….
>
> As to the first issue, it is submitted that the principle of legality operates within narrow parameters, for powerful constitutional reasons. Since the effect of the application of the principle is to change what appears to be the natural meaning of a legislative provision, it is only when there is an established, well-recognised and fundamental principle or right which can be clearly identified as being applicable at the time the legislation is passed, that it can be said that Parliament cannot be taken to have intended to infringe that principle or right by the use of general language in a statutory provision (contrary to the ordinary sense of the words used as a matter of language). But if Parliament cannot be taken to have been squarely on notice of the existence of such a principle or right, then the process of "reading down" or modifying the natural meaning of the words used would undermine rather than promote Parliament's intention as expressed in the legislation."

111. What this passage goes to is the identification of fundamental constitutional rights to which the principle is applicable, not the particular narrow issue. Here it is rightly agreed that the right of access to the courts is a fundamental constitutional right, to which the principle of legality applies (unless there is a clear intent to

derogate manifested). What is not suggested by the learned author, and what finds no basis in the authorities, is the proposition that the particular "micro" manifestation of right of access to the courts must be identified by Parliament. It would be (at the least) unkind to require Parliament to identify at the drafting stage every ingenious argument which might occur to the fertile minds of the Bar. What is more it would effectively run counter to the safeguard which the principle of legality provides.

112. Finally it was submitted that since the sanctions regime was inherently temporary it could not impose a derogation from the right of access to the courts which would infringe the principle of legality. However there are two problems here. The first is that temporary suspensions have been found to be incompatible with the right of access. The second is that this temporary suspension has no defined limit and is being used as a platform for seeking orders which at least may have permanent effects (for example in relation to the release of the undertakings sought as a correlate of the principle).

113. There is therefore nothing in the broader points which provides a way through for the Defendants to the clarity needed for the derogation from the right of access to justice. This then brings the argument to the individual points of construction, which must be taken against the background so established.

Is a cause of action or judgment debt a fund or an economic resource?

114. This is the centre of the Defendants' argument. The Defendants place emphasis on the wide meaning given to "funds" and "economic resources" and say that a judgment debt is similar in nature to ordinary debts and that a cause of action is similar to identified choses in action caught by the legislation.

115. In relation to "funds" and "economic resources" the Defendants submit that the following propositions are well-established:

    i) They have, as the CJEU put it, "*a wide meaning which covers assets of every kind, however acquired*". The Supreme Court made a similar observation in *Ahmed*. Thus, between them, funds and economic resources include assets of every kind, whether tangible or intangible.

    ii) This wide definition reflects the fact that the 2018 Act and the Regulations are "*intended to prevent access to financial means of any kind by designated persons*". Thus, examples of funds and economic resources caught by the sanctions regime extend as far as the provision of telephone or internet hosting services to a designated person and voting rights attached to shares (in addition to the shares themselves).

    iii) The distinction between funds and economic resources depends on the nature of the asset. A "*financial asset or benefit*" constitutes funds. An asset of some other kind constitutes economic resources, if it can be used to obtain funds, goods or services. For example, land constitutes economic resources rather than funds, because it is not a "*financial asset or benefit*" but can be used to obtain a financial asset or benefit, such as cash.

iv) The expression "*financial asset or benefit*" is not defined in the Regulations, but it is not confined to cash or cash equivalents. Certain choses in action, such as "a debt obligation", "rights of set-off" and guarantees, are expressly identified as funds in section 60(1) of the 2018 Act.

116. The Claimants urge focus on the "financial" aspect and upon the backdrop to which I have alluded.

117. So far as causes of action are concerned, I was minded to accept the submission initially advanced by the Claimants that a cause of action is not caught. The point made by the Defendants is key. They point me to certain choses in action which they say are caught: "a debt obligation", "rights of set-off" and guarantees, as well as "*Publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivative products*" which are expressly identified as funds in section 60(1) of the 2018 Act.

118. However there are two points which immediately appear. The first is that there is a clear distinction between these and a cause of action at least. They are certain, if some are fluctuating in value. A cause of action is not certain; it admits of the possibility of loss. That distinction then suggests the second point: why are these identified and not causes of action? In this context and with this range of possibilities identified, absence may be thought to be more likely to be witting, not unwitting.

119. That analysis was supported by the Claimants' submissions that a cause of action falls outside the ambit of the term because the Regulations see "funds" as something which the sanctioned person can use. Under Regulation 11(4)(a) it is contemplated that there can be breach if a person "*uses, alters, moves, transfers or allows access to the funds*". It was said that a designated person could not "use" its cause of action. Or rather, if one counted it as doing so, that would comprehend things which plainly are not sanctioned. So if a cause of action were caught, that would cover making any "change" that would "enable use of " it for any purpose, which would seem to include issuing a claim in court in the hope of a financial settlement. It would potentially follow that the Court itself (if a person) would be prohibited from "allowing" the designated person to have any "access" to its claim. The effect would necessarily be to prevent any designated person from even instituting, let alone vindicating its fundamental right to the court's determination of, its claims. This would apply even to a designated person who was a litigant in person or represented *pro bono*, since the cause of action itself would be unusable. That is not a position which has thus far been suggested to be the case.

120. However ultimately the Claimants conceded that a cause of action could be an economic resource, essentially on the narrow basis that it can be used to obtain funds or financial assets and goods and services, for example via assignment of a cause of action for money.

121. That leaves the question of the status of a judgment debt. Here the oral argument started with a non-engagement by the Claimants. However in the face of the facts that:

    i) In *JSC v Taruta* 22 March 2022, BVIHC (Com) 2014/0062), [26], the parties accepted that a judgment debt obtained by VTB for c.$29 million constituted "funds" within the meaning of section 60(1) and Jack J evidently thought that the concession was rightly made;

    ii) Judgment debts are assets similar in nature to the types of asset classified as funds, for example "debts and debt obligations" in section 60(1). It is hard to see how a judgment debt is less a debt than a contractual debt: it represents an obligation owed by the judgment debtor to the judgment creditor to pay the sum of money awarded by the Court.

    The Claimants ultimately conceded that a judgment debt does fall within the wording of the Act as a "fund".

122. I would therefore conclude, in line with the Claimants' concessions, that a judgment debt is on its face a "fund" under section 60(1) of the 2018 Act (and hence capable of being caught by both Regulations 11 and 12); but a cause of action is an economic resource only.

Entering judgment: "dealing" with a fund (or economic resource)?

123. The second question is whether entry of judgment constitutes "dealing" with a fund. The Defendants say that the answer here is simple. Regulation 12 provides that no person may "make available" any funds to a designated person. The expression "make available" is broad and encompasses all acts necessary for a designated person to obtain full power of disposal in respect of the funds. In these proceedings, the Claimants seek damages of some US$850 million. If the Court enters judgment on those claims, a judgment debt – which constitutes "funds" – would thereby be made available to the Claimants. Under Regulation 12, that is unlawful.

124. It is also said to be unlawful under Regulation 11, which implements the asset freeze by providing that no person may "deal" in the funds or economic resources of designated persons. The changing of a cause of action into a judgment debt is, the Defendants say, "dealing". This is because the underlying cause of action ceases to exist because it merges in the judgment debt. Accordingly, the entry of judgment would necessarily involve extinguishing – and therefore dealing in – the funds or economic resources of the Claimants, namely the underlying causes of action.

125. As to this latter argument I do not consider that as a matter of construction this answer can possibly hinge (as the argument plainly does) on the English Law doctrine of merger – and the Defendants themselves realistically acknowledged that that possibility would be surprising, when it is not a concept which would be applicable in the European Courts. If this were a good point it would have to depend not on merger but on what the Defendants described as "*a broader and more fundamental reason*": that the causes of action are, in a non-technical sense,

"used" to obtain the judgment, in the same way that shares or land might be "used" as security to obtain a loan.

126. The bottom line here is that one can certainly read those provisions in this way. It is not however clear that one must do so. As I have indicated above this argument does not work if (as had been minded to conclude) a cause of action is not an economic resource at all. Nor (even on the basis that it is an economic resource) can it realistically be said that the Court is itself "dealing" within the meaning of Regulation 11(5) (exchanging or using) – as the way in which this part of the argument was cast indicates. It follows that on the basis that a cause of action is taken to be an economic resource, it would not be caught by the Regulation prohibition on dealing/making available.

127. The fact that the logic is not inexorable is illustrated by the judgments relied upon by the Claimants in correspondence. The first case is *Taruta*, in which VTB had obtained a judgment for c.$29m against Mr Taruta. In 2021, prior to its designation, VTB also obtained an order appointing receivers by way of execution over the shares of a BVI company that was indirectly owned by Mr Taruta. Following VTB's designation in 2022, the main question which arose was whether the BVI court could lawfully discharge the receivership order made in 2021. Jack J held that it could not, because this would affect the nature or value of VTB's judgment debt and therefore amount to a "dealing" in funds. However Jack J also dealt with a separate application by VTB's solicitors, Ogier, to come off the record. He refused the application, commenting that "*sanctioned entities retain all their civic rights, including full access to the Courts and an entitlement to have their rights and obligations determined by this Court*".

128. Although the Defendants are right to say that the observation was not only *obiter* but made without the benefit of any argument to the contrary and that there might be a tension between Jack J's observation at [12] and his own observation at [34] that the receivership order could not lawfully be discharged, it is notable that this judge, with the arguments as to "dealing" live and present to his mind, did not see the matter as one which followed.

129. A similar point arises out of *R v R*. The Claimants rely upon an observation of Arden LJ, [26], that what the EU Regulation in that case "*prohibited is not the making of a court order but the satisfaction of claims*". Again, true it is that Arden LJ was concerned with the making of a court order against a designated person, not the making of a court order in favour of a designated person, because what was in issue in *R v R* was whether the court could order a designated person to pay maintenance to his wife from a Russian bank account into a Russian bank account. However again the point was to some extent in play and the concepts presented themselves to Arden LJ's mind as being clearly distinct.

130. Greater weight is added to these points by the background which I have outlined above. Yet further weight is added by the approach to licensing. The Defendants note that there is neither an exemption for, nor any power in OFSI to license the entry of judgment in favour of designated persons. That is true; but at paragraph 6 of Schedule 5 there is permission for OFSI to license "*the use of a designated person's frozen funds*" to satisfy *"a judicial … decision"*. The fact that it refers specifically to decisions made before designation would seem to suggest (quite

strongly) that the making of (other) judicial decisions is contemplated and permitted. It also carries some suggestion that that there is no provision for licensing because it is unnecessary.

131. Thus if the particular identified provisions of the 2018 Act and the Regulations are construed in isolation, it is plainly arguable that it would be unlawful to enter judgment on the causes of action advanced by the Claimants. But the contrary is also arguable; and the more so when one "pans out" from a narrow concentration on the individual words in individual Regulations, which Regulations are long and manifestly derive from a complex genesis, and bring into play the broader backdrop and intent of the Regulations as a whole.

132. I should in passing deal with the submission that (had I formed the view that the question was clear in the Defendants' favour) there are ways round any problem which did exist. It was suggested that, for example, the Court has the power: (i) to enter judgment conditionally upon the creditor ceasing to be a designated person (or an entity controlled by a designated person); (ii) to order any judgment it enters to be subject to an immediate stay on enforcement or execution; and/or (iii) to extract undertakings from the putative creditor as to what it will (or will not) do with or in respect of any judgment entered, there is no reason to suppose that the mere entry of a judgment will breach any relevant prohibition.

133. As the point does not arise I can take this briefly. I tend to the view that the Defendants are right and that – if the entry of judgment is caught by the Act/Regulations - these are either ineffective or in conflict with what would (on this hypothesis) have been the primary conclusion. However that very fact pulls into focus again the need for clarity: if it is being said that the Court cannot even determine (say) that an allegation of fraud against a third party is misconceived (without entering judgment) the extent of the interference with the Court's core functions is so much the greater.

<u>The wording: conclusions</u>

134. Ultimately despite the breadth of the wording, and despite the Parliamentary intent to allow a certain degree of curtailment of some rights which the Defendants rely upon, I conclude that the requisite level of clarity in intent to derogate from the fundamental right of access to the court for determination of rights outside designation is not demonstrated. There are certainly indications consistent with the Defendants' approach to construction. There are arguments which can plainly be run. But there are also counter arguments. There are words which could allow a reader to reach the conclusion for which the Defendants contend. But altogether, even at the level of textual analysis, there is no simple route.

135. In this context one must bear in mind what the authorities require as to implication - bearing in mind too that the possibility that the drafters could have forgotten about the courts is vanishingly small. Going back to the authorities, as noted above, they require us to ask: does the exercise of construction produce a result whereby the right of access to a court "cannot stand" or whereby there is a "necessary implication" of exclusion of the right of access to the courts such that the principle of legality does not come into play? This suggests that had the

legislation been intended to interfere with core judicial functions in this way, the very clearest of words or implications would have been necessary.

136. Plainly the answer to this question is that it does not. It is not a case of the language not permitting of any other meaning. The Defendants are dependent upon piling together a number of indications and asserting that, taken together, these amount to "clarity". But this is not right. In essence there are indications, but they produce no more than a confusion which prevents the position being clear. This is not about "*finding ambiguities which do not exist*", as Mr Rabinowitz KC put it in closing, it is about inherent uncertainties which prevent the finding of clarity.

137. Once that question is determined the answer is clear. Although there was an attempt to suggest that even if the principle of legality came into play there was still scope for me to find that the prohibition on entry of judgment is clearly or unambiguously authorised by the 2018 Act, that argument is doomed to failure. If there is no clear derogation such that the principle of legality does not apply there is plainly insufficient clarity for the presumption to be overcome. To put it another way: with no clear derogation from the right of access to the Courts the principle of legality compels the answer that judgment can be entered.

138. In a sense the conclusion as to the presumption of legality is unnecessary. This is because, if I had to reach a conclusion as to which construction was correct without any recourse to the principle of legality at all I would incline to the view that the Claimants' approach is to be preferred, as the one which best coheres with the overall sanctions regime in a situation where the wording, taken overall, is far from pellucid.

139. It follows that the Defendants' main argument fails.

Other supportive matters

140. I have reached this conclusion simply as a matter of the essential exercise of construction bearing in mind the backdrop to the relevant legislation. However in my judgment that conclusion gains considerable force from sense checking the result via a number of other indicators.

141. The first of these are the practical (one might perhaps say common sense) arguments deployed by the Claimants.

142. If the Defendants are right, it would follow that an innocent third party with a cast iron claim against a designated person which was subject to a partial set off could not get judgment because the set off could not be given effect to – or that the innocent third party could never get a costs order against a designated person however hopeless the designated party's arguments.

143. The Defendants say that there is no inconsistency with their case in that (they say) it reflects the fact that the Regulations do not prevent a designated person from instituting, pursuing or defending proceedings, nor (with a licence) from paying the lawyers acting for it in those proceedings; but on the Second and Third Defendant's case they do prevent the designated person from obtaining a

judgment debt. But it would be very strange if OFSI were minded to allow litigation which could go nowhere.

144. The second is a consideration of the "*is the Court a person*?" question. Each of Regulations 11 to 15 and 19 prohibit certain acts done by a "person". The Defendants' case would suggest/require that the Court is covered by this wording.

145. There are however a number of problems with this argument. First, as a matter of plain language, the High Court of England and Wales is not a person. The Defendants' answer to this is to say that judges are people; but the counter problem is that judges do not act as persons. They are not individual, but interchangeable; technically a judge acting as a judge is a person only in the sense that they are a manifestation of the Crown. Judges act effectively as delegates for the King. Were it the case that the intention was to produce a result which binds the Crown in the exercise of its judicial functions, one would (again) expect this to be made absolutely clear, and not be dependent on an implication of intent to derogate via multiple "indications". The argument by reference to the Crown, as to whether the regulations bind the Crown, and whether judges for this purpose are to be counted as the Crown was one which only emerged in any detail at the hearing and was not fully ventilated before me, so I shall say no more about it at this stage. There are also issues as to *mens rea* for the purposes of the related criminal offences.

146. As I have already indicated, I have relegated this point to a position outside the main argument. The Defendants suggested that the argument is a red herring in analytical terms: because even if the Court is not a person, the parties are and if there is a prohibition it can bite on them, even if the Court itself is not impacted. The way it is put is that the Claimants would be prevented from obtaining a judgment because they would be dealing in a cause of action and, in effect, an economic resource and, in effect, exchanging that or using it to obtain a judgment debt (which is a fund).

147. Clever as the argument is, I am not persuaded that this is a correct reason for not pursuing this analysis. That is because it is not the parties who would do anything active to enter the judgment. They do not "deal". Accordingly it appears that this argument is squarely directed at the court – or other decisionmaker.

148. But it is this latter point which leads me to conclude that this is not (or should not be) the determinative point in the analysis. This is because if the answer lies via this point there is plainly more than scope for a different answer to pertain as between the Court (on this hypothesis not a person) and arbitral tribunals or institutions (more naturally seen as persons). Both parties argued that arbitral bodies had to be subject to the same rules as the Court. I do not accept that this is necessarily true; there are numerous conceptual distinctions and a principled decision could in theory be taken to treat them differently. However everyone is agreed that it seems unlikely that a distinction was intended. Further the EU Regulations (in particular Article 7, which overtly brackets the two together) strongly suggest that one was not intended – which means that if continuity was sought the same result should (barring accidents in drafting) be expected under the Regulations.

149. Thirdly it is also worth noting, as the Claimants do, that there is an oddity in this approach being taken by the Defendants, given that if this were their view one might expect them to plead an illegality defence – which they have not. It is therefore no part of their substantive case that the entry of judgment in the Claimants' favour on their claims would be illegal or contrary to public policy; and yet they submit that the Court would do something illegal if it entered judgment.

150. Fourthly while I accept that OFSI's views are not determinative or even appropriate to the main analysis, in that questions of English law are decided by the English court and not by OFSI or anyone else who makes public statements about them, OFSI's views are – and are accepted to be – capable of being of persuasive value dependent on the reasoning involved in those views, in the same way as a textbook or article may be. This follows from the authorities (for example *Chief Constable of Cumbria v Wright* [2007] 1 WLR 1407 at [17]).

151. So far as this is concerned there are both general and specific indications. There are public statements by OFSI that it will license payment of reasonable legal fees because that is "*part of giving access to justice and legal representation to designated persons*".

152. Then there is the fact that in this litigation licences have been issued which plainly appear to contemplate the continuance of the litigation (and therefore demonstrate that OFSI thinks that it can continue to trial). These are:

    i) A specific licence dated 28 September 2022, permitting NBT to pay the Claimants' legal fees up to the conclusion of the trial of this action;

    ii) A specific licence dated 30 November 2022, permitting the Claimants to pay the adverse costs referred to in Foxton J's order in this case of 13 May 2022;

    iii) A specific licence dated 20 May 2022, allowing the Claimants to pay legal fees and LCIA arbitration and the Tribunal fees, and to pursue the LCIA arbitration to a final award;

    iv) A general licence allowing any designated person inter alia to pay up to £500,000 of legal fees between 28 October 2022 and 28 April 2023, without a specific licence; and

    v) A general licence in relation to the payment by any designated person of costs in relation to LCIA arbitration.

153. While in and of themselves these may not be capable of being indicators of intention, as post dating the relevant legislation (see Bennion paragraph 24.3) that subsequent approach marries up with the pre-legislative statements of intent.

154. Finally there is the Guidance. I place no real weight on this for the reasons I have given, and also because while the 2017 Guidance contained an FAQ (2.14) which plainly did contemplate a designated person being able to enter judgment ("*they would need an OFSI licence to pay legal representatives or to enforce any*

judgement in their favour") the August 2022 guidance no longer included that piece of guidance. While I would not go so far as to accept the Defendants' submission that the Guidance therefore hurts the Claimants' argument, the most that can be obtained from it in the circumstances is a rather weak negative – there is nothing in it which positively indicates that OFSI thinks the entry of judgment is prohibited.

Article 6 ECHR

155. Article 6 was not relied upon by the Defendants, and having reached a conclusion in favour of the Claimants at the first stage of this argument there therefore is no need for this judgment to deal with Article 6 ECHR.

156. To the extent that it did arise I was not persuaded that it added anything material to the strength of the Claimants' arguments. As the Defendants pointed out, the English courts have repeatedly explained that Article 6 does not confer any greater protection or access to a court than the equivalent common law principle considered above. Further the Strasbourg Court has consistently said that it does not confer any absolute right of access to the court. Member States are entitled to restrict the right, provided the restriction pursues a legitimate aim, is proportionate and does not impair the very essence of the right in question. This is not a case where there is authority sowing a more expansive approach in the courts of the EU. On the contrary in *RT France*, Case T-125/22 (CJEU, 27 July 2022) the review of the Russia sanctions endorsed as proportionate some derogation from at least one fundamental right.

157. As Laws J put it in *Witham* at 585: "*…the common law provides no lesser protection of the right of access to the Queen's courts than might be vindicated in Strasbourg*"; and I note that this appears to have been the approach taken in *UNISON* (see [64]).

158. Thus, if, contrary to my earlier conclusion, the common law principle of construction does not affect the construction of the Regulations because there was a clear intent to derogate from the right of access to justice, I am not persuaded that Article 6 would produce a different result.

Other matters

159. There was some attempt by the Claimants to persuade the Court to engage with the merits of the claims. I have not done so, and do not regard it as appropriate to do so given the basis on which I am deciding the issues.

Is there power to licence the prohibited acts?

160. OFSI's power to grant licences derives from Regulation 64. As noted above, Regulation 64(2) provides that licences may be granted only for the purposes set out in Part 1, Schedule 5. OFSI's guidance states that "*OFSI can only issue licences where there are specific and relevant licensing grounds enabling us to do so, and where the conditions in those grounds have been met*".

161. The Second and Third Defendants submit that OFSI does not have power to authorise any of the four acts.

Entry of judgment

162. So far as entry of judgment is concerned, it is common ground that there is neither an exemption for, nor any power in OFSI to license the entry of, judgment in favour of designated persons. It follows however from the arguments above that there is no requirement for a licence for the entry of judgment.

Adverse costs orders

163. The Claimants rely on Schedule 5, paragraph 3,as the source of OFSI's power. OFSI itself cited that provision when it gave the Claimants a licence to pay adverse costs awarded to the First to Third Defendants by Foxton J following the Claimants' unsuccessful summary judgment application. Paragraph 3 reads as follows:

> "3. To enable the payment of –
>
> (a) reasonable professional fees for the provision of legal services, or
>
> (b) reasonable expenses associated with the provision of legal services…"

164. The Defendants submit that this paragraph is concerned with payments by a designated person to its own lawyers for legal services, not payments to another party to satisfy a costs order. They note that (despite OFSI's position on security) OFSI's own guidance only refers to payment of the designated person's fees. On the Defendants' case this is not a case of "*provision of legal services*" within the meaning of the regulation, and nor is it "*professional fees …or… expenses*".

165. In its evidence the Claimants appeared to take a rather strained approach to this, contending that adverse costs are within paragraph 3(b) because a designated person's solicitor "*will need to advise on the risks of an adverse costs order*". Thus the argument appeared to be that a designated person's liability under an adverse costs order is an "*expense associated with the provision of legal services*" because the designated person's solicitor would have advised about adverse costs. However orally a more straightforward (and more compelling) approach was taken.

166. It is common ground that this provision permits OFSI to issue a licence to a designated person to enable it to pay its own lawyers to represent it in litigation. The issue is whether it also allows a licence to be issued to enable a designated person to pay a costs order in favour of the other party to litigation.

167. On this question there is nothing in the language of paragraph 3 to limit the licence to the professional fees of the designated person's own lawyers. What is sought to be paid would on its face fall within the wording: a licence to pay an adverse costs order enables (in purely literal terms) the payment of "*reasonable professional fees for the provision of legal services.*"

168. Of course the point can well be argued as to what was contemplated, but there are two factors which suggest that it is not limited in the way that the Defendants suggest. The first is that Schedule 5 paragraphs 2, 5 and 9M all specifically refer to the needs of, or fees incurred by, a designated person. The fact that paragraph 3 does not so limit itself indicates that it is intended to be different and unlimited as to the recipient of the services. While paragraph 9M is (as its numbering indicates) a later provision, that is not the case as regards the other two paragraphs.

169. As for the Defendants' reliance on the language of the equivalent provision under the EU regime: "*reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services*", it might be said that the use of the word "reimbursement" suggests that this was intended to capture only payments to the designated person's own lawyers to reimburse them for expenses they incurred in providing legal services to him, not payments to another party to satisfy a costs order. However there is no determination in the authorities on this point and concentration on a single word in a document of this nature is probably unwise.

170. Further the fact that the EU Regulation appears to contemplate an application by "*any interested natural or legal person*" would tend to suggest otherwise and that the legal fees or indeed other expenses covered by the paragraph can (as the breadth of the language naturally says) range beyond those of the designated person. That does not, of course, mean that a licence will be granted – that is a matter for OFSI; but the Regulations create a gateway for that application. This requirement itself allows for policing (and refusal) of inapt applications, which would take care of the situations posited by the Defendants where the broader reading could encompass anomalous situations (paying for an acquaintance's unrelated legal expenses).

171. The Defendants' reliance on the OFSI Guidance was (rightly) not significant given that elsewhere they were adamant that it was irrelevant. Certainly this is not the kind of reasoned Guidance which would engage the principles outlined above such as to give me any comfort or any pause for thought.

172. I should perhaps add that my greatest hesitation here was caused by Schedule 5 paragraph 6 ("Pre-existing Judicial Decisions") (with which I deal below in the context of favourable costs orders). However while it was suggested that an adverse costs order was a judgment debt, the argument before me was not conducted by reference to this paragraph. In any event, I have concluded (again see further below) that the drafters of that paragraph did not have costs orders in mind and should not be taken to think of a costs order as a judgment debt.

173. There is then the question of having an eye to the overall intention of the Regulation as regards licensing. What must be intended in introducing a licensing scheme is to achieve some kind of workable situation. It would make no sense to allow some parts of litigation to progress (so for example that innocent defendants wrongly sued by claimants who are designated persons can escape the toils and stigma of litigation) only for the overall progression to be stymied by a bar on other parts.

174. As the Claimants submit, payments of adverse costs orders are a routine and necessary feature of adversarial litigation. In a large and complex case, even a party which is (or will be) successful overall can expect to be required to pay at least the occasional costs order to the other side in respect of interim applications. The legislators must be taken to be well aware of this fact of litigation life.

175. On the Defendants' argument: (i) a licence could be issued to a designated person to pay its own lawyers' costs; but (ii) no licence could be issued to pay adverse costs. This would surely lead to arguments (where the designated person is a claimant) that the unlevel playing field thereby created requires or justifies a stay. If it is right that giving a judgment is not rendered unlawful by the scheme of sanctions, this would cut across the designated person's right of access to the courts.

176. Nor can one see a rational reason aligned with the scheme of sanctions why a designated person should not be made to pay costs of litigation which is (*ex hypothesi*) in existence. An adverse costs order does not benefit a designated person – on the contrary it diminishes its assets. It might therefore be said to further, rather than undermine, the object and purpose of the Regulations.

177. The point was made that the Claimants' argument should be rejected because the paragraph relied on is an exemption and as such falls to be interpreted narrowly. Reference was here made to *R(EZZ) v HM Treasury* [2016] EWHC 1470 case where at [31] that principle of EU Law was stated. However when one takes all of these points together, even taking a narrow interpretation the Claimants' argument prevails. Its starting point is in the language of the provision. That language is supported by the other broader considerations. I am also not entirely persuaded that this principle bites in the context of licences - which are not exceptions.

178. This aligns with the decision of the EU General Court in *Case 314/3 Užsienio reikalų ministerija, Finansinių nusikaltimų tyrimo tarnyba v. Peftiev* ("*Peftiev*"), a case which arose out of the Belarus sanctions of 2006 and concerned the legal expenses exception. The Court there spoke of

> "Article 3(1)(b) of Regulation No 765/2006, the purpose of which is to facilitate access to legal services, must therefore be interpreted in keeping with the requirements deriving from Article 47 of the Charter. The second sentence of the second paragraph of Article 47 of the Charter, concerning the right to an effective judicial remedy, provides that everyone is to have the possibility of being advised, defended and represented….
>
> Thus, Article 3(1)(b) of Regulation No 765/2006 must be interpreted in accordance with Article 47 of the Charter, to the effect that a freeze of funds cannot have the effect of depriving the persons whose funds have been frozen from effective access to justice."

While that case did concern payment of a person's own lawyers, the point about interpretation to give a result consistent with effective access to justice remains.

179. I therefore conclude that the payment of an adverse costs order is licensable under Schedule 5 paragraph 3.

180. I note that my view in this regard aligns with that of Foxton J in *VTB v JSC Antipinsky Refinery* [2022] EWHC 2795 (Comm), where he said, [58(iii)], that paragraph 3 enables the provision of security for costs and that it "*would seem to follow*" that meeting the other side's costs "*is a licensable activity in itself*". I do not however place significant weight on that fact given that (as the Defendants were quick to point out): (a) this was based on (and apparently only on) OFSI's guidance; (b) Foxton J expressed himself in guarded terms; and (c) it does not appear to have been argued that both security for costs and adverse costs fall outside the scope of paragraph 3, as the Second and Third Defendants do argue in this case.

181. I also note that this conclusion aligns with OFSI's views in that (i) OFSI's General Guidance expressly states that a party may be given a licence to pay security for adverse costs*:* "*OFSI's view is that both court fees and payments into court, for security for costs, can be licenced under the reasonable legal fees licencing ground*" (ii) by implication a licence actually to pay that liability can be issued and (iii) on 30 November 2022, OFSI actually issued such a licence in respect of the adverse costs ordered to be paid by Foxton J's order of 13 May 2022.

Security for Costs

182. The current position is that the Claimants have put up £5.4 million as security for the costs of the First to Fourth Defendants in respect of work up to the exchange of witness statements (including reply statements). Those sums were paid by NBT and are held by Steptoe & Johnson UK LLP ("Steptoe") subject to a solicitor's undertaking. It is apparently envisaged that any further provision of security for costs (if I conclude that such a step is licensable) will be effected in a similar way.

183. The position on this point is acknowledged to be fundamentally similar to that which pertains in relation to adverse costs orders. I reach the same conclusion for essentially the same reasons.

184. Given that (i) OFSI is able to issue a licence to pay an existing adverse costs order; and (ii) as noted above, Foxton J considered that it was also able to issue a licence to pay any future adverse costs orders, it makes obvious sense that OFSI can also issue a licence to permit the payment of security for costs for the very purpose of meeting such adverse costs orders.

185. A licence to enable the payment of security for costs is clearly granted to enable (future) payment of reasonable professional fees for the provision of legal services. Alternatively, it would sensibly and properly be described (and bearing in mind the principles of construction set out above, if necessary it must be construed) as a reasonable expense associated with the provision of legal services.

186. It logically can make no difference whether the payment is to be made into court or into a solicitor's account for this purpose, given that the court will have made an order reflecting the appropriate arrangements. The Defendants do not suggest that anything turns on this distinction.

187. It was only faintly suggested that there was any reason why OFSI should be able to licence the payment of adverse costs but not the payment of security for costs. To the extent this argument remained live I reject it. The effect would be to place an impecunious designated person in a significantly worse position than a designated person with substantial funds. In particular, on the Defendants' case, an impecunious designated person would face its claim being stayed because of an inability to provide security for costs. That would provide an obvious access to justice issue.

Damages on the cross-undertaking

188. The point here is slightly different.

189. The Claimants obtained a worldwide freezing order on 27 June 2019, subsequently replaced by undertakings by the First to Fourth Defendants. In the usual way, they gave a cross-undertaking in damages. Following the return date hearing before Jacobs J on 11 July 2019, the Claimants were ordered to fortify the cross-undertaking by providing security of US$2 million. That security is now held in Steptoe's client account. During 2021, the Fourth Defendant brought a heavy application to increase the level of fortification by some US$20 million. This application was rejected by Calver J.

190. The question is whether damages under the cross-undertaking could be ordered to be paid.

191. Ordinarily, if damages were to be awarded to the First to Fourth Defendants under the cross-undertaking, the security would be immediately available to them for enforcement: that is the whole point of fortification.

192. The Claimants submit that a payment of damages pursuant to the cross-undertaking required to be made by court order falls within either Schedule 5, paragraph 3(b), in that it amounts to a payment of "*reasonable expenses associated with the provision of legal services*"; or paragraph 5 in that it amounts to an "extraordinary expense" of a designated person who has successfully obtained a WFO or equivalent undertakings.

193. The Defendants contend that paragraph 3 plainly does not apply, suggesting that OFSI's own guidance appears to recognise this. I would accept this submission. The wording here is not a good fit; an award of damages on a cross-undertaking has nothing to do with legal services provided to the person who gave the cross-undertaking. It is an award of damages to compensate the other party for the loss caused by the injunction.

194. This takes one to paragraph 5 ("*to enable an extraordinary expense of a designated person to be met*"). The Defendants contend that there is nothing extraordinary or unexpected about a liability to pay damages on a cross-undertaking. If a litigant gives a cross-undertaking, it is always possible that it will be enforced: that is by definition one possible outcome of giving the undertaking.

195. I would nonetheless be minded to see it as an appropriate characterisation. It is not an ordinary or routine cost. It occurs only after an inquiry as to whether there should be a liability. Anyone who has ever been involved in one would be likely to regard it as out of the ordinary. Further it follows logically from where the argument goes elsewhere. How could OFSI refuse a licence when *ex hypothesi* money is to be paid to someone (a defendant) who is not sanctioned and who is, on this hypothesis, entitled to compensation pursuant to a decision of the English court. This is the more so as the diminution of a designated person's assets, with no conceivable exchange of value or *quid pro quo,* would further, rather than undermine, the object and purpose of the Regulations.

196. I therefore do not need to deal with the question of whether, if the First to Fourth Defendants were right on this point, I should discharge the undertakings they gave in lieu of the WFO.

197. Had the point arisen I would not have been minded to do so at this stage. It must be borne in mind that this question will arise (if at all) at some point in the not very near future. Sanctions (as the Defendants themselves submit) are intended as temporary measures. It should not be assumed that the sanctions position will be unchanged by the time the Court might hold the Claimants liable on the cross-undertaking.

Conclusion

198. For these reasons I conclude that OFSI has power to licence three of the four contentious acts, i.e. adverse costs, security costs and damages. There is no power to licence the entry of judgment because it is not necessary.

199. It follows that arguments on stay fall away. The nature of the arguments which feed into the exercise of the discretion on stay make it artificial and inappropriate for me to indicate what course I would have taken had I considered otherwise.

CONTROL: IS NBT OWNED OR CONTROLLED BY A DESIGNATED PERSON?

200. In the circumstances this issue is of somewhat less moment than would have been the case if I had favoured the Defendants' submissions on sanctions. In these circumstances I will address the issues more briefly than would have been the case if this issue was to be determinative.

201. It is fair to say that for understandable reasons, given the nature of the argument and the fact that the factual position on control remained in issue until very shortly before the hearing, there was a lot of evidence and a lot of argument addressed to this point. The Defendants indeed identified twelve routes to establishing control via an excellent flowchart/roadmap.

202. However almost all of that evidence fell away in the light of the (sensible and realistic) concession that if control extends to control via office by one means or another, the control test would be satisfied in relation to NBT, at least pursuant to Regulation 7(4) in that either Mr Putin or Ms Nabiullina could exercise influence

over it in significant respects (irrespective of whether they have in fact done so in the past).

203. Ultimately the point resolved into a discrete issue of interpretation of Regulation 7(4), in particular as to whether it extends to a designated person's power to control companies through their office, as opposed to personally.

The Background

The ambit of sanctions

204. As already noted in the context of the earlier issues the Act and Regulations introduce an asset freeze regime under Regulations 11-15. This asset freeze regime applies to persons designated via the list (designated persons).

205. The structure of the regulations is that the prohibitions in Regulations 11, 12 and 14 apply both to the assets of the designated persons and to the assets of an entity that is controlled by the designated person: see e.g., Reg. 11(7) which provides "*(7) For the purposes of paragraph (1) funds or economic resources are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person.*"

206. Such provisions were clearly intended to (and do) capture, for example, valuable property in London owned by an offshore company that is itself owned or controlled by a designated person. Companies that are owned or controlled by designated persons do not themselves become designated persons by virtue of such ownership and control.

207. Pursuant to the Regulations, various people have been designated. As of 30 November 2022, the list identified 1,447 individuals and 161 companies or other entities subject to the asset freeze and set out in each case a short statement of the reasons for the designation. The vast majority of the designated persons are in fact individuals holding some position within the Russian state, or within strategic companies, or otherwise involved in the invasion of Ukraine.

208. Mr Putin was designated on 25 February 2022. The reasons given were:

> "Vladimir Vladimirovich Putin is the President of the Russian Federation, carrying ultimate authority for the policy of the Russian government and Russian armed forces. In February 2022, Putin ordered Russian military forces to launch an invasion of Ukraine, undermining and threatening the territorial integrity, sovereignty or independence of Ukraine."

209. The focus on individuals is such that, on some occasions, close family members of important designated persons are themselves designated. Thus, Ms Maria Vorontsova is designated on the basis that she is "*widely reported to be the daughter*" of Mr Putin. Mr Putin's ex-wife, Lyudmila Ocheretnaya is also a designated person.

210. The designation is not however confined to individuals. A number of state controlled entities have been designated: for example the All Russian State Television and Radio Broadcasting Co (designated on 4 May 2022) and AO NII Vektor (also designated on 4 May 2022 and said to be a "*Government of Russia-affiliated entity which is owned or controlled directly or indirectly by the Government of Russia*"). 18 Banks have also been designated.

211. There is a separate package of what might loosely be labelled as "banking" or "capital markets" sanctions contained in Regulations 16-17. These have a number of aspects:

    i) As originally enacted, Regulations 16-17 prevented certain companies from accessing UK financial markets and e.g., raising loan or money market finance in London. The entities subject to the banking sanctions in their original form are those set out in Schedule 2 to the Regulations.

    ii) This is a much shorter list than the list of designated persons subject to the asset freeze, comprising just 11 companies. There is a partial overlap with the asset freeze but, for example, Gazprom Neft, an oil-producing subsidiary of Gazprom, is subject to the banking sanctions in Regulations 16-17 but is not a designated person for the purposes of the asset freeze. Gazprom itself is neither a designated person nor subject to the banking sanctions; whilst Gazprombank is subject to both the asset freeze and the banking sanctions.

    iii) These sanctions were later supplemented with additional new provisions which:

        a) Prohibited any person from dealing with transferable security or money-market instrument if it is issued by (i) any "person connected with Russia" or (ii) "the Government of Russia" after 1 March 2022 (Regulations 16(4C), 4(D), 4(E) & 4(F));

        b) Prohibited the grant of a loan (i) with a maturity of more than 30 days to any "person connected with Russia" or (ii) to "the Government of Russia" after 1 March 2022 (Reg. 17(5) (definitions of "category 4 loan" and "category 5 loan", both of which are a "relevant loan" and thereby prohibited by Regulations 17(1) & (2)).

212. The term "Government of Russia" is (as noted above) defined by Regulation 6(7) as follows:

> "Government of Russia" means—
>
> (a) the Presidency of the Russian Federation;
>
> (b) public bodies and agencies subordinate to the President of the Russian Federation, including the Administration of the President of the Russian Federation;
>
> (c) the Chairman of the Government of the Russian Federation and the deputies of the Chairman of the Government;

(d) any Ministry of the Russian Federation;

(e) any other public body or agency of the Government of the Russian Federation, including the armed forces and law-enforcement organs of the Russian Federation;

(f) the Central Bank of the Russian Federation."

213. The Government of Russia is also subject to a specific sanction under Regulations 46J and 46K, which prohibit the provision of "*interception and monitoring services*" to or for its benefit. This is the only other occasion, in addition to Regulations 16 and 17 referred to above, on which the sanctions are applied to the "Government of Russia" itself (as defined).

214. Finally, there are separate financial services sanctions that apply specifically to, amongst other entities, the CBR: see Reg. 18A, which prohibits a person from providing financial services for the purpose of foreign exchange reserve and asset management to CBR, the National Wealth Fund of the Russian Federation, the Ministry of Finance of the Russian Federation and "*a person owned or controlled directly or indirectly*" by those bodies. This list is narrower than the more general definition of the "Government of Russia" referred to above.

215. Thus while the terms "Government of Russia", "Presidency of Russian Federation" and "Central Bank" are used in the sanctions legislation none of those entities are listed for the purposes of the asset freeze. Instead the Government and the CBR are subjected to different and distinct sanctions.

Ownership and Control within the Act and the Regulations

216. The concepts of ownership and control are key concepts within the UK sanctions regime. This can be seen in two places within the Act:

i) Where regulations are made pursuant to the 2018 Act, s.11(3)(b) requires that any such regulations: "*must provide that an 'involved person' means a person who— (b) is owned or controlled directly or indirectly by a person who is or has been so involved.*"

ii) Section 62(5) of the 2018 Act then enables regulations made pursuant to that Act to "*make provision as to the meaning of any reference in the regulations to a person 'owning' or 'controlling' another person*.": see also section 11(6)(a).

217. In the Regulations, such provision as to the meaning of "owning" and "controlling" is made by Regulation 7 and Schedule 1.

218. Regulation 7 contains two conditions. If either or both of those are met by an entity ("C"), then it is treated as owned or controlled by a designated person ("P") for the purposes of the sanctions:

i) By Regulation 7(2), the "first condition" (which breaks down into three alternative sub-conditions) is that P:

a) holds directly or indirectly more than 50% of the shares in C,

b) holds directly or indirectly more than 50% of the voting rights in C, or;

c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C.

Regulation 7(3) directs attention to Schedule 1, which contains provisions applicable to the interpretation of Regulation 7(2), in particular, what is meant by "holding a right" or "holding a share" for these purposes.

ii) By Regulation 7(4) the "second condition" is that:

> "it is reasonable, having regard to all the circumstances, to expect that 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 C are conducted in accordance with P's wishes."

219. Schedule 1 contains various provisions applicable to the "first condition" set out in Regulation 7(2). In particular:

i) A person is treated as "holding a right" or "holding a share" indirectly where, amongst other things, they have a '*majority stake*' in the person who holds the right or holds the share: Schedule 1, para 9(1)(a)-(b); para 9(2)(a)-(b).

ii) The concept of "*majority stake*" is defined at para 9(3)(c) as including a situation where A "*has a right to exercise, or actually exercises, dominant influence or control over B*".

iii) By Schedule 1, para 11(1), "*where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact holds the right, unless that person also controls it)*".

iv) By Schedule 1, para 11(2), a person "*controls a right if, by virtue of any arrangement between that person and others, the right is exercisable only—*

a) by that person,

b) *in accordance with that person's directions or instructions, or*

c) *with that person's consent or concurrence.*"

<u>The position of Mr Putin and Ms Nabiullina</u>

220. Mr Putin was designated on 25 February 2022. Ms Nabiullina was added to the list of designated persons on 30 September 2022, after the Defendants had issued the present application.

221. On the same, day, the FCO issued a press release referring to her designation. The relevant parts state as follows:

> "The UK has also sanctioned Elvira Nabiullina, the Governor of the Central Bank of the Russian Federation. In her role, Nabiullina has been instrumental in steering the Russian economy through the Russian regime's illegal war against Ukraine and extending the ruble into the Ukrainian territories that are temporarily controlled by Russia. Nabiullina has been sanctioned and is personally subject to an asset freeze and travel ban. …
>
> The UK Government does not consider that Elvira Nabiullina owns or controls the Central Bank of the Russian Federation for the purposes of reg. 7 of the Russia (Sanctions) (EU Exit) Regulations 2019."

Relevant legal principles

222. Here the focus in argument was on two aspects. The first was Article 7 of the ECHR. The second was the common law presumption against doubtful penalisation.

223. As to the latter, the Claimants pointed to the summary by Simon Brown LJ in *Ricketts v Ad Valorem Factors Ltd* [2004] BCC 164 at [30], as follows:

> "…the court should strive to avoid adopting a construction which penalises someone where the legislator's intention to do so is doubtful, or penalises him in a way which is not made clear."

224. As to the former, it was common ground that the ECHR process comprises two stages. At the first stage, one interprets the legislation by reference to the common law, the English principles of statutory interpretation. At the second stage, one then asks whether that interpretation that has been arrived at is consistent or inconsistent with the relevant Convention right, and if it is not consistent, then the interpretative techniques under section 3 of the Human Rights Act come into play.

225. Article 7 of the ECHR manifestly comes from a very similar place conceptually. It provides:

> "No punishment without law
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

226. Particular reliance was placed on the following two passages:

i) *R v Misra* [2005] 1 Cr App R 21, Judge LJ said, at [30]:

> "Mr Gledhill demonstrated that the Convention contained repeated references to expressions in English such as 'prescribed by law': in French, the same phrase reads '*prevue par la loi*'. We shall assume that the concepts are identical. Article 7 therefore sustains his contention that a criminal offence must be clearly defined in law, and represents the operation of 'the principle of legal certainty' (see, for example, *Brumarescu v Romania* (2001) 33 EHRR 35, para 61 and *Kokkinakis v Greece* (1993) 17 EHRR 397, para 52). The principle enables each community to regulate itself: 'with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible - an individual must have an indication of the legal rules applicable in a given case - and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.' (*S W v United Kingdom: C R v United Kingdom* (1995) 21 EHRR 363)".

ii) *R. v Rimmington* [2006] 1 AC 459 at [33], per Lord Bingham at [35]:

> "The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule *nullum crimen, nulla poena sine lege* (*Kokkinakis v Greece* (1993) 17 EHRR 397, para 52; *SW and CR v United Kingdom* (1995) 21 EHRR 363, para 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (*SW and CR v United Kingdom*), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *G v Federal Republic of Germany* (1989) 60 DR 256, 261, para 1; *SW and CR v United Kingdom*, para 34/32)…"

The Submissions

227. The Claimants' overall submission was that bearing in mind the scheme of the Regulations and the deliberate limits imposed on sanctions against the Russian Government the Regulations should be interpreted as not covering control by reason of office – or indeed employment. They submitted that the limits on the sanctions directed at the Russian state can only reflect a deliberate decision not to subject the Russian Federation, the Government or the CBR to the asset freeze and, had it been intended that they be sanctioned via the asset freeze, it would have been a straightforward thing to list them specifically.

228. The Claimants also pointed to the fact that Regulation 7(2) is plainly limited to ownership, and submitted that this had an impact on the approach to Regulation 7(4). The Claimants submitted that it was appropriate to test rival constructions against what had been done under the legislation in terms of designation; and that when this is done it favours their construction.

229. The Defendants submitted the Claimants' approach was one which implied a qualification into the statutory wording which was not justified. They submitted that there was a difference between what Regulation 7(2) and Regulation 7(4) covered and there was no logical justification for regarding 7(4) as directed to ownership. The Defendants also submitted that reliance on events after the passing of the legislation was impermissible.

230. The Defendants submitted that in the Article 7 jurisprudence uncertainty is by reference to the elements of the offence (the principle being one principally directed to criminal penalty, though applicable more broadly) – a point made at [63] of *Misra* and that this uncertainty was not likely to arise in the case of a statutory offence.

Discussion

231. Ultimately this point is a fairly narrow one, and it turns upon the extent to which one "pans out" from the words, whether by way of recourse to the presumption against doubtful penalisation or by way of interpretation looking for statutory intention by reference to matters beyond the actual words of Regulation 7(4).

232. If one confined oneself to those words, plainly they are apt to cover the position. The relevant regulation wording can be contextually restated thus:

> "Is it reasonable, having regard to all the circumstances, to expect that [Mr Putin] would (if [Mr Putin] 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 [NBT] are conducted in accordance with [Mr Putin's] wishes. That alignment of words and facts underpins the Claimants' concession. But is it the intention of the Regulation to catch such control?"

233. Because the point does not have a practical impact in the light of my earlier conclusions, I can express a conclusion briefly and somewhat tentatively. I would incline to the view that that is not the intention; though I would doubt that the line falls to be drawn quite where the Claimants suggest it should be.

234. So far as uncertainty and the presumption against doubtful penalisation goes I accept the Defendants' submissions that one has to be analytical about the approach. There must be genuine ambiguity such as to lead to uncertainty beyond just disagreement about what words might mean. Having said that, just because an offence is statutory does not mean that it is incapable of being drafted in uncertain or ambiguous language, either in and of itself, or taken in the context of the wider evidence relevant to interpretation. Nor do I consider that the authorities justify the proposition that the principle is confined to unclarity about the elements of an offence or cause of action. While uncertainty of application of principles to a case will not be enough, uncertainty as to the correct meaning of the words expressing an element can be. This is a natural follow on from the overall exercise which is being performed – ascertaining legislative intention.

235. As Sales J made clear in *Bogdanic v SSHD* [2014] EWHC 2872 (QB) at [47-8]:

> "The principle that penal legislation is to be construed strictly is a long-standing one, of recognised constitutional importance: …. The rationale for this principle is that it is presumed within our constitutional system that the legislator intends that a person subject to a penal regime should have been given fair warning of the risks he might face of being made subject to a penalty.
>
> But it is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight"

236. This highlights the fact that intention is all and that it is to be discerned having regard to all relevant indicators and aids. Although the wording in Regulation 7(4) is wide, it must be looked at in full context and not surgically removed and looked at in isolation. This is the problem with the Defendants' submission that the Claimants' approach is to seek to try to imply a qualification into a statutory offence which is not made out on the words: that is only a good point if the qualification is not made out in the words - judged in the broader context which is relevant for the purposes of interpretation.

237. The first piece of context is the rest of the relevant Regulation. That at least raises a question about the width of Regulation 7(4). Regulation 7(2), with its terminology of "holding" is essentially about ownership, direct or through a chain of companies or via a nominee. That is part of the backdrop to interpreting Regulation 7(4). It lends force to the submission that 7(4) is essentially "backstopping" any form of ownership and control which falls slightly outside 7(2); for example a situation where a designated person has established a discretionary trust, the trustees of which own various companies, which in turn own underlying assets, and where the designated person might in fact have retained effective control of the companies within it, and be able to cause their affairs to be conducted in accordance with his wishes. This sort of mechanism – or that of a Liechtenstein Anstalt or a Jersey Foundation – is far from unusual amongst financially sophisticated individuals of high net worth. It is a paradigm which it would be expected would fall within the intention demonstrated by the earlier parts of Regulation 7.

238. So far as concerns that broader background it does appear to me to be significant that at the drafting level the sanctions were not drafted to take aim directly at the Russian State or its main entities – despite the fact that some earlier sanctions (e.g. against Iran, did do so). It also appears significant that the drafting so far as asset freeze is concerned appears to be primarily (though not exclusively) designed to operate at a personal level – as Mr Davies KC for the Claimants put it – a way of inflicting personal financial pain on those associated with the regime and thereby hoping that it will influence a change in policy. Finally there is

significance in the use of the list mechanism throughout the sanctions regime's genesis – reaching back to the UN Sanctions. While there is certainly a significant strand in the sanctions regime of preventing circumvention, what one sees is a line drawn which contradicts the submission that avoiding circumvention is by any means an overriding consideration.

239. The fact that certain entities such as VTB and Sberbank are named under both regimes – being named in the regulations and also being identified as designated persons – is neither here nor there. The mere fact that some entities are subject to both types of sanctions explicitly does not mean that there was an intention to sanction other entities explicitly under one regime and implicitly under an individual via the other.

240. It also appears odd that if banks *de facto* controlled by the CBR or Mr Putin are covered by the sanctions that certain banks are themselves sanctioned separately by name. While this cannot go to the exercise of construction (as a post legislation use of powers by those who may have got the ambit of the powers wrong) that approach by those who must have had close input into the drafting of the Regulations does at least give pause for thought as a test of the rival constructions.

241. It also seems implausible that it was intended that such major entities as banks (or other major entities such as Gazprom) were intended to be sanctioned by a sidewind, in circumstances where they would have no notice of the sanction and be unable themselves the challenge the designation under section 38 of the Act.

242. Stepping back there are powerful "real world" reasons why this is a case for (if necessary) resolving the question by reference to the principle against doubtful penalisation. This is legislation which imposes not insignificant criminal sanctions. As Mr Davies pointed out in submissions commercial people also need to know if a particular company (say, Gazprom or NBT) is sanctioned.

243. The approach thus indicates aligns with the OFSI guidance which states:

> "An entity is owned or controlled directly or indirectly by another person in any of the following circumstances:…
>
> • It is reasonable to expect that the person would be able to ensure the affairs of the entity are conducted in accordance with the person's wishes. This could, for example, include:
>
> o Appointing, solely by exercising one's voting rights, a majority of the members of the administrative, management or supervisory bodies of an entity, who have held office during the present and previous financial year;
>
> o Controlling alone, pursuant to an agreement with other shareholders in or members of an entity, a majority of shareholders' or members' voting rights in that entity;

> o Having the right to exercise a dominant influence over an entity, pursuant to an agreement entered into with that entity, or to a provision in its Memorandum or Articles of Association, where the law governing that entity permits its being subject to such agreement or provision;
>
> o Having the right to exercise a dominant influence referred to in the point above, without being the holder of that right (including by means of a front company);
>
> o Having the ability to direct another entity in accordance with one's wishes. This can be through any means, directly or indirectly. For example, it is possible that a designated person may have control or use of another person's bank accounts or economic resources and may be using them to circumvent financial sanctions.
>
> ...The UK Government will look to designate owned or controlled entities/individuals in their own right where possible."

244. This Guidance is both most apt to the approach of reading Regulation 7(4) cohesively with Regulation 7(2) but also indicates that it is not the intent for complex investigations to have to be made or evidence gathered – because the list should generally set out the persons targeted.

245. I would therefore answer the question in the Claimants' favour, concluding that NBT is not controlled either by Mr Putin or Ms Nabiullina for the purposes of the Regulations.

246. I would add two further points. The first is that the analogy with freezing orders (which the Claimants prayed in aid) is interesting, and reaches a similar result; but I have not placed any reliance on the authorities in that very different context.

247. The second is that I have some hesitation about the approach adopted by the Claimants as regards the precise drawing of the line; and it is evident that this point has also exercised the Claimants. In written submissions there was an ambiguity as to whether what was being contended was for a line geared to stop short of control via public office, or office more generally including via employment. In oral submissions Mr Davies indicated that the Claimants' case was that the intention was not to capture any of these – that control exercised as an employee of a company over rights or assets which actually belong to the company itself is not caught because logically that is in the same category. In both cases control is being exercised on behalf of someone else. In both cases death or loss of office would mean that the sanctions should cease to bite against the previously controlled entity. In both cases (well illustrated by the Roadmap) ascertainment of whether an asset is controlled might be hugely complex to ascertain but with very significant "real world" consequences.

248. On this, despite the clear submissions made for the Claimants, I can on reflection see the attractions of the argument that it is only political office which should fall outside Article 7(4). The practical issues of complexity are ones which afflict

questions of political control, control via employed office and personal (UBO) control; this therefore offers no safe basis for a distinction. The problems caused by death and loss of office do arise in both office cases but do not themselves create problems of such complexity as to force a conclusion. There is at least some indication in the case of *Syriatel Mobile Telecom v Council of the European Union* (Case C-159-19) that control via corporate office would be sufficient. A line which included corporate officeholder control but excluded public/government office-holder control would seem however to align with the overall approach of this sanctions regime. There is also something to be said for this in terms of preventing circumvention; a line drawn to exclude corporate officer holders would be more vulnerable to exploitation on this front.

OTHER MATTERS

249. A further point was raised by the First to Fourth Defendants. This concerned the impact of sanctions on what the relevant parties are agreed would otherwise be the appropriate costs order against First and Eighth Defendants (i.e. in favour of the Claimants) following the withdrawal of a jurisdiction challenge relating to the trust claims ("the Costs/Sanctions Issues"). The relevant issues were directed to be heard at this hearing by Christopher Hancock KC sitting as a Deputy High Court Judge.

The Costs/Sanctions Issues

250. Following the withdrawal of the First and the Eighth Defendants jurisdiction challenge relating to the trust claims, subject to the Costs/Sanctions Issues:

    i) It was common ground that the Claimants would in principle be entitled to an order that the First Defendant pay 50% (with the Eighth Defendant paying the other 50%) of the Claimants' costs of the jurisdiction challenge.

    ii) The First and Eighth Defendants agreed that the amount which would have been so payable was (in total) £260,733.80, including 20% Russian VAT.

    iii) It was further agreed that interest would run on the above sums from the date on which any licence to pay that amount was granted by OFSI.

251. However, such an order raises a number of issues:

    i) Is the making of a costs order against the First Defendant in favour of the Claimants (a "Favourable Costs Order" i.e., in favour of a designated person) itself making funds or economic resources available to or for the benefit of the Claimants for the purposes of Regulations 12-15?

    ii) If so, can a licence can be granted under Part 1 of Schedule 5 of the Regulations to make a Favourable Costs Order or for payment by the First Defendant to the Claimants pursuant to a Favourable Costs Order insofar as it relates to:

        a) The Claimants' costs;

b) Russian VAT on those costs; and

c) Interest on those costs; and

iii) In light of the above, what, if any, costs order should the Court make?

252. The first part of the debate concerns the obverse of the Adverse Costs Order question. I have concluded that OFSI can grant a licence to pay an Adverse Costs Order. But can it grant a licence to enable a designated person to receive payment of a costs order in its favour?

253. There was no real issue as to the first part of the argument: making an order that the Second Defendant (absent a licence) pays anything to the First Claimant is making funds or economic resources available to or for the benefit of a designated person contrary to Regulations 12-15 of the Regulations. There is no relevant exception in Regulation 58. Therefore unless there is a licensing ground for authorising the payment under such an order (and it is then so authorised) the Court cannot make a Favourable Costs Order which encompasses the Second Claimant.

254. As to licensing, the Claimants relied again on Schedule 5 paragraph 3 - for the purpose of enabling "*the payment of reasonable professional fees for the provision of legal services, or reasonable expenses associated with the provision of legal services*".

255. There are, as Mr Edey KC for the First and Fourth Defendants persuasively pointed out, problems with this. For example, all of these expenses either have been or will be paid under the licence granted to them for that purpose. In practice a costs order does not provide for payment of such fees – it indemnifies (or more commonly partially indemnifies) the person who pays the fees. There is also an oddity that if paragraph 3 does apply it might result in two licenses – one for payment of the fees by the Claimants and another for indemnification of the Claimants by the Defendants.

256. Mr Edey also argued that contextually paragraph 6 of the Schedule would appear to be the paragraph to which one would naturally look. That paragraph provides:

> "To enable, by the use of a designated person's frozen funds or economic resources, the implementation or satisfaction (in whole or in part) of a judicial, administrative or arbitral decision or lien, provided that—
>
> (a) the funds or economic resources so used are the subject of the decision or lien,
>
> (b) the decision or lien—
>
> (i) was made or established before the date on which the person became a designated person, and
>
> (ii) is enforceable in the United Kingdom, and

> (c) the use of the frozen funds or economic resources does not directly or indirectly benefit any other designated person."

257. This poses the question of whether it can be right that a costs order/judgment in the designated person's favour would be treated more favourably than a payment of a substantive judgment to be made by the designated person. As he points out, the Regulations clearly do create a situation which can have serious consequences for a non-designated person with a non-pre-designation debt or judgment.

258. However, attractively as this was put, I conclude that a Favourable Costs Order attracts the same treatment as an Adverse Costs Order. Dealing with this last point first, I am not persuaded that paragraph 6 of Schedule 5 has any application to a costs order. A costs order relates to legal services and expenses, which are more explicitly covered in paragraph 3. Further this paragraph is directed to decisions specifically directed at a fund or economic resource.

259. Next, the wording of paragraph 3 is (as already noted) wide – and on its face it covers payment of a costs order (in either direction). Both Adverse and Favourable Costs orders will involve payment of costs either paid or billed to the receiving party. As to the benefit issue, there is no distinction of principle relevant to the purpose of sanctions – a Favourable Costs Order does not give anything to a designated party. At most it reduces the amount it has had to spend on (*ex hypothesi*) an argument upon which it was right, and which OFSI will have licensed. It puts the designated person in the position it would have been in but for a bad point being taken by the other side. Were matters otherwise it would plainly open the door to abusive conduct by non-designated litigants, who could take free shots at the designated person, safe in the knowledge that they would not be visited with real world consequences.

260. I conclude that payment of Favourable Costs Orders to the Second Claimant is licensable.

261. As regards the VAT question I accept the submission that Russian VAT paid or to be paid by the First Claimant does not fall within paragraph 2(3)(d) ("*to enable the basic needs [of the Claimants] to be met*", including needs for the *"payment of tax"*) in circumstances where the payment has been made or there is no doubt of the ability to pay. Nor would I be minded to think that it falls within paragraph 3(b) ("*reasonable expenses associated with the provision of legal services*"). It is not an expense, there is no "reasonableness" element. However ultimately it would seem that the VAT element is simply part of the paragraph (a) amount – it is part and parcel of the legal fees which are caught by paragraph 3(a) because the legal fees are billed and paid as including the relevant VAT figure.

262. Had I concluded otherwise, there is of course no difficulty in payment to the First Claimant, which is (i) not a designated person and (ii) whose assets I have (albeit tentatively) concluded are not to be treated as being controlled by Mr Putin/Ms Nabiullina. However there would appear to be a fairly strong argument that if payment to the Second Claimant were not possible and instead NBT used its own money to satisfy a costs liability of the Second Claimant to enable it to receive a favourable costs payment it would be a benefit being made available to the Second Claimant.

263. Finally there is the question of post-judgment interest on costs. Here I am persuaded that there is no licensing ground for ordering the payment or paying interest on costs in Schedule 5. None was identified in writing or orally by the Claimants. Simply as a matter of principle interest on costs, which is compensation to the party in whose favour a Favourable Costs Order is made for having been precluded from obtaining a return on the money it has paid out in costs could not be regarded as professional fees in respect of legal services or expenses associated with the provision of legal services, so as to fall within the grounds engaged for costs themselves.

264. It was suggested by the First to Fourth Defendants that if this point were reached the Court should "*reserve costs until it has sought and obtained the relevant licence*". I do not consider that this is the appropriate course. The licence is for payment not for the making of the order. It would seem to follow the Order should provide for the (i) payment of costs (including the VAT element) by the First Defendant, such payment to take place following the grant of a licence and (ii) reservation of the question of interest on costs.

Matters agreed/stood over

265. There were three further matters to be dealt with:

    i) An application by MaplesFS Limited to cease to be a Defendant in these proceedings, with its place being taken by MFT (PTC) Limited. That issue was resolved by agreement.

    ii) An application by the Sixth Defendant for security for costs from the Claimants. Subject to the issue of principle with which I have already dealt, that was agreed.

    iii) What, if any, directions the Court should give at this stage as regards trial. It was agreed that this matter should best be left over until after this judgment had been circulated.

CONCLUSION

266. For all of these reasons, the Defendants' applications are dismissed.