Neutral Citation Number: [2025] EWHC 75 (Ch)

Case Nos: BR-2022-000112 & BR-2022-000047

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

IN THE MATTER OF NIKOLAY FETISOV
AND IN THE MATTER OF ILYA YUROV
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 23 January 2025

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PARFITT

Between :

(1) EDWARD THOMAS
(2) MATTHER CARTER
(3) ANN NILSSON
IN THEIR CAPACITIES AS THE JOINT
TRUSTEES IN BANKRUPTCY OF
NIKOLAY FETISOV
AND ILYA YUROV — Applicants

- and –

(1) PJSC NATIONAL BANK TRUST

Interested Party

Stefan Ramel (instructed by TLT LLP) for the Applicants
Neil Dooley (solicitor advocate of Steptoe LLP) for the Interested Party

Hearing date: 15 October 2024

JUDGMENT

This judgment was handed down remotely at 10am on 23 January 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

Deputy Insolvency and Companies Court Judge Parfitt:

1. This is an application by the trustees in bankruptcy of Nikolay Fetisov and Ilya Yurov (the "Trustees") under section 303 of the Insolvency Act 1986 ("IA1986"). The Trustees seek orders permitting them to make distributions in the two bankruptcies (the "Bankruptcies") to PJSC National Bank Trust ("NBT") by making payments to the client account of NBT's solicitors ("Steptoe").

2. At the end of the oral argument in October 2024 I indicated that I would grant the relief sought by the Trustees, and that I would provide my reasons in a reserved judgment at a later date. This judgment explains why I am satisfied that it is appropriate to grant the relief sought.

3. The Trustees appeared by Stefan Ramel of counsel. NBT also appeared as an interested party, by Mr Dooley of Steptoe. I am grateful to both of them for their clear oral and written submissions.

The background

4. I need only record the essentials of the background. NBT was a Russian bank which collapsed in late 2014 and is now in run-off. Mr Fetisov and Mr Yurov (together, the "Bankrupts") were two of the defendants in proceedings which NBT brought in the Commercial Court after its collapse. By order of Mr Justice Bryan dated 23 January 2020 against the Bankrupts and other defendants (the "Bryan Order"), the

Bankrupts were ordered to pay very substantial sums to NBT in several currencies. The Trustees' evidence is that the aggregate liability is around US$900m.

5. The Bankrupts petitioned for their own bankruptcies following the Bryan Order. Bankruptcy orders were made against them on 9 April 2020. The Trustees were appointed as trustees in both bankruptcies on 12 May 2020.

6. The Trustees have realised assets in both Bankruptcies. The evidence in support of the present applications shows that in Mr Fetisov's bankruptcy, gross realisations of some £2.65m were made by May 2023; in Mr Yurov's bankruptcy, gross realisations of more than £3.3m had been made by February 2024.

7. Following the payment of costs and disbursements, and subject to making appropriate retentions for the future conduct of the bankruptcies, the Trustees have determined that they have sufficient funds to make a first distribution to the Bankrupts' respective creditors.

8. By far the largest creditor in both Bankruptcies is NBT. Insofar as any distributions are made in the two Bankruptcies, a very substantial proportion would be paid to NBT. NBT's evidence filed on the present application is that it represents 99.5% by value of the creditors in each bankruptcy. NBT has not yet received any dividends in the Bankruptcies.

The issue

9. As I have already mentioned, NBT is a Russian bank, albeit one that is in run-off following its collapse in 2014. It is regulated and majority owned by the Central Bank of Russia ("CBR").

10. As described in more detail below, and as is well-known, there is a regime of financial sanctions in place in relation to certain Russian individuals and entities. NBT is not specifically named as an entity which is subject to sanctions. Concerns have arisen, however, that NBT might be treated as being subject to sanctions. The Trustees are concerned that the payment of dividends to NBT might be found to be a breach of the sanctions regime, giving rise to criminal liability on their part. They have applied to court to seek an order which will offer them some protection.

11. On 31 May 2023 the Trustees issued an application (the "Original Application") under section 303 IA1986 for a direction permitting them to transfer dividends to NBT. Mr Thomas explains in his evidence that the Trustees did not consider they were required to make the Original Application, but that they considered it prudent to do so. I address below the jurisdiction of the court to assist in answering questions of this sort.

12. The Original Application was listed for a hearing before ICC Judge Greenwood on 12 July 2023. As a result of the ongoing appeal in the *Mints* litigation (discussed in more detail below) the hearing was adjourned. Following the Court of Appeal handing down its decision in *Mints* on 6 October 2023, the Trustees issued the

application which is now before me (the "Revised Application"). The Revised Application provided further details about the issue which has arisen in the light of the Court of Appeal decision in *Mints*, and seeks the court's approval for a more restricted approach to the payment of distributions in the Bankruptcies. As set out in the first paragraph of this judgment, the Trustees now seek an order permitting them to pay NBT's share of any dividends in the Bankruptcies to Steptoe, NBT's solicitors. The imposition of Steptoe is said to mollify any residual concerns about the effect of the sanctions regime, because another UK-based regulated professional with its own duties to comply with the sanctions regime will receive the money from the Trustees. Further, there is a licence in place which permits Steptoe to apply the distributions it will receive from the Bankruptcies towards NBT's legal costs in other proceedings (notwithstanding any sanctions issues). I discuss this in more detail below.

SAMLA and the Regulations

13. The background to and the detail of the relevant sanctions regime which is of concern to the Trustees was carefully described by the Chancellor, Sir Julian Flaux, in paragraphs 4-20 of the Court of Appeal decision in *PJSC National Bank Trust v Mints* [2024] KB 559. I will return to this judgment in more detail below because it is the Chancellor's comments about NBT which give rise to the Trustees' concerns. It is unnecessary for me to set out the Chancellor's five-page history of the sanctions

regime in full in this judgment, but the outline below is based on his careful summary and Mr Ramel's distillation of the key provisions in his skeleton argument.

14. The modern law of sanctions derives from the UN Security Council Resolution 1267 dated 15 October 1999. Initially, the UK gave effect to this and other UN resolutions by orders under the United Nations Act 1946. This practice was successfully challenged in the Supreme Court case of *Ahmed v HM Treasury (Nos. 1 and 2)*[2010] 2 AC 534, because it deprived a sanctioned individual of an effective judicial remedy.

15. The UK then used EU Regulations to implement the UN resolutions. In relation to Russia, the EU adopted Council Regulation (EU) No 269/2014 in response to the Russian invasion of Crimea in 2014. This was given effect in the UK by the Ukraine (European Union Financial Sanctions) (No 2) Regulations 2014 (SI 2014/693).

16. Following Brexit, the UK needed a new sanctions regime to implement UN sanctions and impose its own regime. This was contained in the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), which is now the statutory basis for the sanctions regime in the UK.

17. Section 1 of SAMLA provides that the appropriate Minister may make "sanctions regulations", defined as regulations which do one or more of a list of matters set out at sub-section (5). The relevant matter for present purposes is a regulation which imposes "financial sanctions".

18. The definition of a regulation which imposes financial sanctions is provided in section 3 of SAMLA. Such regulations will impose financial sanctions if they impose prohibitions or requirements for one or more of a list of purposes. Mr Ramel focused on sub-sections 3(1)(a) "freezing funds or economic resources owned, held or controlled by designated persons" and sub-section 3(1)(d) "preventing funds or economic resources from being made available to, or for the benefit of, (i) designated persons".

19. "Funds" and "economic resources" are defined in section 60(1) and (2) of SAMLA, which provides:

> 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 and 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, bonds, 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.

> (2) In this Act "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.

20. "Designated persons" are defined in section 9 of SAMLA, which provides:

> 9 (1) Subsection (2) applies for the purposes of sections 3 to 4, Schedule 1 and sections 6 to 8.
>
> (2) In each of those provisions, "designated persons" means—
>
> > (a) persons designated under any power contained in the regulations that authorises an appropriate Minister to designate persons for the purposes of the regulations or of any provisions of the regulations, or
> >
> > (b) persons who are designated persons under any provision included in the regulations by virtue of section 13 (persons named by or under UN Security Council Resolutions).
>
> (3) In subsection (2) "the regulations" means the regulations mentioned in section 3, 3A, 4, 5(1), 6, 7 or 8 (as the case may be).
>
> (4) As regards designation of persons by virtue of subsection (2)(a), see sections 10 to 12.
>
> (5) In this Act "person" includes (in addition to an individual and a body of persons corporate or unincorporate) any organisation and any association or combination of persons.

21. The relevant regulations made under section 1 of SAMLA in the present case are the Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855) (the "Regulations"). The Regulations came into force on 31 December 2020. Regulation 5 of the Regulations contains a power for the Secretary of State to provide that persons are designated persons for (inter alia) the purposes of regulations 11 to 15

which relate to the freezing of funds and economic resources; this regulation is therefore the relevant power referred to by section 9(2) of SAMLA.

22. The Trustees have drawn attention to the following provisions of the Regulations, which they consider may be engaged by the payment of a dividend in an insolvency process:

(a) Regulation 12 concerns making funds available to designated persons. This regulation provides by paragraph (1) that "a person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available", subject to certain exceptions and licences. Breach of that prohibition is a criminal offence. Paragraph (4) provides that "the reference in paragraph (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person."

(b) Regulation 13 concerns making funds available for the benefit of a designated person. This prohibition is similarly subject to exceptions and licences, and creates a criminal offence. Paragraph (4) provides (so far as relevant) that "funds are made available for the benefit of a designated person

only if that person thereby obtains, or is able to obtain, a significant financial benefit".

(c) Regulations 14 and 15 contain similar prohibitions against making economic resources available to designated persons, again with a criminal penalty.

(d) The Trustees point out that the offences under these Regulations require mens rea; but that a contravention of the prohibitions can also lead to an offence of strict liability under s. 146 of the Policing and Crime Act 2017, with a monetary penalty of up to £1m or 50% of the estimated value of the funds or economic resources, whichever is higher. In the context of these Bankruptcies, therefore, the monetary penalty under this provision could be well in excess of £1m.

(e) Regulation 7 provides the meaning of the phrase "owned or controlled directly or indirectly" which is used in Regulations 12 and 14. The regulation provides two alternative conditions which mean that a person who is not an individual ("C") is owned or controlled directly or indirectly by another person ("P"):

a) The first condition (in paragraph (2)) is that P holds directly or indirectly more than 50% of the shares in C, the voting rights in C, or the right to appoint or remove a majority of the board of directors of C;

b) The second, alternative, condition (in paragraph (4)) 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". It is this condition which is central to the present application.

(f) Regulation 64 provides that regulations 12 to 15 do not apply to anything done under the authority of a licence granted by the Office for Sanctions Implementation ("OFSI"). OFSI is part of HM Treasury and is responsible for implementing, administering, enforcing and supervising the UK financial sanctions regime created under SAMLA.

(g) Regulation 58 provides that the prohibition in regulations 12 and 13 are not contravened by a number of exceptions; the Trustees draw attention to paragraph (4) which provides an exception for a relevant institution crediting a frozen account when it receives funds transferred to that institution for crediting to that account, and (5) which provides an exception where a relevant institution credits an account held by a designated person where "those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a

designated person". A "relevant institution" is a person with permission under Part 4A of the Financial Services and Markets Act 2000 (which deals with permission to carry on regulated activities given by the PRA or FCA as the case may be).

23. That is the framework for the UK sanctions regime insofar as it is relevant to this case. It has been considered in a number of relevant judicial decisions, including in particular the Court of Appeal decision in *Mints*, to which I now turn.

24. NBT was not, and has never been, a designated person in the UK. The designated persons relevant to the present application are Vladimir Putin, the President of the Russian Federation, and Ms Elvira Nabiullina, the Governor of the CBR. They were designated by the Secretary of State on 25 February 2022 and 30 September 2022 respectively. It is Mr Putin's designation, in particular, which is central to the present application. The issue arises because Russia operates what has been described as a "command economy" in which, at least in theory, Mr Putin by reason of his political office has the ability to control any aspect of the Russian state, its economy, or companies operating there.

25. I should record that the Trustees' solicitors alerted the court by letter dated 4 December 2024, during the period between the hearing and this judgment being handed down, that NBT has been sanctioned in the United States by the US Department of the Treasury's Office of Foreign Assets Control ("OFAC").

Sanctions were applied by OFAC on 21 November 2024 against NBT together with more than other 50 Russian banks. Despite this designation in the USA, the Trustees' understanding is that NBT continues not to be a designated person in the UK.

26. By the same letter, the Trustees notified the court that the Regulations are being extended to include a new insolvency licensing purpose. The Trustees informed the court that the modifications appear to relate only to corporate insolvency, so that they appear not to obviate the need for the present application.

Mints

27. The *Mints* litigation involved a claim by NBT as co-claimant with another Russian bank, PJSC Otkritie Financial Corporation ("Otkritie") against Boris Mints and others. The claim was brought in June 2019. In February 2022, Otkritie was designated by the Secretary of State for the purposes of the Regulations.

28. Four of the defendants in the *Mints* litigation applied for a stay of the proceedings on the basis of Otkritie becoming a designated person. Mrs Justice Cockerill DBE dismissed that application (reported at [2023] EWHC 118 (Comm)). The defendants appealed. Judgment on the appeal (the "*Mints* Appeal") was handed down on 6 October 2023 and is reported at [2024] KC 559. The Chancellor gave the only reasoned judgment, with which Popplewell and Newey LJJ agreed.

29. The Trustees have summarised the three key issues in the *Mints* Appeal as follows:

(a) Whether a judgment of the English court can be entered against a designated person without contravening the Regulations;

(b) Whether OFSI can licence the payment of a designated person's adverse legal costs (or their own costs), the payment of damages pursuant to an undertaking or the satisfaction of an order for security for costs; and

(c) Whether a designated person can control an entity within the meaning of Regulation 7 where the entity is not a personal asset of the designated person but the designated person is able to exert influence over it by virtue of the political office that he or she holds at the relevant time (which the Trustees describe as the "Control Issue").

30. The Chancellor resolved the first two questions in favour of the respondent banks, and therefore dismissed the appeal. However, he went on to consider the Control Issue, obiter. He held that Regulation 7(4) was satisfied in relation to NBT in that Mr Putin, as the apex of a command economy, could exert influence over it and "could be deemed to control everything in Russia". This finding was based on a concession by the claimant banks at first instance, recorded at paragraph 63 of the Chancellor's judgment, that "if control extends to control via office by one means or another, the control test would be satisfied in relation to NBT at least pursuant to regulation 7(4) in that either Mr Putin or Ms Nabiullina could exercise influence

over it in significant respects." That concession is not binding on the parties to the present application, and NBT made it clear that they do not make the same concession before me.

31. Later in the *Mints* Appeal judgment, at paragraph 233 the Chancellor rejected the submission of the respondent banks that the result was absurd; the absurdity, he held, lay not in his construction of the Regulations but in the Secretary of State having designated the head of a command economy without having grasped the implications under the Regulations. As to those implications, the Chancellor's view was the Regulation 7(4) was expressed using "wide wording" and there was nothing to justify a carve-out where the ability to exert influence arises from political office. The Chancellor was of the view that Regulation 7 had a "clear and wide meaning" and there was "no genuine ambiguity" as to its meaning.

Developments with OFSI after *Mints*

32. Ten days after the *Mints* Appeal judgment, on 16 October 2023 OFSI issued an e-alert in response. The relevant passage of the alert stated:

> *"There is no presumption on the part of the Government that a private entity based in or incorporated in Russia or any jurisdiction in which a public official is designated is in itself sufficient evidence to demonstrate that the relevant official exercises control over that entity. In the interests of reducing any*

uncertainty, we are exploring the options available to the Government in clarifying this position further."

33. As foreshadowed in that e-alert, on 17 November 2023 OFSI and the Foreign and Commonwealth Development Office issued joint guidance on the application of the UK's "ownership and control" test under all UK sanctions regimes (the "OFSI Guidance"). The Trustees drew attention to the following passage:

"...Specifically, for the purposes of regulation 7(4) of the [Regulations], the UK government does not consider 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 be considered to exercise control over certain private entities where this can be supported by sufficient evidence on a case-by-case basis."

34. NBT is engaged in other litigation in England and Wales, including claims against Oleg Soloshanskiy and, separately, Evgeny Novitskiy. In both cases, NBT has obtained freezing injunctions and has had to put up sums of money by way of fortification. Concerned about the apparent discrepancy between the OFSI Guidance and the effect of the judgment in the *Mints* Appeal, NBT's solicitors have written to OFSI in connection with the Soloshanskiy and Novitskiy cases. In relation to the Soloshanskiy case, on 19 December 2023 they asked whether NBT would require a licence to receive adverse costs payments. OFSI responded on the same

day, stating that "*OFSI continue to operate on the basis that NBT is not owned or controlled by a [Designated Person]. As such, for proceedings which do not involve a designated entity, no licence is required for the receipt of monies by your firm from NBT... In the absence of any such evidence, OFSI does not consider NBT to be subject to sanctions.*" NBT's solicitors responded to OFSI to confirm their view that "*based on the information available to us, Mr Putin and/or Ms Nabiullina do not in fact exercise control over NBT.*" In relation to the Novitskiy case, NBT's solicitors wrote to OFSI on 29 July 2024 informing OFSI of the litigation and stating that there was no intention of applying for a specific licence in respect of the proceedings. OFSI has not responded.

35. NBT has also brought proceedings in the BVI. NBT made a protective licence application to OFSI. OFSI's response dated 10 July 2024 made clear that OFSI did not consider that a licence was required.

36. In the *Mints* litigation, NBT and Otkritie (which as explained above is a designated person) have a specific licence to enable the payment of NBT and Otkritie's legal costs. On 1 December 2023, NBT's solicitors sought an amendment to this licence for the express purpose of enabling the receipt by Steptoe of a dividend from the present Bankruptcies. OFSI acceded to the amendment request. This will have the effect of permitting any dividend in the Bankruptcies to be used to pay NBT and Otkritie's legal costs in the *Mints* litigation. The Trustees invite me to infer from the

amendment to the licence that OFSI saw no issue in NBT receiving a dividend from the Bankruptcies. That seems to me to be a fair inference; OFSI's position throughout the correspondence with Steptoe has been to accept that NBT is not subject to sanctions, although OFSI have stressed the importance of continued monitoring of the situation for evidence indicating to the contrary.

37. The defendants in the *Mints* appeal, who were the unsuccessful appellants in the Court of Appeal, obtained permission to appeal from the Supreme Court on 24 January 2024. It appears, however, that the appeal is unlikely to proceed because of other confidential developments alluded to in the evidence.

Post-*Mints* cases

38. Shortly after the *Mints* Appeal decision was handed down, on 2 November 2023 Mr Justice Foxton heard argument in the case of *Litasco SA v Der Mond Oil and Gas Africa SA & anor* [2023] EWHC 2866 (Comm), handing down judgment on 7 November 2023 ("*Litasco*"). In *Litasco*, Mr Justice Foxton rejected a submission that a non-designated Swiss subsidiary of a non-designated Russian oil company was "owned or controlled" by President Putin for the purposes of Regulation 7. Mr Justice Foxton carefully considered the Chancellor's judgment in the *Mints* Appeal, and made the following observations both as to the basis for the decision and the proper interpretation of Regulation 7(4):

"66. Mrs Justice Cockerill's decision on the principal issues was upheld by the Court of Appeal. The Chancellor dealt with the control issue in what was, therefore, an obiter passage at [225] to [234]. His conclusions, supported by Popplewell and Newey LJJ, were as follows:

i) By excluding control arising from a political office, the Judge had put "an impermissible gloss on the language of the Regulation because of a concern on her part that, if the appellants were correct about the construction of the Regulation, the consequence might well be that every company in Russia was 'controlled' by Mr Putin and hence subject to sanctions."

ii) "If, as may well be the case, that is a 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 wording of the Regulations to avoid such a consequence."

iii) The relevant language "is not concerned with ownership, but with influence or control" and "is apt to cover the case of a designated person who, for whatever reason, is able to exercise control over another company irrespective of whether the designated person has an ownership interest in the other company, economic or otherwise."

iv) "The provision does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes".

67. *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 Russia "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.

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. Further, the issue of control arises here 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 Litasco 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 Litasco on payment of this debt would be used in accordance with President Putin's wishes, and I regard the suggestion as wholly improbable.

69. I would be 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. Many executive or legislative sovereign bodies have the power to bring an entity incorporated under the laws of their state under their control or to take control of their assets. The practical and legal inhibitions on the exercise of such powers will vary greatly between different countries, and I am willing to assume that they are wholly absent in Russia.

70. 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])."

39. The focus on the existing influence of a designated person as opposed to a state of affairs which the designated person is in a position to bring about means that Mr Justice Foxton did not consider that Mr Putin's position as the head of a "command economy" meant he controlled every company operating within Russia. His view was that the designated person has to "call the shots", not be a person who merely *can* call the shots. His view was that the *Mints* Appeal decision depends on the concession made by NBT that Mr Putin did control NBT. It is apparent from the approach taken in *Litasco* that Mr Justice Foxton thought a more nuanced concession might have led to a different outcome: if Mr Putin was merely someone who was able to call the shots, rather than the person who called the shots, then the position might have been different.

40. The extent to which the *Mints* Appeal decision conflicts with *Litasco*, and whether they could be reconciled, was considered by Nicholas Thompsell (sitting as a Deputy Judge of the High Court, as he then was) in *Hellard v OJSC Rossiysky Kredit Bank (& ors)* [2024] EWHC 1783 (Ch) ("*Rossiysky*"). This case concerned the bankruptcy of a Mr Motylev, and an application by the trustees in bankruptcy for directions under section 303 IA1986 to address concerns with certain creditors potentially being subject to the sanctions regime, and (if so) whether those creditors could vote in decision procedures in the bankruptcy. The creditors in question were Russian banks which were in insolvency processes in Russia and there was a concern that Mr Putin or Ms Nabiullina might be treated as controlling them for the purposes of Regulation 7(4), albeit the trustees were not presently aware of such control being exercised.

41. In *Rossiysky*, the Judge thought Foxton J's focus on existing exercises of influence or control was "difficult to reconcile" with the parenthetical words in Regulation 7(4) that control could be shown if it is reasonable, having regard to all the circumstances, to expect that P would be able to achieve the result that C's affairs are conducted in accordance with P's wishes "if P chose to". This language suggested to the Judge that the existing position is not the end of the enquiry (at paragraph 74).

42. However, he went on to explain why he thought that *Litasco* and the *Mints* Appeal decision could sit together. He did so by reference to four categories of control, which he explained at paragraphs 76 and 77:

(a) *De jure* control: this would clearly satisfy the test, and could be determined by looking at the constitutional documents for the entity in question.

(b) Actual present *de facto* control: this is where the putative controller is manifestly "calling the shots" while having no legal right to do so; again, this would satisfy the test.

(c) Potential future *de jure* control: this would be control arising, say, under a forward contract of some sort which would give the putative controller a legal right to assume control. Whether such control exists would involve looking at the documents which are the source of the legal right.

(d) Potential future *de facto* control. This would exist where although there is no evidence of current *de facto* control, there is a good reason to believe the controller could, if he or she wished, exercise control in some manner.

43. The Judge thought that the final category, of potential future *de facto* control would be rare, because he thought it was appropriate to give a strict meaning to the words "(if P chose to)" so that the controller's choice would have to be definitive without third party consent, and it would need to be an unfettered choice, unconstrained by

penalties or adverse consequences which the decision maker would be unlikely to accept. He gave two stark examples (at paragraphs 79 and 80): a billionaire might conceivably purchase (and thus control) almost any company in the world; with a sufficiently generous offer, he might be very likely to acquire control of any such company, although even so this would depend on third party consent as the existing shareholders would have to accept the offer. The Judge thought a stricter reading of "(if P chose to)" with third-party consent negating P's choice would be required to prevent this billionaire being treated as a controller of all possible targets. The second example he gave is a robber with a gun: the robber is in a position to control any shop he cares to hold up. The Judge thought this would be on the wrong side of the strict reading of "(if P chose to)" in Regulation 7(4), because there would be penalties for the robber; if it were otherwise, everyone with a gun would be able to control "every organisation that he might be able to coerce by making use of that weapon".

44. The Judge thought these examples were absurd, and demonstrated that the phrase "(if P chose to)" in Regulation 7(4) should be given a less wide interpretation (at paragraph 83). He considered that the outcome in *Litasco* was best explained having regard to these considerations. As for the different outcome in *Mints*, he referred to the concession made by the claimant banks which was that Mr Putin had existing *de facto* control over the CBR and thus over NBT. With this point conceded, the outcome was in his view explicable and consistent with *Litasco*, there being an important difference between actual *de facto* control (as had been conceded in the

Mints Appeal) and potential future *de facto* control with no evidence of current *de facto* control (the situation in *Litasco*).

45. The Trustees contended before me that *Rossiysky* indicated that potential future de facto control would not amount to control for the purposes of Regulation 7(4). This submission goes too far. Applying the strict analysis of "(if P chose to)" at paragraph 83 of *Rossiysky*, if there were evidence that a designated person could obtain de facto control unilaterally and without penalty, that evidence might be sufficient to demonstrate control within the meaning of Regulation 7(4). Whether it does so would depend on whether it is "reasonable, having regard to all the circumstances, to expect" such future de facto control to be obtained. There would need to be an evaluative judgment based on all the circumstances to determine whether the evidence was sufficient to found a reasonable expectation of future de facto control. This ties in with the focus in OFSI's correspondence with Steptoe on the need to be alert for any evidence being obtained which alters the status quo, in which NBT is not treated by OFSI to be controlled by Mr Putin and/or Ms Nabiullina.

Discussion

46. Turning back to the present case, it is easy to see why the Trustees are concerned. The obiter dicta in the *Mints* Appeal indicate that NBT is controlled by a designated person within the meaning of Regulation 7(4), although this conclusion was the result of a concession that Mr Putin had current de facto control of NBT which the

Trustees and NBT do not make before me. The argument in the *Mints* Appeal thus focused on whether the conceded control was the right sort of control, and whether political control did not count. That distinction did not find favour with the Chancellor. No doubt heightening the Trustees' concerns, the judges in *Litasco* and *Rossiysky* seem to have thought the concession in *Mints* was rightly made (see paragraphs 67-68 of *Litasco* and paragraph 86 of *Rossiysky*), although this was only relevant to enable them to distinguish their own cases in which no such concession had been made. Without the concession, the *Mints* Appeal would have needed to consider whether there was evidence to establish that the test in Regulation 7(4) was established, an exercise which can be seen in operation in *Litasco* and *Rossiysky*. The absence of evidence in those cases led to the conclusion that Regulation 7(4) control was not established.

47. It seems to me that the appropriate approach for this court is to consider all the evidence, which is something the Court of Appeal in *Mints* did not need to do. I consider the following points to be important:

(a) NBT is not a designated person in the UK and, until recently, was not designated anywhere. The recent OFAC designation of NBT appears to have been a broad-brush designation given that fifty other Russian banks were subjected to sanctions at the same time, rather than a reassessment of Mr Putin and/or Ms Nabiullina's ability to control NBT.

(b) The *Mints* Appeal proceeded on the basis of a concession about Mr Putin's actual de facto control of NBT. That concession was thought to have been properly made in *Litasco* and *Rossiysky*, but it does not seem to me that the impressions of the judges in these cases relating to other potentially sanctioned entities can have any bearing on the assessment of the facts in the present case.

(c) OFSI has confirmed that it does not consider NBT to be owned or controlled directly or indirectly by Mr Putin or Ms Nabiullina.

(d) Steptoe have also confirmed, without waiving privilege, that their view based on the information available to them is that Mr Putin and/or Ms Nabiullina do not in fact exercise control over NBT. This is directly contrary to the concession made in *Mints*, and removes much of the relevance of that decision to the question I have to decide.

(e) Although it is possible, given the nature of Mr Putin's political position, that he may in the future seek to control the affairs of NBT in some relevant way, there is no evidence that he could do so without third-party consents, a breach of the law, or consequences which might cause him not to seek such control. The absence of evidence of potential de facto control in the present case is significant. If there were such evidence, OFSI would no doubt take a different position.

(f) Overall, and to use the language of Regulation 7(4), it does not seem to me that it is reasonable, having regard to all the circumstances, to expect that Mr Putin and/or Ms Nabiullina would (if they 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 NBT are conducted in accordance with their wishes. If that expectation were reasonable, it appears to me that there would by now be some evidence of actual de facto control by one of the designated persons, and that would be reflected in a different approach by OFSI.

48. The Trustees raise two further points. The first is that the court needs to consider whether (if a designated person controls NBT within the meaning of the Regulations) making a distribution to NBT from the Bankruptcies would infringe the Regulations. The answer to that, as the Trustees accept, is in the affirmative. At a minimum, and even with the revised mechanism now proposed by the Trustees by which Steptoe will receive any distributions into its client account, a payment to Steptoe will indirectly make funds available to NBT which might engage Regulation 12.

49. The second point is whether any exemptions apply, again on the assumption that a designated person controls NBT. Here, the Trustees point to Regulation 58(5). As set out above, this exempts payments to relevant institutions (such as the bank which

provides Steptoe's client account) on behalf of a person in discharge of an obligation which arose before that person became a designated person. Assuming that it is Mr Putin's control which makes the receipt of funds by NBT a receipt by a designated person, as he was the first of the two relevant individuals to be designated, the date before which any obligation would have needed to have arisen is 25 February 2022.

50. The underlying facts which gave rise to the judgments against the Bankrupts occurred well before this, as was the payment obligation arising from the Bryan Order in January 2020. The bankruptcy orders in April 2020 were also well before Mr Putin was added to the sanctions list.

51. On the making of the bankruptcy orders, the sums in the Bryan Order became bankruptcy debts within the meaning of section 382 IA 1986, which includes so far as relevant "any debt or liability to which [the bankrupt] is subject at the commencement of the bankruptcy". If NBT is to receive a distribution in the Bankruptcies, that distribution will be in respect of bankruptcy debts to which the Bankrupts were already subject at the commencement of the Bankruptcies. I agree with the Trustees that the payment of a distribution by way of a pari passu distribution of the realised assets of the Bankrupts represents a discharge (or partial discharge) of an obligation arising before 25 February 2022. In particular, I do not consider that the only obligation being discharged in the payment of a dividend is the obligation to pay the dividend actually declared; indeed, even that obligation is

questionable given section 325(2) IA 1986 by which no claim lies against a trustee for a dividend. What occurs in a bankruptcy is an aggregation of the bankruptcy debts, the realisation of the bankrupt's property and its distribution to creditors whose debts are admitted to proof. The latest source of the obligation which is satisfied when a distribution is made is, in my view, the making of the bankruptcy order which pools the interests of the bankrupt's creditors and thereby changes the character of the obligation to a right to participate in the collective process of bankruptcy. Perhaps the prior obligation which arose before the date of the bankruptcy would also continue to count as the obligation whose date was relevant for the purposes of Regulation 58(5), but I do not need to decide that question given the timings in the present case. Whether the obligation arose on the Bryan Order or on the bankruptcy orders, the obligation was well before the designation of Mr Putin.

52. In the *Mints* Appeal judgment, the Chancellor formed the view that an obligation which was subsequently turned into a money judgment arises, for the purposes of Regulation 58(5), when the original obligation arises and not when the judgment is entered. This makes sense for money judgments, where it would be absurd for a creditor to become worse off if a judgment is obtained after the debtor becomes a designated person. Perhaps the same analysis should apply to bankruptcy debts, by analogy. But this is not a question I need to decide.

53. It seems to me that the Regulation 58(5) exemption applies to the proposed payment to Steptoe's client account, which will provide further comfort to the Trustees if I am wrong about whether NBT is to be treated as subject to the sanctions regime.

The court's jurisdiction to consider questions of this sort

54. The present application seeks the court's assistance in relation to a difficult question arising in the Bankruptcies under the same principles as were engaged in *Rossiysky*. At paragraph 166 of that judgment, Nicholas Thompsell set out six principles relevant to the exercise of the court's discretion to grant declaratory relief taken from the judgment of Aikens LJ in *Rolls Royce PLC v Unite the Union* [2009] EWCA Civ 387, with commentary explaining whether they were satisfied. I adopt the same approach:

(a) *The power of the court to grant relief is discretionary.* I have this in mind when assessing the other principles below.

(b) *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.* The parties before the court on this application were the Trustees and NBT; NBT was served although not named as a respondent, and has filed evidence. I am satisfied that there is a real dispute as to the existence of a legal right as between the Trustees and NBT, as the sanctions

issue impacts NBT's ability to receive a distribution in the Bankruptcies. OFSI has not been notified specifically of the application, or served with it. The Trustees' position is that OFSI had been made aware of the possibility of a distribution in the Bankruptcies by Steptoe's application to vary the licence in the *Mints* litigation, and took no objection to it. Steptoe has also been pressing OFSI separately on behalf of NBT, and OFSI have consistently taken the view that NBT is not subject to sanctions.

(c) *Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question*. I am satisfied about this point.

(d) *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 does not seem to me to arise.

(e) *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.* To an extent, this is a friendly action in the sense that the Trustees and NBT are both seeking relief permitting the making of distributions to NBT and there is nobody before the court

opposing the relief sought. However, this is far from an academic question. The Trustees are concerned that they may be committing a criminal offence, and there is a clear interest in the court assisting its officers in the performance of their functions by assisting in cases such as the present.

(f) *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.* As set out above, the most obvious absence from this application is OFSI. In *Rossiysky*, OFSI was joined as a respondent by the trustees in bankruptcy. OFSI requested to be removed as a party. It did not appear and was not represented at the hearing, and it adopted an apparently neutral stance in correspondence in relation to the questions raised by the trustees. The approach in the present case is different, because OFSI has not been joined and there is no evidence that it was specifically notified of the present application or the hearings in July 2023 and October 2024. On balance, I am satisfied that OFSI's position has been made clear in the correspondence to which I have been taken by the Trustees. OFSI's position has been, consistently, that NBT is not subject to UK sanctions. It would have been preferable for OFSI to have been served with the present application or at least notified of the hearing, but I do not think OFSI would have responded any differently to the hands-off approach it took in *Rossiysky.* In any event, I am satisfied that

the Trustees and NBT have presented the arguments fully and properly. The consequences for the Trustees if they breach the sanctions rules are penal; in those circumstances it is firmly in their interests to have the right answer rather than the one which NBT would find most convenient, and their thorough and balanced presentation of the arguments has been of great assistance. I am ultimately satisfied about this criterion. I will, however, require the Trustees to give notice of my order to OFSI. If OFSI have any reason to object to it, they will be able to take any appropriate steps.

(g) *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 the issue*. As in the *Rossiysky* case, an alternative to making a declaration is to give directions under s. 303 IA 1986. I agree with the view expressed in that case that the court could as a matter of jurisdiction proceed either way, and I have considered the principles at paragraphs 167 to 174 of the judgment in connection with the exercise of the court's power under s. 303 IA 1986. As in *Rossiysky,* the Trustees are not seeking to use s. 303 IA 1986 to offload a commercial decision on the court, and they are not seeking to modify the general law. They are simply seeking to understand what the law is. They are seeking comfort on a matter of real personal significance to them given the criminal sanctions they might face if they get it wrong, and in my

judgment it is an entirely appropriate course for them to adopt. Ultimately, however, I also agree with the conclusion the judge reached in *Rossiysky*, that it is better for the court to give directions under s. 303 IA1986 in a fact-dependent case like this, rather than make a broad declaration that no crime is being committed. A factor of importance in *Rossiysky* was OFSI's position as the prosecuting authority and its lack of support for the making of a declaration; I have in mind the decision of the Trustees not to join or serve OFSI with the present application, and the likelihood that OFSI would have adopted the same approach here.

55. For this reason, I do not consider it necessary to make any declarations in this case. This is despite my finding that, if I am wrong about whether NBT is subject to the sanctions regime, Regulation 58(5) provides a limited exemption. It seems to me that this is not a case in which to make a declaration of that sort as the most effective way to proceed is by addressing NBT's status directly via a direction under s. 303 IA 1986.

Disposition

56. As I described at the outset of this judgment, the Trustees have revised the relief they seek compared to the original application they made in 2023. The order they ask the court to make is not couched in terms of declarations, but directions. It is as follows:

IT IS ORDERED THAT:

(1) The Applicants are permitted to make distributions by way of dividend of funds in the [Bankruptcies] which are due to [NBT] as a creditor of the bankruptcy estate by payments by electronic transfer to a client account under the control of [Steptoe], NBT's UK lawyers.

57. I am content to base my order on that approach, which seems to me to be more aligned with a direction than a declaration.

58. The Trustees rightly drew my attention to the form of order described at paragraph 205 of the *Rossiysky* judgment. Nicholas Thompsell gave directions under s. 303 IA 1986 to implement two broad points (with the wording to be confirmed in a subsequent order). It seems to me that the appropriate form of relief in the present case should be in the same essential terms, to reflect the possibility of a factual development which the Trustees ought to take into account. Adapting the language to the present case, the order should include the following paragraphs:

(a) Pending any change of 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 NBT on the understanding that it is not a designated person and is 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.

(b) The Trustees should, however, undertake (to an extent that is proportionate having regard to cost) enhanced monitoring of the position of NBT, 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.

59. Those provisos represent a sensible balance. They protect the Trustees as matters currently stand, but do not absolve them from ongoing responsibilities. Mr Dooley for NBT submitted that if NBT had not been designated yet, it was not going to be. That may well turn out to be right, but the sanctions regime involves political and factual questions which do change over time. The OFAC designation of NBT is proof of this phenomenon. It is therefore appropriate to ensure that care continues to be given by the Trustees to these matters.

60. With the adaptations outlined above including an obligation to notify OFSI of the court's order, I will grant the relief sought by the Trustees in relation to each bankruptcy.