Russian sanctions and court proceedings

Stephen Jourdan KC and Cecily Crampin discuss the High Court's decision in *PJSC National Bank Trust*

Introduction

On 27 January 2023, Cockerill J gave judgment in *PJSC National Bank Trust v Mints* [2023] EWHC 118 (Comm).

In brief summary, she determined that a designated person under the Russia (Sanctions) (EU Exit) Regulations 2019:

- can pursue proceedings in the High Court and obtain a judgment without obtaining an OFSI licence, because pursuing legal proceedings is not prohibited by the Regulations;

- can pay costs to another party and can provide security for costs, provided an OFSI licence is granted, because both types of payment are "to enable the payment of reasonable professional fees for the provision of legal services";

- if the court orders the designated person to pay damages pursuant to an undertaking in damages given to obtain an interim injunction, can pay the damages if an OFSI licence is granted, because such a payment is an "extraordinary expense of a designated person".

Her judgment sheds light on some issues concerning the impact of the Regulations on property litigation which we have had to grapple with. However, she gave permission to appeal, so this judgment may not be the last word on the subject.

Litigation and designated persons: how far does the Russia Sanctions regime go?

The Russian invasion of Ukraine in the spring of 2022 has increased focus on the Russian sanctions regime, following the designation of a number of individuals and companies under the Regulations.

The widely-drafted language of the Sanctions and Anti-Money Laundering Act 2018, and the Regulations made under that Act, is derived from, but not simply a repeat of, the EU sanctions regime to which the UK subscribed prior to Brexit. The meaning of that language is not always obvious, particularly when it has to be applied to issues arising between a landlord and tenant, or a vendor and purchaser of land, or a mortgagee of land and the mortgagor.

PJSC wrestles with the meaning and effect of the Regulations in determining a fundamental issue: to what extent do the 2019 Regulations prevent effective litigation when one of the parties becomes designated during the currency of the claim?

In this long-running, complex, commercial case, one of the claimants was designated in the run up to trial. The Defendants argued that the trial could not go ahead. They said that entry of judgment for the Claimants by the court, were that the outcome at trial, would be unlawful. In addition the Defendants would be prejudiced because the Claimants could not pay adverse costs orders, a security for costs order would have to be discharged, and the Defendants could not be awarded damages under the Claimants' cross undertaking in an earlier freezing injunction. All of those steps, the Defendants said, were prohibited by the Regulations and could not be licenced by OFSI because none fell into the categories of licence OFSI could make. The claim should thus be stayed.

Cockerill J decided that the entry of judgment is not something prohibited by the Regulations, that both positive and adverse costs awards and security for costs fall within para 3 of Schedule 5 of the Regulations as something which OFSI could licence to enable payment of reasonable professional fees and expenses for the provision of legal services, and that payment of damages under the cross undertaking could be licensed to enable anything to be done to deal with an extraordinary situation under para 7 of schedule 5.

In so doing, she considered the history of the sanctions regime, from its UN roots, through the EU legislation, and then the post Brexit rendering with its exclusion of certain key phrases.

This article summarises the basis of the decision, and then considers briefly its possible implications.

The sanctions regime – a brief overview

There are numerous sanctions regimes in relation to various countries and categories of persons, contained in regulations principally made under the Sanctions and Anti-Money Laundering Act 2018. The regime which has come most to the fore recently is the regime applicable to Russia, contained in the Russia (Sanctions) (EU Exit) Regulations 2019.

Under the Regulations, the Secretary of State may designate persons by name for various purposes, including applying an asset-freeze to them under regulations 11 to 15. Those regulations prohibit:

- dealing with funds or economic resources owned, held or controlled by a designated person (reg 11);

- making funds available directly or indirectly to a designated person (reg 12) or for the benefit of a designated person (reg 13);

- making economic resources available directly or indirectly to a designated person if that person would be likely to exchange the economic resources for, or use them in exchange for, funds, goods or services (reg 14); and

- making economic resources available for the benefit of a designated person if that person thereby obtains, or is able to obtain, a significant financial benefit (reg 15).

In each case, the prohibition is breached if the person knows or has reasonable cause to suspect they are breaching it. Breach is a criminal offence.

For these purposes:

- "funds" is widely defined by s.60(1) of the 2018 Act to cover all sorts of financial assets or benefits. The expression includes cash or the right to payment of cash e.g. cheques and debts. It also includes "interest, dividends and other income on or value accruing from or generated by assets" which we think must include rent;

- "economic resources" is defined by s.60(2) of the 2018 Act to mean "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". This will include land, as Cockerill J said at [115(iii)]: "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.

The Regulations provide a system of licensing by the Office of Sanctions Implementation (part of the Treasury), known as "OFSI", so that otherwise prohibited steps may be taken if done so in a way controlled by the licence.

There are however only limited bases on which OFSI can grant a licence which are set out in Schedule 5. These include:

- para 3: to enable payment of reasonable professional fees and expenses for the provision of legal services;

- para 5: to enable an extraordinary expense of a designated person to be met;

- para 6: to enable by the use of the designated person's frozen funds or economic resources, the implementation or satisfaction of a judicial decision provided that (amongst other things) the funds or economic resources so used are the subject of the decision, and it was made before the date on which the person became a designated person;

- para 8: to enable, by the use of the designated person's frozen funds or economic resources, the satisfaction of an obligation of that person (whether arising under a contract, other agreement, or otherwise), provided that (amongst other things), the obligation arose before the date on which the person became a designated person.

There is an additional set of actions excepted from the prohibitions, under reg 58. These include, at reg 58(5), that regulations 12 and 13 are not contravened by the transfer of funds to a relevant institution (a person permitted to carry on a regulated activity under part 4A of the Financial Services and Markets Act 2000, including banks) for crediting to an account held or controlled by a designated person where those funds are transferred in discharge of an obligation which arose before the date on which the person was designated.

The treatment of litigation and the entry of judgment in favour of a designated person

The central issue addressed in *PJSC* was whether entry of judgment in favour of a designated person for the payment of money to that person was itself prohibited by the sanctions regime.

The judge's analysis, in deciding that it was not, was focussed on construing the 2018 Act and the 2019 Regulations in the light of the UN resolutions and the orders which gave effect to them, and then the EU regulations which applied before Brexit, from which they stem. She considered that Parliament's intention was to provide continuity from the EU regulations, despite the different and more extensive drafting in the legislation passed by the UK Parliament and in the 2019 Regulations.

She framed the issue as being whether, in the 2018 Act, Parliament had unambiguously curtailed the common law right of a person to access to the courts. If not, so that right continued despite designation of a party, the court must be able to enter judgment since that is an inherent part of the common law right.

One important point discussed in the judgment is the difference in language between the EU regulations and the UK Regulations and whether that difference in language signalled an intention to produce a different result.

The EU Regulations said that the prohibition on making funds or economic resources available to a sanctioned person did not apply where there was added to a frozen bank account "payments due under judicial, administrative or arbitral decisions rendered in a Member State or enforceable in the Member State concerned".

The equivalent provisions of the UK Regulations make no reference to payments due under judicial, administrative or arbitral decisions.

The Defendants argued that this removal of reference to judgments in favour of a designated person showed that access to the courts was implicitly removed. The judge disagreed. She considered that the Act and the Regulations took a different approach to drafting to the EU Regulations, but there was no intention to produce a different effect.

The Defendants argued that a cause of action is an "economic resource" and a judgment debt is "funds" or economic resources, and hence judgment for a designated person would be dealing with funds or economic resources or making them available.

It is clear from the judgment that there was considerable argument on these points, but ultimately the Claimants conceded that a cause of action was an "economic resource" and a judgment debt was a "fund".

This did not get the Defendants where they wanted to go, though. The Judge held that a court in entering judgment is not "dealing with" the cause of action, nor is entering judgment making a "fund" available to the claimant. She based this not on a linguistic analysis of the Regulations, but rather because she concluded 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": [134].

The treatment of costs orders made against a designated person

The Judge held that a designated person who is party to litigation can pay costs to another party pursuant to an order for costs, and satisfy an order for payment of security for costs provided an OFSI licence is granted under Sch 5 para 3. She held that in each case the payment is "to enable the payment of reasonable professional fees for the provision of legal services".

The Judge said that a payment under an order for costs fell within the literal meaning of the words used in Sch 5 para 3. This seems questionable. A payment under an order for costs does not usually enable professional fees for legal services to be paid; they will already have been paid. What it does is provide some reimbursement to the person who paid them – usually not of the whole of the amount they have paid.

We can, however, see the justification for applying a purposive interpretation to the language to achieve the result arrived at by the Judge. We doubt that even a purposive interpretation would be sufficient to enable payment of an order for costs made in favour of a litigant in person. They would be entitled to a payment of £18 per hour under the Litigant in Person Costs and Expenses Act 1975, but that is plainly not a payment to enable the payment of reasonable professional fees for the provision of legal services.

The treatment of an order made against a designated person for payment of compensation pursuant to a cross-undertaking in damages

When a claimant obtains an interim injunction, they invariably have to undertake to the court that if the Court later finds that the order has caused loss to the defendant, and decides that the defendant should be compensated for that loss, the claimant will comply with any order the court may make.

The Judge had to determine whether, assuming such an order was made, OFSI could grant a licence authorising the claimant to make the payment needed to satisfy the order. She held that OFSI could do this under Sch 5 para 5: "To enable an extraordinary expense of a designated person to be met."

She said "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": [195].

This again seems to us to be stretching the language of the Regulations considerably. It is difficult to square with the distinction which is clearly made between payment of obligations existing at the time of designation and new obligations arising subsequently. If payment of a sum of money assessed by the court is an "extraordinary expense" because that is not an ordinary or routine cost, and occurs after an enquiry as to whether there should be a liability, then that would be true of an order for the payment of damages for breach of a contract made after designation.

The implications of the judgment

In our view, despite asserting that she was applying the language of the Regulations, the reality is that the judge adopted a purposive approach to the interpretation of the 2018 Act and the Regulations. She emphasised achieving continuity with the previous EU regulations and achieving a sensible and fair result.

That being so, and subject to it surviving scrutiny by the Court of Appeal, we think it suggests that the Courts will reach practical and sensible solutions to some of the property litigation conundrums we have wrestled with. One of the issues that arise when the sanctions regime and property law collide is the extent to which the non-sanctioned party is stymied by the designation of the other, so that aspects of the property relationship are unenforceable, and indeed incapable of being addressed by the court, whilst the designation stays in place. The practical approach suggested in this decision, would support answers that do not prevent the non-designated party from enforcing their property law rights.

For example, take the question of what happens if a tenant of offices is designated at a time when they are claiming an order for a new tenancy under the Landlord and Tenant Act 1954.

It follows from *PJSC* that both the existing tenancy and the claim to the new tenancy are "economic resources" but that the landlord and the court may deal with the claim without worrying about whether they are "dealing with" the economic resources, because litigation is not such a dealing.

When the parties have agreed, or the court has determined, the rent payable under the new tenancy and the terms of the new tenancy, and the interim rent payable under s.24A, can the new tenancy be granted?

The right to the new tenancy will be an "economic resource" and the landlord will worry that:

- by granting the new tenancy, the landlord would contravene the reg. 11 direction not to "deal with" an economic resource owned, held or controlled by a designated person, and

- none of the provisions of Sch 5 appear to give OFSI the right to grant a licence authorising the grant to a designated person of a new tenancy.

We think that, taking the generous approach to the interpretation of the legislation adopted by Cockerill J, the court might well conclude that granting the new tenancy to satisfy an order of the court, or even an agreement as to the terms of the new tenancy giving effect to the tenant's rights under the 1954 Act, would not amount to "dealing with" the right to a new tenancy. In that case, reg. 11 would not apply. Rather, it would amount to making an economic resource available to the tenant, but in circumstances where:

- that person is not likely to exchange the tenancy for funds, goods or services, so that there is no breach of reg 14; and

- where the grant of the tenancy would be unlikely to confer on the tenant a significant financial benefit, so that there is no breach of reg 15.

An alternative analysis might be that, if a court order for the grant of a new tenancy is made, OFSI can grant a licence under Sch 5 para 7: "To enable anything to be done to deal with an extraordinary situation", applying Cockerill J's reasoning that court orders are out of the ordinary and therefore a situation in which the court orders someone to do something is an "extraordinary situation". As nearly all 1954 Act renewals end with an agreement rather than a court order, one could describe a court order for the grant of a new tenancy as being just as much an "extraordinary situation" as the making of an order for payment of compensation pursuant to an undertaking in damages.

Or perhaps a purposive interpretation could be given to Sch 5 para 8 which authorises OFSI to grant a licence:

> "To enable, by the use of a designated person's frozen funds or economic resources, the satisfaction of an obligation of that person (whether arising under a contract, other agreement or otherwise), provided that—
> (a) the obligation arose before the date on which the person became a designated person, and
> (b) no payments are made to another designated person, whether directly or indirectly."

Perhaps the Landlord and Tenant Act 1954 could be regarded as the source of the obligation to grant the new tenancy for the purposes of that paragraph and therefore an obligation which arose before designation.

How widely can one read the para 8 obligation?

It would seem to follow from the judgment that preparing a claim and sending it for issue is not "dealing with" an economic resource". In addition, though, the judgment deprecates a granular analysis of what happens to a cause of action through the litigation process. At [124-5], the judge said that reliance on the doctrine of merger of the cause of action with judgment could not be taken as an instance of dealing with the cause of action, given the background to the Act and the Regulations in EU law, so that the meaning of "dealing" could not hinge on the peculiarly English law doctrine of merger. Likewise, a granular analysis in which one said one was dealing with a cause of action by suing on it appears the wrong approach. In this context, one perhaps better sees the litigation steps including entry of judgment as enforcing a pre-existing obligation, as the judge suggests of entry of judgment at [90].

If that is right, it suggests a wide understanding of pre-existing obligations. The idea of a pre-existing obligation can be found in reg 58(5), which allows payment into the frozen bank account of a designated person to satisfy in discharge of an obligation which arose before the date of designation, and the licencing condition in Sch 5 para 8, which, conversely, allows OFSI to licence the use of the designated person's frozen funds or economic resources, the satisfaction of an obligation of that person (whether arising under a contract, other agreement, or otherwise), provided that (amongst other things), the obligation arose before the date on which the person became a designated person.

The judge's suggestion that entry of judgment is part of enforcing such an obligation suggests an argument that reg 58(5) would allow the payment of settlement monies to a designated

person's frozen bank account where the designated person has a claim against someone else which arose, whether by contract or tort or other cause of action, before designation. It suggests an argument that OFSI can licence a designated person likewise to pay a judgment debt, or settlement monies, on a cause of action arising before designation, whatever the date of settlement or judgment, despite entry of judgment after designation (and despite the specific ability to licence payments to satisfy pre designation judgments in para 6).

The judgment does suggest a limit. In discussing costs orders for the benefit of a designated person, at [253] it is suggested that a positive costs order in favour of a designated person cannot be made unless payment can be, and in due course is, licensed. What is said is "there is no relevant exception in Regulation 58". That suggests that the costs order is not part of enforcement of an existing obligation. One might say that this is because costs orders are discretionary and not an inherent part of enforcement of a cause of action. That seems odd though, given the ubiquity of the CPR (if the matter comes to court). Besides other causes of action, such as proprietary estoppel, give the court a discretion as to the order which could be made. It is not obvious why a costs order should not be payable under reg 58(5) on a wide reading of obligation.

Overall, the judgment does not provide all the answers to the problems created by the Regulations, but the approach taken by Cockerill J will provide valuable assistance in resolving property problems arising where a landlord, tenant, vendor, purchaser, mortgagor or mortgagee has been sanctioned.

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1 February 2023