

Control by a Designated Person under UK Sanctions Legislation: *Litasco SA v Der Mond Oil & Gas*

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The recent Commercial Court decision of Mr Justice Foxton in *Litasco SA v Der Mond Oil & Gas and another* [2023] EWHC 2866 provides useful guidance on the question of “control” of corporate entities by “designated persons” under the UK sanctions regime.

Background

The decision arose out of an application for summary judgment by the claimant in the dispute, Litasco. That means the issues were decided without a trial and a more detailed investigation of the facts. Summary judgment is a procedure adopted precisely where such an investigation is unnecessary because the respondent to the application, here Der Mond, has no real prospect of succeeding with its case.

The contract the subject of the dispute was concluded between Litasco, a Swiss subsidiary of a Russian company, and two Senegalese companies, Der Mond and Der Mond’s parent (acting as guarantor). It concerned the sale of Nigerian crude by Litasco, which was delivered to Der Mond in Senegal. Der Mond had made partial payments of the contract price but had failed to pay the balance. Litasco claimed for the balance of the contract price.

Der Mond raised a number of defences including a sanctions case relying upon the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 (“the 2019 Regulations”). That case was advanced both on a contractual basis (pursuant to the terms of a sanctions clause in the contract) and also as a matter of general law.

Der Mond’s case ultimately failed for a number of reasons, including that the sanctions clause was not triggered (there had not been any change in sanctions as required on its wording); and Der Mond had not been able to identify on what basis it was said that the 2019 Regulations were even applicable to the parties or to the transaction.

Der Mond’s case on control

What is, however, noteworthy is the discussion related to control of corporate entities in the context of the 2019 Regulations. This arose because Der Mond sought to rely upon regulation 12, which provides that a person (including a corporate entity) must not make funds available “indirectly” to a “designated person”. A “designated person”, under the regulations, is a person designated by the UK government and with whom other parties are prohibited from dealing. Making funds available “indirectly” includes making them available to a person/corporate entity who is “controlled” directly or indirectly by the designated person.

The question of “control” of a corporate entity is addressed in regulation 7, which provides that a corporate entity is directly or indirectly controlled by another person where one or both of two

conditions are met. The first condition concerns ownership of the corporate entity. The second, and of interest here, is where – and we have broken this down into its component parts:

- it is reasonable to expect... that the other (controlling) person would be able, in most cases or in significant respects,
- by whatever means and whether directly or indirectly,
- to achieve the result that affairs of the corporate entity are conducted in accordance with that other (controlling) person's wishes.

Der Mond argued that regulation 12 was triggered because Mr Vagit Alekperov, a designated person and former president of Litasco, controlled Litasco. This argument was dismissed by Foxton J who concluded there was no evidence to establish a triable case that Mr Alekperov controlled Litasco. The contention was pure speculation.

Was Litasco controlled by Vladimir Putin?

Additionally, Der Mond argued that Vladimir Putin, also a designated person, controlled Litasco. In doing so Der Mond sought to rely upon (non-binding) comments by the Court of Appeal in the very recent decision of *PJSC National Bank and another v Mints and others* [2023] EWCA Civ 1132. There the Court of Appeal suggested that there was no basis not to apply the concept of control broadly – and, in particular, that it should include political control. It was said by the Court of Appeal that the consequence of regulation 7 “*might well be that every company in Russia was ‘controlled’ by Mr Putin and hence subject to sanctions*”.

The present case and *Mints* do, however, differ in material respects. In *Mints*, the relevant corporate entity was, essentially, wholly owned and controlled by a Russian public body, the Central Bank of Russia. Evidence was adduced in *Mints* that President Putin exercised de facto control over the Central Bank of Russia and, in the event, it was conceded that the relevant corporate entity was subject to the control of President Putin.

But that was not the case here. Der Mond could not point to any evidence that Litasco was under the de facto control of President Putin. Indeed, the parent of Litasco, Lukoil, is not state-owned and there was no evidence that it functions as an organ of the Russian state. There was also no evidence that funds received by Litasco would be used in accordance with President Putin's wishes.

It was accepted by Foxton J that President Putin *could* place Litasco under his de facto control, but he thought that the better interpretation of regulation 7 is that it is concerned with existing influence by a designated person. It should not be interpreted as being concerned with influence that a designated person is in a position to bring about. Otherwise, as Foxton J rightly noted, it would follow that President Putin was arguably in control of corporate entities he knows nothing about.

Squaring Foxton J's analysis with *Mints*

Foxton J considered that this interpretation was in fact consistent with the non-binding comments in *Mints*. In particular, the Court of Appeal had appeared to place emphasis on the fact that regulation 7 applies when the designated person “*calls the shots*”, i.e. not where the designated person “*can call the shots*”. He also noted that the Court of Appeal had made its observations tentatively and within the context of that case, i.e. where it was accepted that the relevant corporate entity was subject to the control of President Putin.

In our view, Foxton J’s approach is plainly balanced and sensible because there must be some limit to the scope of operation of regulation 7. It would seem clear from this judgment that, to rely upon regulation 7, control by a designated person must be established by evidence in the usual way. Furthermore, the decision is also consistent with recent guidance from the UK government published on 17 November 2023 (two days after Foxton J’s decision was published). The guidance states that there is no presumption that a private entity will be judged to be controlled by 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*”. It also makes clear that the UK government does not consider that President Putin exercises indirect or de facto control over Russian entities merely by virtue of his position as Russian President; and that a person should only be considered to exercise control where this can be supported by evidence on a case-by-case basis.