

MINTS V. BANKS TRUST & OTKRITIE. UK COURT OF APPEAL PROVIDES AN UNPRECEDENTEDLY BROAD INTERPRETATION OF THE «CONTROL» TEST

October 20, 2023.

On October 6, 2023, the UK Court of Appeal in *Mints v. Banks Trust & Otkritie*¹ broadly interpreted one of the criteria of ownership or control by a designated person under UK sanctions regulations. Under the criterion, a person is deemed to be owned or controlled by a designated person if it is reasonable to expect that the designated person would by any means achieve the result that other person's affairs are conducted in accordance with the sanctioned person's wishes.

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I. Factual Background

In 2019, National Bank Trust (“**NBT**”) and Otkritie Bank filed a lawsuit against the former ultimate beneficial owners of the banks (among others, Mr. Boris Mints) to recover their losses. The defendants have requested a stay of proceedings because Otkritie Bank is directly designated in the UK, and NBT is controlled by designated persons – Mr. Putin and Mrs. Nabiullina. Therefore, the defendants alleged, the English court cannot enter judgement in favor of the banks, and the banks will be unable to pay the defendants' legal expenses and damages in the event of a court decision to that effect.

To consider the motion, the courts needed to determine whether:

¹ The judgement is available at the [link](#).

- the court may enter judgement in favor of the plaintiffs?
- OFSI (the UK sanctions authority) may grant a license for certain actions in connection with the proceedings (including payment by the banks of legal expenses and damages)?
- NBT is controlled by designated persons under the Russia (Sanctions) (EU Exit) Regulations 2019 (“**Sanctions Regulations**”)?

II. Courts` positions

With respect to the first two issues, both the court of first instance and the Court of Appeal ruled in favor of the banks, stating:

- The Sanctions Regulations do not prohibit entering judgement in favor of sanctioned persons.
- The Sanctions Regulations allow OFSI to license various proceedings-related actions, including payment of legal expenses and damages by banks.

Given the position of the first instance and the Court of Appeal on the first two issues, the issue of control over NBT had no practical effect. However, both courts deemed it necessary to comment briefly on the issue.

a. Court of first instance on control

The judge of first instance concluded that Mr. Putin and Mrs. Nabiullina did not control NBT within the meaning of the Sanctions Regulations criteria. While noting that *de facto* NBT’s affairs could be conducted in accordance with Mr. Putin’s wishes, the judge narrowly interpreted the criterion in question, stating that:

- it plays an auxiliary role to the formal ownership criterion² and applies only to certain complex structures that do not trigger the formal ownership criterion (e.g. discretionary trusts with effective control of a designated person);
- it applies solely to control in personal capacity (effective personal control) and does not cover control resulting from holding a public office;
- a different interpretation of the criterion in question could lead to the absurd conclusion that every Russian company is controlled by Mr. Putin and is subject to sanctions.

b. UK Court of Appeal on control

The Court of Appeal rejected the position of the first instance, affirming that none of the above-mentioned limitations follows from the text of the Sanctions Regulations. The criterion of control is formulated as widely as possible and its text does not permit any limitations on its scope:

“[t]he use of the words: “in all the circumstances” and “by whatever means” makes it clear that [the criterion] does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes.”³

The Court expressly acknowledged that Mr. Putin could be viewed to control all Russian companies. As to the absurd consequences of such stance – rendering all Russian companies subject to sanctions – the Court of Appeal noted that they arise not from a precise interpretation of the clear and broad wording of the control criterion, but from the ill-considered decision of the British government to designate Mr. Putin.

III. UK Government position

To avoid the said consequences, on October 16, 2023, the Foreign, Commonwealth and Development Office issued a brief statement. Thereunder, designation of a public official is not in itself sufficient evidence to demonstrate that the relevant official exercise control over a private entity registered in a respective jurisdiction⁴. The Foreign, Commonwealth and Development Office also noted that the government is working on additional clarifications regarding the issue.

IV. Our brief conclusions

Thus, the Court of Appeal concluded that the scope of the criterion in question has an exceptionally broad scope. Although the Court of Appeal commented on the issue of control as “*obiter dictum*” and, therefore, the relevant conclusions are not formally binding on other courts, this position will unfortunately be taken into account by the courts and other parties. The most calamitous consequence of the Court of Appeal’s decision – rendering all Russian companies subject to sanctions because of Mr. Putin’s alleged control – was curbed by the aforementioned statement of the Foreign, Commonwealth and Development Office. Nevertheless, the rest of the Court of Appeal’s analysis may result in significantly stricter sanctions compliance procedures in respect of Russian persons.

² Under formal ownership criterion, a person is deemed to be controlled by a designated person if the designated person, directly or indirectly, holds 50% of shares or voting rights in the person, or has the right to appoint or remove a majority of the person’s board of directors.

³ Judgement of the Court of Appeal, paragraph 229.

⁴ Statement of the Foreign, Commonwealth & Development Office is available at the [link](#).



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