Neutral Citation Number: [2024] EWHC 1783 (Ch)

Case No: BR-2020-000477

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST (ChD)

IN THE MATTER OF ANATOLY LEONIDOVICH MOTYLEV
IN BANKRUPTCY

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 July 2024

Before :

Mr Nicholas Thompsell
sitting as a Deputy Judge of the High Court

- -

Between :

(1) KEVIN HELLARD
(2) ROBERT STARKINS
(3) NICHOLAS NICHOLSON **Applicants**

- and -

(1) OJSC ROSSIYSKY KREDIT BANK (in liquidation)
(2) CJSC MOSSTROYECONOMBANK (in liquidation)
(3) AMB BANK (in liquidation)
(4) JSC KB RETAIL LENDING COMPANY (in liquidation)
(5) OFFICE OF FINANCIAL SANCTIONS IMPLEMENTATION **Respondents**

- -
- -

Thomas Munby KC (instructed by **CMS Cameron McKenna LLP**) appeared for the Applicants

Hearing date 11 June 2024

- -

APPROVED JUDGMENT

Deputy Judge Nicholas Thompsell:

1. INTRODUCTION

1. The applicants in this matter (the "**Trustees**") are the trustees in bankruptcy of Mr Anatoly Leonidovich Motylev (whom I shall refer to as "**Mr Motylev**" or the "**Bankrupt**"). They have applied to the court for assistance by way of directions under s.303(2) Insolvency Act 1986 ("**IA 1986**") and/or declarations, concerning three apparently simple questions:

   i) First, should they treat the First to Fourth Respondents (the "**Russian Bank Creditors**") as being caught by the sanctions that have been imposed under the Russia (Sanctions) (EU Exit) Regulations 2019 (the "**2019 Regulations**")?

   ii) Secondly, if the Russian Bank Creditors should be treated as being caught by sanctions, is it lawful for the Trustees to accept votes from those creditors for the purposes of any creditors' decision procedure and/or to allow those creditors to take part in and vote at meetings of the creditors' committee?

   iii) Thirdly, are the Trustees providing financial services in breach of Regulation 18A of the 2019 Regulations?

2. The Trustees require the court's assistance on these points as there has been some doubt as to how to apply the 2019 Regulations in the particular circumstances in which they find themselves, and as a result they find themselves between a rock and a hard place. If they wrongfully treat the Russian Bank Creditors as not being subject to sanctions, and it turns out that they are, the Trustees could be exposed to criminal and substantial civil liability. Conversely, if they wrongfully treat the Russian Bank Creditors as being subject to sanctions and accordingly refuse to allow them to participate in the normal way in the Bankrupt's insolvency, and it turns out that they are not subject to sanctions, and there was no basis for a reasonable belief that they were, they could find themselves civilly liable to the Russian Bank Creditors.

3. Whilst the three questions for consideration may be simply put, in relation to the first two of these at least, the answers are not simple at all. They require consideration of the 2019 Regulations, the broader UK sanctions regime, and of recent case law interpreting this.

4. The Trustees are asking for the court's guidance, to be provided in a manner that will provide the Trustees with protection if they follow that guidance) in relation to the status of the Russian Bank Creditors under the 2019 Regulations.

2. BACKGROUND

5. Mr Motylev is a Russian national who has been resident in London since July 2015. So far as the Trustees are aware, no sanctions issues arise in relation to him.

6. The Russian Bank Creditors are banks formerly controlled by the Bankrupt, which collapsed shortly before his departure from Russia. The Bankrupt has been charged in his absence by the criminal authorities in Russia with various crimes involving alleged fraud and financial mismanagement relating to the Russian Bank Creditors.

7. Mr Motylev was initially declared bankrupt in Russia on 19 February 2018. In September 2020, his Russian Financial Manager (which I am told is broadly analogous to a trustee in bankruptcy in the United Kingdom) obtained recognition of this bankruptcy in the United Kingdom and a freezing order and other interim relief in support.

8. Shortly thereafter, the Financial Manager presented an English bankruptcy petition relying on the debts admitted in the Russian bankruptcy proceedings. Ultimately, Mr Motylev was declared bankrupt in England by a bankruptcy order dated 2 November 2020 and trustees in bankruptcy were appointed. A block transfer order of 23 December 2022 established the Trustees as his current trustees in bankruptcy.

9. The period of Mr Motylev's English bankruptcy (the "**Bankruptcy**") will be longer than is usual. By order of ICC Judge Mullen dated 8 March 2023, the Bankrupt's discharge from bankruptcy was suspended for three years from the date of that order, on the ground that he had failed to satisfy his obligations as a bankrupt.

10. As matters stand, proofs of debt totalling £741million have been received in the Bankruptcy, although these have not yet been adjudicated. The Russian Bank Creditors comprise a 52.88% majority of the total. As regards almost all the other creditors, the Trustees have evinced some concerns as to connections to the Bankrupt and/or validity of claims.

11. The Trustees and the Russian Financial Manager have very sensibly entered into a Cooperation Agreement dated 22 September 2021 to govern the interaction of the two procedures and (in very broad terms) provides for the (English) Bankruptcy to take primacy in most respects.

12. A creditors' committee has been established for the purposes of the Bankruptcy. The Russian Bank Creditors comprise four of the five members of that committee. To date, that creditors' committee has passed four resolutions, of which three remain in force: two successive resolutions fixing the Trustees' basis of remuneration (with some remuneration having been already drawn under the first such resolution) and another dispensing with six-monthly reports to the committee.

3. REPRESENTATION AT THE HEARING

13. The Trustees have joined as respondents the parties who (other than the Trustees themselves) are most likely to be affected by the outcome of the application, namely the Russian Bank Creditors, and the Office for Financial Sanctions Implementation ("**OFSI**"), which is joined as the Fifth Respondent. OFSI is the

United Kingdom governmental body charged with the implementation and enforcement of the sanctions legislation.

14. Whilst at this hearing the Trustees have been ably represented by Mr Thomas Munby KC, neither the Russian Bank Creditors nor OFSI have chosen to appear or to be represented at this hearing. They had ample opportunity to do so had they wished this.

15. OFSI has provided some guidance in correspondence as to certain aspects of its approach, including in the form of a letter dated 24 May 2024 from the Government Legal Department. OFSI has also provided some of OFSI's published guidance. However, OFSI has declined to express any opinion on the questions raised by the Trustees. From the correspondence, OFSI appears to be neutral on the questions of fact and law raised by the application. It has indicated that it does not intend to participate citing "*constraints on resources and our need to prevent unnecessary costs to public funds*".

16. OFSI also requested to the Trustees that it should be removed as a party. The Trustees did not consider this appropriate as it would appear potentially to undermine the protective effect of the application. I agree.

17. The Russian Bank Creditors have stated in correspondence that that they did not consider themselves to be sanctioned but have not provided any detailed reasoning to counter the concerns raised by the Trustees.

18. One point that I needed to consider was whether the hearing should proceed at all in the absence of any of the Respondents. This is a matter within the court's discretion under its general powers of management in CPR rule 3.1, and specifically under CPR rule 23.11.

19. In the current case, given that the absence of each of the Respondents was deliberate, I considered that I should proceed to consider the application. It is clear that both the Russian Bank Creditors and OFSI have been engaged with the application, even if OFSI to date has not expressed any view in relation to the central questions raised by the application.

20. I will consider further, however, whether it is appropriate to make a declaration that would be binding on OFSI.

4. THE SANCTIONS LEGISLATION

(a) Overview

21. As was explained by the Court of Appeal in *PJSC National Bank Trust and another v Mints and others* [2023] EWCA Civ 1132 ("***Mints***") at [4]-[11], the current United Kingdom sanctions regime derives from the scheme of sanctions introduced by the United Nations from 1999 onwards in the context of the so-called "war on terror". The United Kingdom originally implemented sanctions by orders made under the United Nations Act 1946, and subsequently through European Union regulations, commencing with Council Regulation (EC) No. 881/2002.

22. Prior to Brexit, sanctions responsive to the Russian invasion of Crimea in 2014 were contained in EU Council Regulation 269/2014, Sanctions were implemented in the UK by the Ukraine (European Union Financial Sanctions) (No 2) Regulations 2014.

23. Following Brexit, the UK's sanctions regime derives its authority from the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**"). The 2019 Regulations were made under SAMLA, originally with the simple intention of continuing the prior EU regime. However, the scale on which the 2019 Regulations have been used has been greatly increased since the Russian invasion of mainland Ukraine in 2022.

24. Under s.8 SAMLA, regulations may be made to comply with a United Nations obligation. These may include prohibitions or requirements imposed on or otherwise relating to "designated persons". S.9 SAMLA defines designated persons including by reference to powers that may be given to authorise an appropriate Minister to designate persons for the purposes of any such regulations. S.10 SAMLA clarifies that the power to designate may be to designate a person by name or by description.

25. S.44 SAMLA contains a statutory protection against civil proceedings so that if an act is undertaken in the reasonable belief that the act is in compliance with (amongst other things) regulations made under SAMLA, the person undertaking that act with that belief is not liable to any civil proceedings that would have arisen under SAMLA.

26. S.44 is of limited assistance, however, to the Trustees in that it applies only where there is a reasonable belief that one is complying with regulations under SAMLA. If the Trustees are unable to form a view whether or not they have reasonable cause to suspect that the Russian Bank Creditors are caught by the sanctions legislation, then it will not protect them if, out of caution, and having regard to potential liability under s.146(1) Policing and Crime Act 2017 ("**PACA 2017**") discussed below, they decide that they should treat the Russian Bank Creditors as being so caught.

27. Turning to the 20019 Regulations these are said (according to Regulation 4) to have been for the purposes of

> "encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."

28. However, by means of amendment regulations made in 2023 a second purpose was added of:

> "promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine."

29. Regulation 5 deals with the power of the Secretary of State to designate persons. Relevant to this case, the Secretary of State has designated Mr Vladimir Putin the President of the Russian Federation ("**President Putin**") and Ms Elvira

Nabiullina ("**Governor Nabiullina**"), the Governor of the Central Bank of Russia (the "**Central Bank**").

30. The 2019 Regulations implement a scheme of sanctions whereby individuals and institutions are designated to become the subject of sanctions (and thereby become "designated persons"). Being so designated has the result of freezing the designated person's assets, and bringing into play certain criminal offences that may be breached by those dealing with the assets of a designated person.

31. Importantly, as this gives rise to the Trustees' first concern, these provisions are extended so that the offences are considered to be committed if the assets in question 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. The Trustees are finding it difficult to understand the scope of this deeming provision and this is one of the main points that they are asking the court to assist with.

(b) Offences under the 2019 Regulations

32. In more detail, Regulation 11 introduces the "asset freeze" over funds and economic resources of designated persons, including for these purposes, persons "owned or controlled" by designated persons. It is in these terms:

> "**Asset freeze in relation to designated persons**
>
> 11(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. …
>
> (3) A person who contravenes the prohibition in paragraph (1) commits an offence.
>
> (4) For the purposes of paragraph (1) a person "deals with" funds if the person -
>
> (a) uses, alters, moves, transfers or allows access to the funds,
>
> (b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or
>
> (c) makes any other change, including portfolio management, that would enable use of the funds.
>
> (5) For the purposes of paragraph (1) 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 and services (whether by pledging them as security or otherwise). …
>
> (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.
>
> (8) For the avoidance of doubt, the reference in paragraph (1) to a designated person includes P if P is a designated person."

33. This provision and the further provisions mentioned below make use of definitions included in SAMLA, including the following:

i) by s.9(5) "*person*" is defined so that it:

> "includes (in addition to an individual and a body of persons corporate or unincorporate) any organisation and any association or combination of persons";

ii) by s.60(1), "*funds*" are defined as follows:

> "60(1) In this Act, "funds" means financial assets and benefits of every kind, including (but not limited to) –
>
> (a) cash, cheques, claims on money, drafts, money orders or other payment instruments;
>
> (b) deposits, balances on accounts, debts and debt obligations;
>
> (c) publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bond, notes, warrants, debentures and derivative products;
>
> (d) interest, dividends and other income on or value accruing from or generated by assets;
>
> (e) credit, rights of set-off, guarantees, performance bonds and other financial commitments;
>
> (f) letters of credit, bills of lading and bills of sale;
>
> (g) documents providing evidence of an interest in funds or financial resources;
>
> (h) any other instrument of export financing.";

iii) by s.60(2), "economic resources" are defined to mean:

> "assets of every kind, whether tangible or intangible, moveable or immoveable, which are not funds but can be used to obtain funds, goods or services."; and

iv) s.61(1), defines "financial services" in a manner that reflects many of the types of activity that are required to be authorised under the Financial Services and Markets Act 2000.

34. Regulation 12 provides as makes it an offence for a person ("P") to:

> "… 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."

35. There is express provision in Regulation 12 to include "*making funds available indirectly*".

36. Regulation 12(4) extends the reference to making funds available indirectly to a designated person to include making them available, in particular, to

> "a person owned or controlled directly or indirectly (within the meaning of Regulation 7) by the designated person."

37. Regulation 13 covers much the same ground in creating a further offence if there is a breach of the following:

> "A person ("P") must not make funds available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the funds available."

38. Regulation 14 creates another offence if there is breach of the following provision:

> "A person ("P") must not make economic resources available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect –
>
> (a) that P is making the economic resources so available, and
>
> (b) that the designated person would be likely to exchange the economic resources for, or use them in exchange for, funds, goods or services."

39. Regulation 15 creates a further offence if there is breach of the following provision:

> "A person ("P") must not make economic resources available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect that P is making the economic resources so available."

40. Regulation 18A prohibits the provision of certain "financial services" to certain specific persons. This is considered in detail at paragraphs [154] to [162] below.

41. Regulation 19 creates a further offence of intentionally participating in activities knowing that the object or effect of them (whether directly or indirectly) is to circumvent any of the prohibitions in regulations 11 to 18C or to enable or facilitate circumvention.

42. Regulation 64 deals with the power of OFSI (as an arm of the Treasury) to issue licences in appropriate circumstances permitting otherwise prohibited conduct.

43. It may be noted that the offences created by the 2019 Regulations, whilst very broad in scope when taken with various definitions that extend their scope, have a mental element to them, so that a person needs to have knowledge, or reasonable cause to suspect that, he or she is involved in providing a direct or indirect benefit to a designated person.

(c) Civil fines under PACA 2017

44. However, whilst the mental element might provide a defence in relation to these criminal offences, it does not provide a defence to a civil fine under s.146(1) PACA 2017. This section empowers the Treasury to:

> "impose a monetary penalty on a person if it is satisfied, on the balance of probabilities, that … the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation";
>
> and s.146(1A) provides that for this purpose:
>
> "any requirement imposed by or under that legislation for a person to have known, suspected or believed any matter is to be ignored".

45. The current maximum penalty is the greater of £1m and 50% of the estimated value of the funds or resources in question. Under s.148(1) PACA 2017, if a monetary penalty is payable by a body, the Treasury may also impose a monetary penalty on an officer of the body if it is satisfied, on the balance of probabilities, that the breach or failure in respect of which the monetary penalty is payable by the body took place with the consent or connivance of the officer or was attributable to any neglect on the part of the officer.

46. It may be considered somewhat unfair (if not Kafkaesque) that a person can be subject to a very substantial fine where that person has not actually committed an offence (because the mental element is an integral part of the relevant offences). However, the existence of the civil penalty underlines the seriousness with which the UK government takes the matter of making sanctions bite, and therefore giving the maximum encouragement to individuals and institutions to do their utmost to avoid dealing with the assets of a designated person or making those assets or their value available to a designated person. It is no doubt also intended to allow the authorities to act where there is a strong suspicion that the mental element is present, but this would be difficult to prove.

47. OFSI has published guidance as to how it uses its powers. Under this guidance OFSI promises, amongst other things, to promote compliance and engage with the private sector and provide guidance and alerts and to take an effective compliance approach responding consistently, proportionately, and transparently. OFSI will consider the conduct of the companies and individuals involved and the degree to which a person had knowledge or reasonable cause to suspect will be considered as a case factor, but lack of such knowledge would not necessarily prevent the imposition of a fine. OFSI will consider both actual knowledge and whether a person should have been aware of the effect of that person's actions. Where OFSI determines that a breach has occurred, and an incorrect assessment of ownership and control of an entity is relevant to the commission of the breach, OFSI will consider the degree and quality of research and due diligence conducted on the ownership and control of that entity.

48. OFSI sets out an illustrative list of efforts which, if demonstrated, it would regard as "potentially mitigating" as follows:

- "an examination of the formal ownership and control mechanisms of an entity to establish whether there is available evidence of ownership and control by a designated person

- an examination of actual, or the potential for, influence or de facto control over an entity by a designated person

- open-source research on an entity and any persons with ownership of, or the ability to exercise control over, the entity, together with an examination of whether such persons are, or have links to, designated persons such that further investigation may be warranted

- direct contact with the entity and/or other relevant entities to probe into indirect or de facto control, including, where appropriate, seeking commitments by UK persons as to the role of any designated person or person with links to a designated person

- regular checks and/or ongoing monitoring of the above where appropriate".

(d) Summary

49. I have set out the statutory and regulatory references in some detail as the words through which the various offences are created are important, but the position can, at a high level be summarised as follows. There are various offences that are committed if one does some act that deals with or directly or indirectly makes available to a designated person "funds" or "economic benefits" owned, held or controlled by a designated person. Funds or economic benefits will be treated as being so 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. As is developed further below,

Regulation 7 has created two ways in which a person (who is not an individual) can be said to be "*owned or controlled*".

5. THE TRUSTEES' FIRST QUESTION

(a) Overview of the difficulties in answering the question

50. It is this last aspect that is at the root of the first problem that the Trustees face. The problem is that it is difficult on the basis of the current law to assess in what circumstances a person should be regarded as being owned or controlled directly or indirectly by a designated person.

51. Regulation 7 explains what is meant by persons being "*owned or controlled*" by a designated person:

> "7(1) A person who is not an individual ("C") is "owned or controlled directly or indirectly" by another person ("P") if either of the following two conditions is met (or both are met):
>
> (2) The first condition 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 rights directly or indirectly to appoint or remove a majority of the board of directors of C.
>
> (3) Schedule 1 contains provisions applying for the purpose of interpreting paragraph (2).
>
> (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 the affairs of C are conducted in accordance with P's wishes."

52. The first condition, set out in Regulation 7(2) will be generally straightforward to apply as it involves tracing the ownership of shares, voting rights and rights (directly or indirectly) to appoint or remove a majority of the board of directors. Whilst there might be difficulties in obtaining all the facts that may be relevant to this test, the test is at least clear in that it is focused on the holding of different types of rights.

53. However, the second condition, set out in Regulation 7(4), is more difficult to apply. The second condition requires the person applying it to have regard to all the circumstances, and to make value judgments as to what is "*reasonable*" to expect; what is meant by "*in most cases*" and by "*in significant respects*" as regards conducting the affairs of the body in question in accordance with the putative controller's wishes.

54. The circumstances relating to the control of the Russian Bank Creditors are particularly difficult to construe. The Trustees have satisfied themselves that the Russian Bank Creditors are not themselves designated persons. They have satisfied themselves (to the extent that it is possible to do so) that the Russian

Bank Creditors are not in the direct or indirect ownership of designated persons. But they are at sea in applying the test under Regulation 7(4).

55. This question has been thrown into sharp relief by the decision in *Mints.*

(b) Mints

56. In that case, the Court of Appeal (Flaux C, with whom Newey and Popplewell LJJ agreed) considered proceedings in which one of the claimants was a 99% subsidiary of the Central Bank which was said to be "*owned and controlled*" within the meaning of Regulation 7 by President Putin and Governor Nabiullina.

57. The first issue before the Court was whether judgment could lawfully be entered in favour of a designated person who has established a valid cause of action. The Court considered that it could for reasons set out at [178]-[213], taking into account inter alia: the "principle of legality" (whereby fundamental common law rights, such as access to the court, are only curtailed where that is clearly required by primary legislation); article 6 of the European Convention on Human Rights; an assumption of continuity with the pre-Brexit EU sanctions regime; and detailed analysis of the terms of the 2019 Regulations.

58. Accordingly, the Court did not need to decide whether the further issue of whether the relevant claimant was in fact "*owned and controlled*" by designated persons. Nevertheless, it set out detailed *obiter dicta* on the point at [225]-[233].

59. In that case it had been conceded (by what was said to be a "*sensible and realistic*" concession) that, if control under the 2019 Regulations extends to control via political office, the control test would be satisfied in the case of the Claimant in that either President Putin or Governor Nabiullina could exercise influence in significant respects: see at [63].

60. The judge at first instance had held that control via political office fell outside the test for control under the second condition in Regulation 7(4). The Court of Appeal disagreed, indicating (at [225]) that the judge had:

> "put an impermissible gloss upon the statutory language because of a concern that the consequence might otherwise be that every company in Russia is "controlled" by President Putin and hence subject to sanctions. If, as may well be the case, that is the consequence of giving Regulation 7 its correct meaning, then the remedy is not for the judge to put a gloss on the language to avoid that consequence, but for the executive and Parliament to amend the legislation to avoid that consequence."

61. Similarly, at [233] the Court rejected a submission that the inclusion within Regulation 7(4) of control via political office would lead to absurd results. This was rejected on the basis that:

> "the absurd consequences arise not from giving the Regulation its clear and wide meaning but from the subsequent designation by the Government of Mr Putin, without having thought through the consequences that … Mr Putin is at the apex of a command

> economy. In those circumstances consistent with the concession I mentioned in para 63, in a very real sense (and certainly in the sense of Regulation 7(4)), Mr Putin could be deemed to control everything in Russia."

62. This decision was, on this point, *obiter dicta*. Importantly, the question that Mr Putin was in control, if control could include political control (as the court found it to be), was assumed rather than established as a matter of fact.

63. Permission to appeal from the decision of the Court of Appeal in *Mints* was granted by the Supreme Court on 24 January 2024 and it will be interesting to see what transpires from this.

(b) Litasco

64. In *Litasco SA v Der Mond Oil & Gas Africa SA* [2023] EWHC 2866 (Comm) ("*Litasco*"), Foxton J engaged with the "*control*" element of the *Mints* decision in the course of his giving summary judgment on a money claim in favour of a non-designated Swiss subsidiary of a non-designated Russian oil company.

65. He dismissed defences based on sanctions both under a specific provision in the relevant contract dealing with sanctions and as a matter of general law. In so doing, he analysed the origins of the language of Regulation 7(4) and at [56]-[62] and at [65]-[71]) considered in detail, before dismissing it, an argument that the claimant Swiss subsidiary was "*owned or controlled*" by President Putin within the meaning of Regulation 7.

66. Although Foxton J was:

> "… prepared to assume that it is strongly arguable that President Putin has the means of placing all of Litasco and/or its assets under his de facto control, should he decide to do so…"

nevertheless, he did not consider that President Putin was in control of the claimant Swiss subsidiary.

67. First, at [67]-[68] he drew a distinction between the circumstances of the Swiss company he was considering and the circumstances under consideration in *Mints*. In *Mints*, the evidence (or rather assumption) was that the Central Bank was an "*organ of the Russian state*" over which President Putin exercised *de facto* control and which in practice "*serves as an arm of the executive*". Foxton J considered that:

> "against that background it is perhaps not surprising that it was conceded in that case that [the relevant 99% owned subsidiary of the Central Bank] was subject to the control of President Putin".

68. In contrast that there was no evidence to show that the claimant Swiss company in his case

> "was presently under the de facto control of President Putin … [it] is not a state owned body and there is no suggestion that it functions as an organ of the Russian state".

69. At [68] he regarded it as significant that, in the case before him,

> "the issue of control here arises in the context of Regulation 12, the relevant "affair" for Regulation 7(4) purposes being the availability of funds and the question being whether making funds available to [the Swiss company claimant] amounts to "making funds indirectly available to" President Putin. As a result, the issue of control has, as its central focus, the ability of the designated person to control the use of the funds made available. I was shown no material which provided an arguable basis for contending that funds received by [the Swiss claimant] on payment of this debt would be used in accordance with President Putin's wishes, and I regard the suggestion as wholly implausible".

70. At [70] he set out his reasoning as follows:

> "However, I believe the better interpretation of Regulation 7(4) is that it is concerned with an existing influence of a designated person over a relevant affair of the company (just as its legislative parent in the Broadcasting Act 1990 was so concerned), not a state of affairs which a designated person is in a position to bring about. Were matters otherwise, it would follow that President Putin was arguably in control, for Regulation 7(4) purposes, of companies of whose existence he was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him. Further, I note that the Chancellor endorsed part of Mr Rabinowitz KC's summary of the effect of Regulation 7(4), namely that it applies "when the designated person 'calls the shots'" ([229], [232]), not the wider formulation at [114] ("if the designated person calls the shots, or can call the shots"). While I accept that the Chancellor at [233] lends some limited support to a view that being "at the apex of a command economy" might be sufficient for Regulation 7(4) purposes, and that "Mr Putin could be deemed to control everything in Russia", these observations were couched in tentative terms, and, in my view, necessarily reflected the particular context in which they were made (see [67])."

(c) Reconciling Mints and Litasco

71. I share the learned judge's hesitancy in believing that the interpretation of Regulation 7(4) should be extended so far as to extend to companies of whose existence the putative controller was wholly ignorant and whose affairs were conducted on a routine basis without any thought of that controller. However, his reasoning needs to be reconciled with two points that emerge from *Mints*.

72. The first is the argument in *Mints* recorded at my paragraph [61] above, that if there is any absurdity, it arises from the way that President Putin has been designated, rather than from any inherent absurdity in applying the plain words of Regulation 7. This argument, however, is far less forceful in relation to the point that Foxton J was making. His concern - the absurdity of someone who

did not know of the existence of the company being deemed to be a controller of that company - is a point of more general application and does not arise merely because President Putin was named as a designated person.

73. The second is the warning against putting an "*impermissible gloss*" on the plain wording of the 2019 Regulations.

74. In this regard, the language of Regulation 7(4):

> "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 …" (Emphasis added.)

is difficult to reconcile with the theory that this wording is aimed at catching only *existing* exercises of influence by a designated person to the exclusion of the ability of a designated person to obtain that influence i*n the future* if he were to choose so to do.

75. Nevertheless, in my view, the language of Regulation 7(4) is readily reconcilable with the approach taken by Foxton J in *Litasco.*

76. It seems to me useful to break the concept of "*control*" down into four types:

i) ***de jure* control**: this exists where there is an absolute legal right to exercise control embedded, for example in the constitution of a company or a body;

ii) **actual present *de facto* control**: this exists where the putative controller is manifestly "*calling the shots*" (to adopt the language used in *Mints*) with no legal right to do so;

iii) **potential future *de jure* control**: the creation of this category is, in my view the main reason why the words "*(if P chose to)*" are included in Regulation 7(4). This would exist where, although the designated person enjoyed no current legal right of ownership or control, the designated person had the legal means to obtain ownership or control. The most obvious example of this, would be where the designated person had an option or a forward contract to acquire a majority shareholding in a company; and

iv) **potential future *de facto* control**. This would exist where although there was no evidence that the putative controller was currently exercising *de facto* control, there is some good reason to believe that the putative controller could, if he or she wished, exercise control in some manner. For reasons I will expand on below, whilst this category must exist theoretically, I believe its existence in practice will be very rare.

77. The threshold for establishing, or having reasonable cause to suspect, control for these four different potential types of control is different:

i) ***De jure* control** is demonstrated merely by considering the constitutive documents (and any surrounding legal instruments, such as for example a requisition order), and equally can be demonstrated not to exist in the absence of any such provision. There is reasonable cause to suspect it exists when there is reasonable cause to believe that such documents or instruments may exist.

ii) **Actual present *de facto* control** is demonstrated by pointing to circumstances where the putative controller has exercised a decisive influence to control what is happening. There is reasonable cause to suspect it exists where there is reasonable cause to suspect that such events may have occurred.

iii) **Potential future *de jure* control** is demonstrated merely by considering the agreements (such as an option agreement) or other instruments, such as for example a future-speaking requisition order, and equally can be demonstrated not to exist in the absence of any such provision. There is reasonable cause to suspect it when there is reasonable cause to believe that such documents or instruments may exist.

iv) **Potential future *de facto* control** requires some particular feature leading one to believe that the putative controller could, if he or she wished, exercise control in some manner otherwise than by the exercise of a legal right or legal power. It is difficult to conceive a manner in which this can be demonstrated since by definition that feature will not be the existence of a legal right or legal power and, as the control has not yet been exercised, it will be difficult to point to circumstances to establish this.

78. The existence of potential future *de facto* control will be rare as I think it is necessary to give a strict meaning to the words "*(if P chose to)*" to connote the idea that P's choice and action would be enough to make ownership or control come about and that that choice needs to be one unfettered by the prospect of penalties or other adverse consequences to P. Whilst I acknowledge that this analysis also is putting a "gloss" on the wording, I consider that this is a necessary rather than an impermissible one. Two possible scenarios illustrate why.

79. First a billionaire may have the resources to be able to make a bid for control of a publicly traded company at a level that is substantially above the traded price of the shares of the company and thereby obtain control of that company. Whilst it might be said in a loose way that the billionaire could obtain control of that company *if he chose to*, this is not strictly true. His acquisition of control would require other persons (existing shareholders) to act by accepting his offer, and this is not guaranteed however generous the offer may be. It is more correct to say that *it is likely* that he could obtain control if he chose to, than to make the absolute statement that the matter will be settled purely as a result of his choice. Further, it would be an absurd reading of Regulation 17(4) to believe that the billionaire should be regarded as having control of every company that the billionaire could clearly afford to purchase. The absurdity of this latter reading is a reason to confine the words "*if P chose to*" to their strict meaning.

80. To take a second example scenario, it might be said, using the words "*if he chose to*" in a loose way, that anyone who can get hold of a gun can, if he chooses to, control the assets of a particular convenience store by holding up that convenience store. Again, there may be no certainty about this – the store owner may not co-operate and the police may intervene, but perhaps more importantly in this scenario, it is unnatural to say that someone can do something "*if he chose to* " if there are potential penalties or costs in taking that action that, for most people, would be sufficient to deter such action. Again, it would be an absurd reading of Regulation 17(4) to believe that anyone with a gun (or access to a gun) should be regarded as having control of every organisation that he might be able to coerce by making use of that weapon.

81. As was noted in *Vneshprombank LLC v Bedzhamov* [2024] EWHC 1048 (Ch), at [53], the Court should:

> "seek to avoid a construction of a statutory provision that produces an absurd result, since this is unlikely to have been intended" by the legislator". *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778 at [48]; *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431 at [24]-[25] (per Lord Kerr)."

82. Although, as the judgment goes on to confirm,

> ""Absurdity" includes "virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief"… However it is a high test. On the authorities (in particular *SSWP v Johnson and R v McCool*) it appears that, to be absurd, a construction has to wholly undermine the statutory scheme."

83. In my view the examples I have given demonstrate that it would be an absurd construction of the wording "*if P chose to*" in Regulation 7(4), such that it would undermine the statutory scheme, if this phrase were to be read so widely so as to encompass:

    i) situations where P might be *likely to* able to bring about a position where he could take control, but only on the assumption that other people cooperate; and/or

    ii) situations where P would face penalties or consequences that might be unwelcome to P such that it is unlikely that P would choose to take such control.

84. I consider that, the result in *Litasco* is best explained having regard to the above considerations.

85. As is noted at [67] in *Litasco:*

> "*Mints* was a case in which NBT was 97.9% (or 99.9%) owned and controlled by a Russian public body, the Central Bank of Russia. The governor of the Central Bank of Russia is appointed by the Duma on the recommendation of the President of Russia, and board members are appointed on the basis of a proposal to the Duma with the agreement of the President of Russia. It was the Mints parties' evidence that the Central Bank of Rusia "is an organ of the Russian state" over which President Putin exercised de facto control, and that "in practice it serves as an arm of the executive". Against that background, it is perhaps not surprising that it was conceded in that case that NBT was subject to the control of President Putin."

86. In other words, it was conceded in *Mints* that President Putin had existing *de facto* control over the Central Bank and the company in question, NBT was almost a 100% subsidiary of the Central Bank of Russia. It was not surprising to find control in that context. There was a combination of existing *de facto* control at the level of the Central Bank and existing *de jure* control as between the Central Bank and NBT.

87. By contrast, in *Litasco* as we see at [68]:

> "the Defendants in this case did not point to any similar evidence said to show (or arguably show) that Litasco was presently under the de facto control of President Putin. Lukoil is not a state-owned body and there is no suggestion that it functions as an organ of the Russian state."

88. There was no evidence that *Litasco* was presently under the *de facto* control of President Putin. Foxton J was prepared to assume that it was strongly arguable that President Putin had the means of placing all of the task and and/or its assets under his *de facto* control, should he decide to do so. He noted at [69] that many executive or legislative sovereign bodies around the world would have a similar power in relation to companies within their jurisdictions and that the

> "practical and legal inhibitions on the exercise of such powers will vary greatly between different countries".

89. However, he went on to say that he was:

> "willing to assume that they are wholly absent in Russia".

90. Applying my categories of control, in *Litasco*, there was no evidence of existing *de jure* or existing *de facto* control or of future *de jure* control. As regards future *de jure* control, even if practical and legal inhibitions were "*wholly absent*" there still would have been steps involving the cooperation of other people that would, on the strict (and I consider correct) reading of what is meant to be able to do something "*if P chose to*" to place the circumstances outside the meaning of that phrase. In the absence of any evidence also to show any legal right that would establish potential future *de jure* control, it is unsurprising that Foxton J considered it unnecessary to consider these words within Regulation 7(4).

91. The decision in *Litasco* is clearly correct when one considers these matters and it does not depend on interpreting Regulation 7(4) in the teeth of its express wording as applying only to existing, rather than possible future *de facto* control. It is not that the court should ignore the words "*if P chose to*" in Regulation 7(4). It is that these words cannot be thought to apply if P has no present means of controlling the person in question without the cooperation of others and/or would face penalties or undesirable consequences in obtaining such control. The latter consideration would apply particularly where the potential for benefit that P would obtain if he were to take control was disproportionately small compared with such penalties or consequences. Whilst these points were not expressly considered in the judgment in *Litasco*, it may be that the point was so obvious that the judge did not need to deal with them.

(d) Application to the present case

92. I extract from *Mints* and *Litasco* and the discussion above two points that are relevant to the current case.

93. The first (*from Litasco*) is that control should be looked at in the context of control that would result in direct or indirect control of the property (amounting to funds or economic benefits) in question.

94. In the case before me, the property that may be caught by the 2019 Regulations is the Russian judgment debts, the rights of the Russian Bank Creditors to prove in the Bankruptcy, and/or their subsequent receipt of cash (or other assets) through distributions in the Bankruptcy. It is these rights, and not any assets that the Trustees may hold or be able to call in. I consider that an analogy can be drawn here where a designated person might be holding shares in the company – where his rights are the rights of those shares not the underlying assets of the company; or another analogy would be where a person is holding units in a unit trust, the rights would be the units, not the underlying assets of the unit trusts.

95. In the current context, the question is whether President Putin or Governor Nabiullina would be able to exercise control over the Russian Bank Creditors via their liquidators so as to affect their dealings with these assets. I will consider this question further below.

96. The second is that, there being no evidence of *de jure* control or of present actual *de facto* control or of any possible future *de jure* control, it is necessary to consider what circumstances would need to occur to bring about any possible future *de facto* control by President Putin or Governor Nabiullina.

6. DO DESIGNATED PERSONS HAVE CONTROL OF THE RUSSIAN BANK CREDITORS?

97. The Russian Bank Creditors are not themselves designated persons. However, as we have seen, the Trustees are concerned that it is arguable that dealing with them may create an offence because the Russian Bank Creditors may nevertheless be subject to the 2019 Regulations if they are owned or controlled by a designated person within the meaning of Regulation 7, specifically as a result of Regulation 7(4).

98. The Trustees are concerned that the Russian Bank Creditors' own Russian liquidation arrangements have the effect of placing them under the "*direct or indirect control*" of senior Russian officials who are personally designated under the Regulations (namely President Putin and/or Governor Nabiullina).

99. The Trustees have gone to considerable lengths to research the issue of control by reference to publicly available sources and have also engaged with the assistance of a corporate intelligence firm. From this, they have pieced together the following analysis.

100. The Russian Bank Creditors are each themselves in Russian insolvency processes under the administration of the Deposit Insurance Agency (the "**DIA**"). As these liquidators control the Russian Bank Creditors, and are themselves under the control of the DIA, the Trustees are concerned that it may be concluded that the Russian Bank Creditors are controlled by the DIA.

101. The DIA was established in January 2004 pursuant to Russian federal law177-FZ passed on 23 December 2003 as later amended (the "**DIA Constitution**"). The DIA is a Russian non-profit state corporation established to manage the operation of the deposit insurance system in Russia and to provide compensation to depositors in Russian banks if a bank fails. The DIA also administers the insolvencies of banks that have state licenses to receive deposits.

102. The DIA is wholly owned by Russia's Federal agency for the management of state assets, Rosimushchestvo. This agency is not a designated person. Its head, Mr Vadim Yakovenko, is not designated either. It is not owned by any person but is understood to be an organ of the Russian state - a holding entity for the Russian state and an arm of the Russian Ministry of Finance.

103. The DIA has three tiers of management: a "Supervisory Board", a "Management Board" and the "General Director".

104. According to article 18(1) of the DIA Constitution, the Supervisory Board is the highest management body. It is composed of thirteen members – seven representatives of the Bank of Russia, including the Chairman of the Central Bank *ex-officio;* five representatives of the government of the Russian Federation; and the General Director of the DIA.

105. Apart from Governor Nabiullina, one other member of the Supervisory Board, Mr Alexey Vladimorvich Moiseyev, is a designated person. He has been designated because of his position on the board of Russia's largest state-owned shipping company, Sovcomflot.

106. Governor Nabiullina serves as the chair of the DIA's Supervisory Board. Her powers include calling Supervisory Board meetings and exercising a casting vote at such meetings. She is able to recommend the appointment or dismissal of the General Director, but her recommendations need to be agreed by President Putin and submitted to the Duma for approval.

107. Governor Nabiullina also exercises a level of indirect control over the seven Bank of Russia appointees to the DIA Supervisory Board as she appoints

Deputy Governors of the Bank and in practice it is Deputy Governors that form part of the Supervisory Board. In addition to that direct influence, the Central Bank appears to have some financial influence over the DIA, as a provider of credit to finance its activities if its primary funding sources prove insufficient.

108. The Central Bank itself is not designated under the Regulations, although it is an organ of the Russian state. It is supposed to enjoy independence of other state bodies as a matter of Russian constitutional law. Its governor is appointed on the recommendation of President Putin by vote of the Duma.

109. The governor (currently Governor Nabiullina) controls the composition of the Management Board but she does not have unrestricted power to appoint its board (who are appointed on her recommendation but only with the approval of President Putin and the Duma).

110. The Management Board of the DIA comprises the General Director and employees of the DIA. The Management Board has various powers according to article 21 of the DIA Constitution. Some of these are circumscribed by Supervisory Board approval.

111. The General Director of the DIA appears to have wide authority to conduct the DIA's day-to-day activities. The General Director who held office upon Governor Nabiullina becoming chair of the Supervisory Board of the DIA in 2017 appears to have remained in office until January 2022 when he was appointed deputy chairman of the Central Bank; and the Trustees are not aware of any indication that Governor Nabiullina sought his removal. The current General Director was appointed on the recommendation of Governor Nabiullina in January 2022, following what appears to have been a long career in the DIA.

112. The Trustees' legal representatives have emphasised that the Trustees' analysis of the constitutional position as it appears from publicly available documents is subject to significant limitations. The Trustees do not know: how decision making occurs in practice within that constitutional framework; the level of influence exerted over the DIA's activities by designated persons (i.e. Governor Nabiullina or President Putin); what would occur if President Putin chose to seek to exercise influence within the Central Bank/DIA; or what other legal powers President Putin may have which might enable him to take control. The Trustees are of course mindful of the way in which decision-making within public life in Russia has been characterised by the court in *Mints* and in *Litasco*.

113. The Trustees are satisfied that "control" does not appear to exist in relation to the Russian Bank Creditors under the first condition, that set out in Regulation 7(2) of the 2019 Regulations, by reason of holding of more than 50% of shares or voting rights, or the right to appoint or remove a majority of directors.

114. However, as regards "control" under the second condition, that set out in Regulation 7(4), they are concerned that, whilst the publicly available constitutional arrangements disclose in their words, "*significant but limited influence of Governor Nabiullina, and the influence of President Putin, over the management of the DIA*"; this combined with the DIA's public ownership by the Russian state, and Ms Nabiullina's position as chairperson of both the

Central Bank and the DIA, may be sufficient to give rise to reasonable grounds to suspect that the DIA is controlled by Ms Nabiullina and/or Mr Putin within the meaning of the 2019 Regulations.

115. The Trustees have not been able to obtain any further comfort on these matters from OFSI (as the prosecuting authority) or from the Russian Bank creditors (as the affected parties and possessors of relevant primary facts).

116. None of the Russian Bank Creditors has chosen to file evidence or respond actively to the application. Nor have they explained their position in a way which goes substantively beyond the assertion in pre-action correspondence (made in equivalent terms by each of them) that the Trustee's application is premature as each of the Russian Bank Creditors are not designated persons and neither is the DIA. They have failed to engage with the question concerning control with the meaning of Regulation 7.

117. Equally OFSI has not provided any direct comfort, and, despite having been provided with all of the information that the Trustees have managed to obtain, it has stated that it is not in a position to make a determination on whether the DIA is owned or controlled directly or indirectly within the meaning of Regulation 7, as alleged in the witness statement.

118. It is understandable that OFSI does not want to fetter its future discretion to find that any of the Russian Bank Creditors are under the control of Governor Nabiullina or President Putin since more facts may emerge that demonstrate that Governor Nabiullina, and/or President Putin may in fact be micromanaging and exercising control over the day-to-day operations of one or more on the Russian Creditor Banks through the individual liquidators that appointed by the DIA. Indeed, I do not think that the court looking at this matter today, despite all the evidence that has been put before it, can definitively rule on the question whether or not such control exists. For a definitive ruling on this matter there would need to be more evidence as to Russian law and of governmental practice in Russia.

119. What I will say is that, applying the principles that I have discussed above, I do not think on the basis of the evidence provided to date that any of this evidence creates a position whereby the Trustees could be said to know or to have reasonable cause to suspect that the funds or economic resources comprised in the claims that the Russian Bank Creditors have in the Bankruptcy (or the judgment debts underlying such claims, or any proceeds that they may receive from the Bankruptcy) are held or controlled by a person that is a designated person or is owned or controlled by a designated person.

120. Applying my three categories, first I do not consider there is any evidence of present or future *de jure* control. Whilst Governor Nabiullina, and President Putin each have significant influence as to the supervision and senior management of the DIA, they do not, I consider, have any direct or indirect ability to control the individuals appointed as liquidators in the management of specific liquidations being conducted by the DIA. I do not consider it at all likely that those with a supervisory role within the organisation could as a matter of right direct how individual liquidators should discharge their statutory duties.

121. Secondly, there is no evidence of any actual present *de facto* control in that there is no publicly available evidence that Governor Nabiullina or President Putin have interfered with the conduct of any liquidation managed by the DIA.

122. Thirdly, when I consider potential future *de facto* control, it seems to me that Governor Nabiullina or President Putin if either of them did wish to seek to directly influence the liquidators in the carrying out of their duties, there would be no easy way for them to do this. They could do this if they were willing to breach the current constitutional arrangements and directly seek to order what liquidators were doing. They might also be able to bring this about by appointing placemen (or placewomen) to the post of General Director and then to the Management Board, and thereby via those placees get to a position where they could ensure that the individual liquidators acted according to their orders. Any such arrangement would, however, likely require the cooperation of those persons and of the Duma and could be expected to involve the expenditure of political and/or reputational capital, as it would be obvious to the world that it was improper for them to interfere in a statutory process.

123. Whilst the position is not as extreme as the examples I have given regarding the spendthrift billionaire and the pistol-wielding store robber, I think the principle still applies that, until Governor Nabiullina or President Putin do take steps to control the liquidators in the carrying out of their duties, it is going too far to say that either of them they could, if they wished, do this, as this would be to ignore the fact that other people would need to cooperate with this and also to ignore the difficulties and political and reputational costs to them in bringing this about.

124. I am comforted in reaching this conclusion that it is consistent with the guidance published by OFSI.

125. The publication "*Ownership and Control: Public Officials and Control Guidance (dated 17 November 2023)*" published jointly by OFSI and the Foreign Commonwealth and Development Office, in its second edition (which appears to have been published in response to *Mints* includes the following under the heading *"Public officials and Control of Public Bodies"*.

> "The Foreign Commonwealth and Development Office (FCDO) does not generally consider designated public officials to exercise control over a public body in which they hold a leadership function, such that the affairs of that public body should be considered to be conducted in accordance with the wishes of that individual. … The FCDO does not intend for sanctions measures targeting public officials to prohibit routine transactions with public bodies, including (but not limited to): taxes; fees; import duties; the purchase or receipt of permits, licences, or public utility services; or any other ordinary and incidental payments. If the FCDO considered that a public official was exercising control over the public body under UK sanctions regulations, FCDO would look to designate the public body where possible when designating the relevant public official.

> For example, regarding government ministries, if a designated individual were a high-ranking public official serving as a government minister, the public body in which they held a leadership position would not be automatically subject to sanctions just because the minister is designated.
>
> However, if there was sufficient evidence to demonstrate that the designated public official exercises control over the public body within the meaning of the relevant regulations, then the relevant legal test under UK sanctions regulations may be met (see Regulation 7(4) of, for example [the Regulations]). Whether it would be reasonable to expect that the affairs of the public body could in fact be conducted in accordance with the designated person's wishes if the designated so chose will depend on the circumstances. A relevant consideration could be, for example, whether the designated person derives a significant personal benefit from payments to the public body, such that they amount to payments to that person rather than the public body."

126. In another section under the heading "*Public officials and Control of Private Entities*" it states:

> "There is no presumption on the part of the UK government that a private entity is subject to the control of a designated public official simply because that entity is based or incorporated in a jurisdiction in which that official has a leading role in economic policy or decision making. Further evidence is required to demonstrate that the relevant official exercises control over that entity under UK sanctions regulations.
>
> For example, if a designated individual was a high-ranking public official, private entity X would not be considered by the UK government to be controlled within the meaning of Regulation 7(4) just because it was based in or incorporated in the same country. If there was sufficient evidence to demonstrate that the designated public official exercises control in Regulation 7(4) terms over private entity X specifically, then the relevant legal test under UK sanctions regulations can be met.
>
> Specifically, for the purposes of Regulation 7(4) of [the Regulations] the UK government does not consider that President Putin exercises indirect or de facto control over all entities in the Russian economy merely by virtue of his occupation of the Russian Presidency. A person should only be considered to exercise control over certain private entities where this can be supported by sufficient evidence on a case-by-case basis."

127. This guidance does not deal specifically with the passage in Regulation 7(4) requiring an assessment whether it is reasonable that "*P would (if P chose to) be able*"… to ensure that his wishes are carried through, but the insistence that

there be sufficient evidence to conclude that an official exercises control, gives rise to a similar result to the one that I consider should be applied in this case.

128. Whilst this guidance does not have any legal effect in the sense that it is not binding on a court, and whilst it has not adopted the exact analytical approach that I have set out above nevertheless, the fact that OFSI and I have reached similar conclusions may indicate that we are both on the right track.

7. IS VOTING CAUGHT BY SANCTIONS?

129. If (despite the lack of evidence that this be the case) the Russian Bank Creditors should be treated as if they were subject to the ownership or control (within Regulation 7(4)) of designated persons, the next question that the Trustees find to be uncertain is whether on that footing they can lawfully exercise, and the Trustees can lawfully count, their votes as creditors and members of the creditors' committee in light of the asset freezing provisions in Regulation 11.

130. It is necessary first to consider the nature of the relevant voting rights. Under the bankruptcy provisions of the IA 1986 and Insolvency (England and Wales) Rules 2016 (the "**Insolvency Rules 2016**"), the creditors may vote upon various matters by means of a "creditors' decision procedure". Without attempting an exhaustive list, matters subject to such a creditors' vote include: removing a trustee under s.298 of the IA 1986; appointing replacement trustees under s.298-300; appointing a creditors' committee; giving a decision on any matter on which such a decision is requested by the trustee, either of his own accord or having been required to seek such a decision by request of 10% of the creditors by value; and determining various aspects of the trustee's remuneration in cases where no creditors' committee has been appointed.

131. In addition to directly voting on certain matters, the creditors are empowered by s.301 IA 1986 and Part 17 Insolvency Rules 2016 to establish a "creditors' committee". Where established, the creditors' committee has various prescribed functions. These include: receiving notice from the trustee of any exercise of his/her powers to dispose of property to an associate of the bankrupt or to employ a solicitor under s.314(6) IA 1986; giving permission for any proposed distribution of property *in specie* under s.326; imposing stipulations as to security or otherwise upon sales of property in the bankruptcy estate for consideration payable at a future time under paragraph 3 of Schedule 5 IA 1986; determining various aspects of the trustee's remuneration; and generally (under rule 17.2 of the Insolvency Rules 2016 to:

> "assist the office-holder in discharging the office-holder's functions; and act in relation to the office-holder in such manner as may from time to time be agreed".

132. The Trustees' concern arises from the definitions of "*funds*" in s.60(1) SAMLA set out at [33] above) and of "*deals with*" (in Regulation 11(4) of the 2019 Regulations as set out at [32] above). They are concerned about two possible analyses that might have this result.

133. The first analysis potentially applies on the basis that the claims of the Russian Bank Creditors are "*funds*" because "*debts and debt obligations*" are expressly included within the definition by s.60(1)(b). Can it therefore be said that the Russian Bank Creditors "*deal with*" those debts by voting, or the Trustees "*deal with*" them by accepting such votes, on the grounds that to do so:

    i) "*uses*" the debt within Regulation 11(4)(a);

    ii) "*deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination*" within Regulation 11(4)(b); or

    iii) "*makes any other change … that would enable use of the funds*" within Regulation 11(4)(c)?

134. The second potential analysis is based on holding that the voting rights arising from the debts are themselves "*funds*" because, although they do not fall within any of the specific categories set out in s.60(1)(a)-(h), they do fall within the overarching definition in s60(1) of "*financial assets and benefits of every kind*".

135. The Trustee's concern is aggravated by guidance issued by the European Commission in its document "*Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No269/2014*" (the latter Regulation being the Regulation from which, as mentioned above, the 2019 Regulations derive). Article 2 of that Regulation provides for funds and economic resources to be "frozen". The "FAQ" document addresses the impact of this on shareholding voting as follows:

> "**15. What measure (if any) should competent authorities adopt in respect of listed shareholders with qualifying holdings in an EU bank? Is the freezing of voting rights appropriate/required? In that case, should a proportionality approach be applied, e.g. by starting with increased monitoring of governance?**
>
> Shares qualify as funds and therefore must be frozen if belonging to, owned, held or controlled by a listed person. Accordingly, this means that it is prohibited for the listed person to exercise any voting rights which could lead to any change in relation to these shares (e.g. in their volume, amount, location, ownership, possession, character, destination etc.). Either way, since they can be used to obtain funds, goods or services, voting rights as such can be considered an intangible economic resource. This means they should be frozen, i.e. prevented from being used to obtain funds, goods or services in any way. Therefore under no circumstance nor for any purpose may listed shareholders exercise directly or indirectly their voting rights in a company or fund. Voting rights must be fully frozen."

136. As this guidance relates to a European provision, and was promulgated well after the United Kingdom left the European Union, I disregard it as an

authoritative source of law in the United Kingdom. There are two reasons also why I consider that it is not helpful for the current analysis.

137. The first is that this guidance applies only to the exercise of voting rights of listed shares. It therefore on its terms does not apply to voting rights of a creditor participating in an English bankruptcy.

138. This is an important distinction since voting rights relating to shares may be considered to be part and parcel of the bundle of rights comprised in the share, whereas voting rights in a bankruptcy do not drive from any asset that could be described as a "*fund*" itself – they derive from IA 1986. They are no more a "*fund*" than a right to vote in a general election.

139. The second is that the logic of the Commission Guidance is suspect. Just because (in the context of a listed company) some votes might be used to obtain funds, goods or services for example a vote on a dividend), it does not follow the other rights to vote on other matters which would not have that effect, for example a vote on appointing auditors) can be considered an intangible economic resource.

140. Certainly, this logic does not apply generally to the sort of vote that might be undertaken by creditor at a creditor's meeting or by a creditor acting as a member of a creditors' committee. The only exception might be a vote to approve a distribution to creditors, if the effect was to result in funds, goods or services being distributed to a designated person (or a body in the control of a designated person).

141. Turning aside from this guidance and considering the arguments on their merits, I can deal very briefly with the first argument.

142. I am prepared to assume that the creditor claims in the bankruptcy, and the foreign judgment debts that are the basis of those claims, are "*funds*". I do not accept, however, that using voting rights under the bankruptcy regime involves "*using*" such funds within the meaning of Regulation 11(4)(a).

143. First there is the point I have mentioned that what is being used is a right to vote afforded by IA 1986, not any right attaching to the debts themselves - the voting rights are not part of the rights inherent in the debts, but arise extraneously under the insolvency machinery as part of a statutory process (operating collectively and under the supervision of the court) to resolve the bankrupt's affairs.

144. Secondly there is the point that the debts themselves remain unaffected by the use of voting rights, pending payment of any dividend and eventual discharge of the bankruptcy and therefore the use of a vote cannot be seen as a dealing with debts as funds within the meaning of any of paragraphs (a) (b) or (c) of Regulation 11(4). Neither can I see, except in one scenario, how the result of any voting would have the effect mentioned in paragraph (c) that it "*makes any other change … that would enable use" of the underlying debt*".

145. The exception would be a vote to approve a distribution (dividend) in the Bankruptcy if that was the necessary step to cause a designated person or a person owned or controlled by a designated person, to obtain the funds.

146. Turning to the second argument, voting rights under the bankruptcy machinery cannot themselves be regarded as "benefits" so as to fall within the definition of "funds". Such voting rights have no value *per se*, and cannot be divorced from the statutory machinery of the bankruptcy process. Also, there is a strong argument that the phrase "*financial assets and benefits of every kind*", notwithstanding the words following "*(but not limited to)*" needs to be read *sui generis* with the following list of assets set out in s.60(1) and voting rights are clearly not of the same nature to the type of financial rights set out there.

147. It is notable that the European Commission in the final part of its "FAQ" document seems to have regarded shareholder voting rights as "economic resources" rather than "funds".

148. If the voting rights are to be considered as "*economic resources*" Regulation 11 is not engaged as the definition of "*dealing with*" economic resources requires either "*exchang*[ing] *the economic resources for funds, goods or services*" or "*us*[ing] *the economic resources in exchange for funds goods or services*" under Regulation 11(5)), neither of which could be said to happen as the result of the use of a vote.

149. In any case I consider that the votes we are speaking of cannot be regarded as economic resources within the meaning of s.60(2) SAMLA as they cannot be used to obtain funds goods or services.

150. Stepping back from the statutory language (and considering the wider principles of construction summarised above), I agree with the Trustees' argument that it is not easy to see why the legislature should have wished to prohibit the exercise of creditor voting rights within the bankruptcy process by designated persons. Unlike in the case of shareholder voting rights, such creditor voting cannot permit the designated person to access the underlying asset or its value: they remain locked within the bankruptcy until the Trustee decides to make a dividend or distribution. Moreover (and, again, unlike in the case of shareholder rights) such voting rights are to be exercised within the context of a statutory scheme under the supervision of an officer of the Court and – ultimately – the court itself.

151. I agree also with the Trustee's argument that prohibiting the exercise of creditor voting rights by creditors who are designated persons would give rise to consequences which are at least highly inconvenient, if not "*absurd*". The presence of a single sanctioned creditor would prevent the proper operation of statutory machinery which is supposed to operate for the collective benefit of all creditors and in the public interest. Where (as here) sanctioned creditors make up a majority of the creditor pool, there would be a serious risk of the bankruptcy developing contrary to the views of the majority creditor. In any case, there is a likelihood of unnecessary delay, uncertainty, court applications and licencing applications to OFSI.

152. OFSI has not engaged at all with the question whether creditor voting rights in bankruptcy are caught by Regulation 11, and there is, therefore, no contrary argument for me to take into account.

153. It seems to me, therefore, that the 2019 Regulations do not prevent the counting of creditor votes (or the exercise of rights to vote at the creditor committee) in a bankruptcy by a person caught under Regulation 7(4).

8. ARE THE TRUSTEES IN BREACH OF REGULATION 18(A)?

154. OFSI has (tentatively) invited the Trustees to consider whether they are providing financial services to a designated person (or someone owned or controlled by a designated person), for the purposes of Regulation 18A, and thereby committing an offence under that regulation.

155. Regulation 18A prohibits the provision of certain "*financial services*" to certain specific persons in the following terms.

> "(1) A person ("P") must not provide financial services to a person mentioned in paragraph (2) where (a) the financial services are for the purpose of foreign exchange reserve and asset management; and (b) P knows, or has reasonable cause to suspect, that the financial services are provided to such a person.
>
> (2) The persons mentioned in this paragraph are -
>
> (a) the Central Bank of the Russian Federation …
>
> (d) a person owned or controlled directly or indirectly (within the meaning of Regulation 7) by a person mentioned in sub-paragraphs (a) to (c), or
>
> (e) a person acting on behalf or at the direction of a person mentioned in sub-paragraphs (a) to (c)."

156. "Financial services" are defined in s.61(1) SAMLA as follows:

> In this Act "financial services" means any service of a financial nature, including (but not limited to)—
>
> (a) insurance-related services consisting of—
>
> (i) direct life assurance;
>
> (ii) direct insurance other than life assurance;
>
> (iii) reinsurance and retrocession;
>
> (iv) insurance intermediation, such as brokerage and agency;
>
> (v) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;

> (b) banking and other financial services consisting of—
>
> (i) accepting deposits and other repayable funds;
>
> (ii) lending (including consumer credit, mortgage credit, factoring and financing of commercial transactions);
>
> (iii) financial leasing;
>
> (iv) payment and money transmission services (including credit, charge and debit cards, travellers' cheques and bankers' drafts);
>
> (v) providing guarantees or commitments;
>
> (vi) financial trading (as defined in subsection (2));
>
> (vii) participating in issues of any kind of securities (including underwriting and placement as an agent, whether publicly or privately) and providing services related to such issues;
>
> (viii) money brokering;
>
> (ix) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
>
> (x) settlement and clearing services for financial assets (including securities, derivative products and other negotiable instruments);
>
> (xi) providing or transferring financial information, and financial data processing or related software (but only by suppliers of other financial services);
>
> (xii) providing advisory and other auxiliary financial services in respect of any activity listed in sub-paragraphs (i) to (xi) (including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy).

157. Some of the terms used in this definition are further defined within s.60 SAMLA.

158. The Trustees are confident that they are not breaching Regulation 18A, and I consider that they are correct in this for three reasons.

159. First, they are undertaking the statutory functions of a Trustee in Bankruptcy and these statutory purposes do not include anything that falls within the definition of “financial services” within s.61 SAMLA. Whilst the words at the beginning of s.61(1) "*any service of a financial nature*" are very wide, I consider

it is clear that they should be read *sui generis* with the list of activities following (notwithstanding that these wide words are not limited to that list).

160. Secondly, the Trustees are not providing any services "*for the purpose of foreign exchange reserve and asset management*" as required by Regulation 18A(1)(a). Whatever services they provide are for the purposes of their role as trustees in bankruptcy.

161. Thirdly, even if the Trustees could be said to be providing "*financial services*" for the purpose of "*foreign exchange reserve and asset management*", they are not providing such services to any of the persons listed in Regulation 18(2) (even if you take the view (as I do not) that the Russian Bank Creditors are under the control of Central Bank). The Trustee's services are provided in relation to the Bankrupt's estate under the supervision of the court. Whilst the Trustees may have duties that can be enforced by creditors it would be wrong to think of them as providing services to particular creditors.

162. OFSI has raised Regulation 18A tentatively and in OFSI's own words "*not to suggest that it was applicable on the current scenario but to ensure that the parties had fully considered its applicability*"; and professes no view on the point itself. In my view, OFSI is being far too cautious. It is obvious on its face that the Regulation does not apply.

9. RELIEF SOUGHT

163. To summarise my judgment so far:

i) I do not consider I have the evidential basis to determine whether the Russian Bank Creditors should be regarded as owned or controlled by a designated person.

ii) I do consider, however, that the evidence that the Trustees have been able to find, having made, in my opinion, strenuous efforts to find out whatever they can, does not provide any evidence that could be said to leading to the trustees knowing that the Russian Bank Creditors or any of them are owned or controlled by a designated person, or that would lead to a reasonable suspicion that that is the case.

iii) I do not consider that even, if the Russian Bank Creditors should be regarded as being owned or controlled by a designated person, affording the Russian Bank Creditors the voting rights of a creditor in a bankruptcy, or representation and voting on a Creditors' Committee, would cause a breach of any prohibition created by the 2019 Regulations, or could lead to any civil fine under PACA 2017. This is because the voting rights are neither funds nor economic benefits and accepting those votes does not involve dealing with funds or economic benefits.

iv) I do not consider that the Trustees in undertaking their duties as trustees in bankruptcy are thereby breaching the restrictions on carrying out financial services under the 2019 Regulations.

164. Having made these findings, I need to consider the relief that the Trustees invite me to give.

165. They have asked me in the alternative to consider the possibility of declaratory relief as to the application or effect of the Regulations on the basis of two jurisdictions.

(a) Declaratory relief

166. First, they claim relief under s.19 Senior Courts Act 1981 and CPR rule 40.20. They cite the well-known statement of principles enunciated by Aikens LJ in *Rolls Royce PLC v Unite the Union* [2009] EWCA Civ 387 at [120]. These principles, and my comments on them are as follows:

i) *The power of the court to grant declaratory relief is discretionary.*

This is, of course, correct, and in exercising that discretion, I will give regard amongst other things, to the further guidance provided by this case.

ii) *There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*

I consider that this requirement is satisfied in that the Relevant Bank Creditors consider that they have a right to prove in the Bankruptcy and to exercise votes within the credit committee, and there is a real possibility that, without guidance from the court (or from OFSI), the Trustees may feel compelled to deny them those rights.

iii) *Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*

I consider that this point is satisfied.

iv) *The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue.*

This point also is satisfied.

v) *The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*

This point is not strictly relevant as it is only the Trustees that are pressing for an answer, but I do consider that there is a public interest in clarifying the application of the 2019 Regulations.

vi) *However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*

There is at first glance something of a difficulty with this point as none of the Respondents have been represented in court. However, given the stance of the Trustees, which is that they want, and reasonably seek, an answer but have been broadly neutral on how the questions are to be resolved, and accordingly have, in my view, put the case fairly and in a balanced way to the court dealing with all sides of the questions, rather than in a partisan manner, I consider that the arguments have been put before the court and that this should not of itself be an objection to declaratory relief.

In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."

I will consider this question below having regard also to the alternative of providing directions under the powers of the court to supervise a bankruptcy.

(b) s.303(2) IA 1986

167. If declarations are not considered appropriate, the Trustees seek directions under s.303(2) IA 1986 which provides that:

> "The trustee of a bankrupt's estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy".

168. Further, under s.363(1) IA 1986:

> "every bankruptcy is under the general control of the court and, subject to the provisions of this Group of Parts, the court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy".

169. As said by Lloyd LJ, delivering the judgment of the Court of Appeal in *Donaldson v O Sullivan* [2009] 1WLR 924:

> "bankruptcy is a court -controlled process in relation to which the court has wide powers, exercisable for the purpose of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation."

170. Mr Munby has pointed out that I need to consider however two limitations as a matter of practice:

171. First the power under s s.303(2) IA 1986 is not meant to be used to allow a trustee in bankruptcy to offload commercial decisions to the court. It is to be

applied where the court's guidance is genuinely needed: see for example *Re Longmeade Ltd* [2016] EWHC 356 (Ch) [2016] Bus LR 506 at [61]-[64] citing various well-known authorities to that effect.

172. I agree with Mr Mumby, however that that is not what is happening here - the Trustees are looking for authoritative legal guidance, rather than for the court to make a commercial decision on their behalf.

173. Secondly this power does not permit the court to modify the general law. As was held by Mann J in *HMRC v Ariel* [2016] EWHC 1674 (Ch) [2017] 1 WLR 319 at [53]:

> "The section itself is intended to allow "General control of trustee by the court", but that must be in relation to matters within the bankruptcy itself and cannot be taken to allow the court to modify the rights of others who have acquired those rights entirely independently of the bankruptcy. Thus if a trustee commits an act of trespass, whether in relation to land or goods, for which he is liable in damages, section 303(2) would not empower the trustee to apply for an order exonerating him from paying damages. As trustee he is subject to the general law, and section 303 does not empower to the court to disapply it. Its essential purpose is principally to allow those interested in the bankruptcy (including the trustee) to bring bankruptcy related matters before the court so that the court can make appropriate orders to take the bankruptcy forward. …."

174. Mr Munby submits that the present application does not involve inviting the court to make directions which fall foul of this second principle. I agree. The court is being asked to declare what the law is (applied to the facts put before it), not to modify the law.

175. In summary, I consider that in answering the questions raised by the Trustees, I could act within the court's powers either by making declarations or by providing directions.

176. There are, however, certain public law considerations I should consider before I make any order that is binding on OFSI.

10. PUBLIC LAW CONSIDERATIONS

(a) O'Reilly v Mackman

177. The first consideration is whether in doing so I would breach the principle in *O'Reilly v Mackman* [1983] 2 AC 237 ("***O'Reilly***") having regard to the dictum of Lord Diplock in that case that:

> "it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this

> means to evade the provisions of Order 53 for the protection of such authorities,"

178. This point is one similar to one that I considered at [52] to [58] in *Rushmer v Central Bedfordshire Council* [2023] EWHC 1341 (Ch); [2023] PTSR 1820 and the analysis that I provided in that case I think applies similarly in the case before me now. I accept the Trustees' submission that the principle in *O'Reilly v Mackman* is no obstacle to the relief sought on the application.

179. The core principle in *O'Reilly* is that cited above, in summary that challenges to the decisions of an authority should be made via administrative proceedings rather than by way of ordinary action. In this case, there is no challenge to a decision of a public authority - indeed, OFSI has declined to make any decision. Insofar as the case engages public law issues, what is sought is simply declarations as to the state of the law. Accordingly, somewhat analogously with Rushmer (at [57](a)), it is not clear that the principle in *O'Reilly* is engaged at all.

180. Also, insofar as this application could be said to raise some public law issues (i.e. as to the scope of the sanctions regime), they arise in the context of:

i) a bankruptcy which constitutes a pre-existing insolvency proceeding in the Insolvency & Companies Court; and

ii) a specific application within that bankruptcy for the Court to exercise its supervisory powers under s.303 of the IA 1986.

Those matters can only be pursued by way of proceedings in the current form; and it would (it is submitted) have been inappropriate and impractical to seek to "carve-out" certain issues to be pursued by way of judicial review. There is again some loose analogy to *Rushmer*, where the processes of the Court were better suited to the particular dispute.

181. Finally, it is clear that in a number of cases on this very topic of sanctions issues as to the ambit of criminal or public law including *Mints*, *Litasco* and *Vneshprombank* have been addressed outside judicial review proceedings.

(b) Should a civil court predetermine a criminal matter?

182. Secondly, I need to consider a line of cases that address the caution needed when a civil court strays into areas which potentially affect criminal liability.

183. This topic was considered *in Regina (Rusbridger and another) v Attorney General* [2003] UKHL 38 ("***Rusbridger***"). In that case the editor and one of the journalists for *The Guardian* newspaper sought a declaration that they could publish a series of articles advocating republicanism and urging the abolition of the monarchy (but by democratic means without involving any force) without breaching section 3 of the Treason and Felony Act 1848 which made it an offence to "imagine, invent, devise, or intend to deprive or depose" our Queen. This matter was capable of debate both based on the wording of that section and having regard to its interaction with the Human Rights Act 1998, and particularly the right to freedom of expression under Article 10.

184. In his speech, Lord Steyn (with whom Lord Scott of Foscote and Lord Walker of Gestingthorpe agreed) considered (at [16]) a principle that had been discussed in *Imperial Tobacco Ltd v Attorney General* [1981] AC 718. This was that it is not appropriate for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is lawful and to name the Attorney General as the formal defendant to the claim. His Lordship considered, however, that:

> "since 1951 [I think this may be a typographical error and that 1981 may be meant] it has become well established that there is jurisdiction for a civil court to make such a declaration… But the exceptional nature of such a declaration by a civil court has on a number of occasions been emphasised."

185. Lord Steyn went on to consider first a threshold condition that the applicant for relief has an interest in or other standing in the issue, which he considered was the case in the matter before him.

186. Next, he considered three criteria necessary for the case to fall within the exceptional category.

187. The first criterion was whether there was any genuine dispute. The Attorney General in that case offered what might be described as a "*Catch-22*" analysis, arguing that there would be a dispute if the Attorney General threatened to prosecute. In that event no claim for a declaration would be possible because there would be an imminent threat of prosecution. On the other hand, if the Attorney General simply declined to indicate any view (as was the case there) there was no dispute. Lord Steyn did not see the absence of a dispute as concluding the matter or to be a "weighty criterion" if there were otherwise good reasons to allow the claim for a declaration to go forward.

188. The second criterion was whether the case is fact sensitive or not. Lord Steyn thought that most claims for a declaration would founder on this ground. However, questions of pure law may more readily be made the subject matter of a declaration.

189. The third criterion was whether there was a cogent public or individual interest which could be advanced by the grant of a declaration.

190. Having considered these issues, Lord Steyn considered that the case before him fell within the exceptional category, but nevertheless refused to allow the relief requested on the basis that it was obvious that section 3 could not survive scrutiny under the Human Rights Act 1998 and the courts ought not to be troubled further with this "unnecessary litigation". This was a point that all their Lordships agreed with: none of them considered that *The Guardian* or its journalists were under any real danger of prosecution or conviction or that the existence of the 1848 act had caused any of them "*to sleep in their beds less soundly*."

191. Lord Roger of Earlsferry placed more reliance on the fact that the claimants were unaffected in their actions or in their well-being by the existence of section

3 of the 1848 Act. He acknowledged the principle in *Imperial Tobacco* but considered (at [56]) that the authorities do not spell out what constitutes an exceptional case for those purposes, rather:

> "in ordinary cases people must take and act on their own legal advice. So, broadly speaking, a very exceptional case must be one where, unusually, the interests of justice require that the particular claimant should be able to obtain the ruling of the civil court before embarking on, or continuing with, a particular course of conduct which, on one of you might expose him to the risk of prosecution".

192. He considered the case before him did not meet that test as there was no real risk of prosecution in that case.

193. It seems that the point that there must be a real dispute and the applicant must have something at stake is not an absolute point. In *Bowman v Fels* [2005] EWCA (Civ) 226 the Court of Appeal felt able to make a declaration in relation to an issue of public law that it considered to be of very great importance concerning the duties of solicitors and barrister where they make a disclosure under section 328 of the Proceeds of Crime Act 2002 pending obtaining a consent from National Crime Intelligence Service, notwithstanding that the underlying dispute that had first raised the question had been settled. The court found, whilst that appeals which are academic as between the parties should generally not be heard, they could be heard if there was a good reason in the public interest for doing so. I should note, however, that reliance was placed in this case on the fact that there were three public bodies intervening who were anxious to obtain guidance on this point.

194. *Regina (Haynes) v Stafford Borough Council* [2006] EWHC 1366 (Admin) is a case where the court was prepared to issue declarations involving the determination by the administrative court of questions which could call for consideration by a criminal court if criminal proceedings were brought. Walker LJ considered the question whether it is permissible and appropriate for him to pronounce on questions which potentially affect criminal liability. In this he had regard to *Attorney General v Able* [1984] QB 795 where Woolf J (as he then was) said it was important that the courts should bear in mind the danger of usurping the jurisdiction of the criminal courts and the observation of Viscount Dilhorne in *Imperial Tobacco* that only in a very exceptional case would it be right for a civil court to make a declaration as to the criminality or otherwise of future conduct.

195. Walker LJ, after considering relevant legal textbooks and an academic article, identified certain relevant propositions, although he was careful to say that he was not setting out a code of general application, but merely propositions that had relevance to the case before him. His propositions may be summarised as follows:

i) The High Court has jurisdiction to make a declaration as to whether a criminal offence has been committed or may be committed in the future, but it is only to be exercised in exceptional circumstances. The court

should adopt an essentially flexible approach in deciding this. The only rigid rule is that once criminal proceedings have begun the court should not intervene.

ii) The extent to which cases are fact-sensitive or not is a factor of great importance – a question of pure law may more readily be made the subject matter of a declaration.

iii) It will be relevant to consider the extent to which there is a cogent public or individual interest which could be advanced by the grant of a declaration.

iv) It will only be proper to grant a declaration if it is clearly established that there is no risk of treating conduct as criminal which is not clearly in contravention of the criminal law.

v) There may be a distinction between declarations that conduct is criminal and declarations that conduct is not criminal. If a court declares what conduct will be criminal, it may be considered to be performing the task of the jury in a criminal trial. However, if the court rules that conduct is not criminal, it is performing a similar function to the judge at a criminal trial who stops the case on a submission of no case to answer.

vi) The courts should be particularly wary of embarking on this jurisdiction otherwise than at the suit of the Attorney General; the court should be particularly cautious wary proposed declaration involves existing, rather than prospective future conduct.

196. I was also referred to *Transport for London v Uber London Limited* [2015] EWHC 2918 (Admin) as another case where the court (Ousely J, sitting in the Administrative Court) felt it appropriate to grant a declaration in relation to a matter that would be determinative of whether a regulatory offence was being committed. In doing so he had regard to: the importance of the issue; that the declaration being sought was not one that certain conduct is criminal; that the relevant regulator (Transport for London) was pressing for a declaration; and that there were no current criminal proceedings.

(c) Applying these principles in this case

197. Applying the principles gleaned from these cases to my findings in relation to this application, I reach the following conclusions.

198. First, whilst I have not seen any evidence that the Russian Bank Creditors are in fact owned or controlled by a designated person, whether or not they are so owned or controlled is a question of fact and the court is not in position to make any ruling on this.

199. Secondly, whilst I do not think on the basis of the evidence provided to date that any of this evidence creates a position whereby the Trustees could be said to know or to have reasonable cause to suspect that the funds and/or economic resources comprised in the claims that the Russian Bank Creditors have in the bankruptcy (or the judgment debts underlying such claims, or any proceeds that

they may receive from the bankruptcy) are held or controlled by a designated person, I do not consider it appropriate that I should make a declaration to this effect.

200. This is for the following reasons:

i) This is a question of fact rather than one of law.

ii) The matter touches on criminal liability and the relevant prosecuting authority (OFSI, rather than the Attorney General in this case) does not support the making of a declaration.

iii) I consider that the circumstances are not sufficiently exceptional so as to warrant a breach of the principle in *Imperial Tobacco*. The circumstances, to me, do not seem to be substantially different to those in *Rusbridger*. Given the guidance that has been published by OFSI and the Foreign Colonial and Development Office, taken together with the decision in *Litasco* and the observations made in this judgment, notwithstanding the dicta in *Mints*, I think it is highly unlikely either that, unless the facts known to the Trustees change, they would face prosecution under the 2019 Regulations, or a civil fine under PACA 2017. It is in my view clear that the Trustees have done all that they can be expected to do to comply with the Regulation and, unless new matters come to light, it would be perverse for OFSI to take action against them, particularly in the light of its published guidance. Like the editor of *The Guardian* in *Rusbridger*, the Trustees should be able to sleep soundly in their beds.

iv) The point is particular to the Trustees and is not of any further general interest.

v) I am proposing to give directions to the Trustees under the IA 1986 power and this provides an alternative means of protection for the Trustees.

201. Turning to the Trustees' second concern regarding voting rights, I consider that the application of the principles that I have discussed above, point differently and that, having found that voting rights are neither funds nor economic benefits for the purposes of the prohibitions created by the 2019 Regulations and dealing with them cannot be regarded as dealing with funds nor economic benefits, I should make a declaration to this effect.

202. This is for the following reasons:

i) This is a question is one of law rather than one of fact.

ii) Whilst, as with the previous point, the matter also touches on criminal liability, OFSI does not support the making of a declaration, and the Trustees should not lose any sleep over matter, in this case the interpretation of the law is one in which there is a substantial general interest. Trustees in bankruptcy have a need to understand the law on

this point, and I consider that I should follow the example of *Bowman v Fels* in providing an authoritative determination of the law on this point.

203. Turning to the Trustees third concern, whether the Trustees are providing financial services, the answer to this question is so clear that I do not consider that there is any need to make a declaration to this effect.

11. CONCLUSIONS

204. Having regard to all the matters considered above I will order as follows.

205. Whilst I will not go so far as to make a declaration in relation to the status of the Russian Bank Creditors, I will give directions under section 303 IA 1986 to implement the following broad points (the wording of which is to be confirmed in an order of the court) that:

i) pending any change in circumstances, including any new facts of which the Trustees may become aware, or any notice or requirement from OFSI, or any new guidance from the court (including as a result of the appeal to the Supreme Court in *Mints*), the Trustees should deal with the Russian Bank Creditors on the understanding that they are not designated persons and are not owned or controlled by any designated person and on the basis that they have no knowledge and no grounds for reasonable suspicion that this is not the case;

ii) the Trustees should, however, undertake (to an extent that is proportionate having regard to cost) enhanced monitoring of the position of the Russian Bank Creditors, checking at least on each occasion that they are considering a distribution to creditors that there is no change in the public records on which they have relied or other matter reasonably accessible within the public domain that would or might change the position significantly from the one presented to the court.

206. The court should make a declaration in broadly the following terms (again the wording of which is to be confirmed in an order of the court). The voting rights of creditors under a creditors' decision procedure under the bankruptcy provisions of IA 1986 and the Insolvency (England and Wales) Rules 2016 and the rights of creditors to participate in and vote at a creditors' committee under section 301 IA 1986 and Part 17 Insolvency Rules 2016 do not constitute "funds" or "economic benefits" for the purposes of the 2019 Regulations and using such rights or accepting any such votes do not amount to dealing with "funds" or with "economic benefits" for the purposes of the 2019 Regulations.

207. It has been drawn to my attention that, as this judgment relates to a hearing where only one party was represented, it falls within paragraph 6.2 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001. Therefore, under paragraph 6.1 of that Practice Direction, it should not be cited in court unless it contains an express statement that it that it purports to establish a new principle or to extend the present law. Against this background, I confirm that it is my intention that the declaration to be made in accordance with the previous paragraph of this judgment is intended to establish a new principle or extend the

present law and that my discussion under the heading "*5. The Trustees' First Question*" is intended to extend the understanding of the present law.