



General Licence – Allowing lawyers to work hard, or hardly work?

Since the Russian invasion of Ukraine on 22 February 2022, western powers have sanctioned over 1200 individuals, with UK sanctions on Russia freezing £18 billion of Russian assets.

The imposition of sanctions by the UK, EU, UN, US and many other states has created a novel and challenging environment for suppliers and service providers who have for years, and entirely legitimately, acted for Russian clients, corporate and individual.

There have been a number of recent developments that provide insight on how law firms and litigants are navigating the UK sanctions regime, in what has been (for want of a better phrase) an unprecedented year in the luxury asset market.

Background to UK Sanctions

The UK's sanctions regime has been implemented by the Russia (Sanctions) (EU Exit) Regulations 2019 (the "**Russia Regulations**"). Alongside a broad framework of general prohibitions which apply to any legal person connected to Russia, the Russia Regulations also contain the UK's framework for targeted sanctions against individuals ("**designated persons**") and organisations ("**designated entities**"). Once designated, a person or entity is likely to find itself subject to an asset freeze pursuant to which an offence is committed by any UK person found to be dealing with any funds or economic resources owned, held or controlled by a designated person or entity.

A pillar of our justice system is the fact that everyone is entitled to access to legal advice and representation. However, the Russia Regulations, created a novel catch 22 for lawyers in the UK; while the Russia Regulations have at no point prohibited lawyers in the UK from providing legitimate legal representation to designated persons or entities, they did, until recently, prevent lawyers from being paid for those services without having first received a specific licence from the Office of Financial Sanctions Implementation ("**OFSI**").

Obtaining such a licence ought not to be controversial where the legal services required are genuine, but while estimated turnaround times for applications in March 2022 were approximately 2 months, it was not long (following the ramping up of the UK sanctions regime in response to the Russian invasion of Ukraine, coupled with understaffing at OFSI) until applicants started to find themselves without a decision (and in many cases without a human response of any kind) for 6 months or more.

This has left law firms with a difficult choice – work for free and hope you might one day be permitted to be paid for your work, or decline to act in the first place.

This caused particular problems for many lawyers who were keen to act, but needed to be paid in order to do so. That included lawyers representing clients in court proceedings.

OFSI's answer to this issue came on 28 October 2022 (remember this date), with the issuance of the General Licence INT/2022/2252300 (the "**General Licence**") which, broadly speaking, created a means for lawyers to receive payment of their fees from designated persons or entities without committing an offence under the Russia Regulations.

VTB Commodities Trading DAC v JSC Antipinsky Refinery [2022] EWHC 2795 (Comm)

It is against this backdrop we consider the recent judgment handed down in the High Court case of *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2022] EWHC 2795 (Comm) (the "**VTB Case**"). While the factual background of the VTB Case is interesting in its own right, it is how the designation of VTB Commodities Trading DAC ("**VTB**") under the Russia Regulations during the course proceedings played out which is of particular relevance. The first hearing, to which the judgment relates, took place on that fateful date of 28 October 2022, so we see how the English courts handled the rapidly changing sanctions playing field in real time.

In particular, it is the analyses of the General Licence and OFSI's approach to legal costs which are especially insightful and provide useful commentary for practitioners across the UK.

Case Background

On 24 February 2022, following Russia's invasion of Ukraine, VTB became a designated entity under the Russia Regulations. One of the consequences of such a designation is an asset freeze. There are only two ways to legitimately "get around" an asset freeze in the UK, with an "exemption" or a "licence". With no applicable exemptions, VTB relied on the provision of a specific licence by OFSI to permit the payment of legal fees and costs.

Despite VTB's lawyers having made an application for a specific licence on 3 March 2022 (1 week after VTB's designation) by the time of the 28 October 2022 hearing, a decision about a licence had still not been made. As a result of this delay, VTB's lawyers came off the record and were unwilling to resume services without past costs being paid and funds being placed on account in respect of future costs. Mr Justice Foxton was sympathetic towards VTB's lawyer's position, stating that they cannot be criticised for adopting that stance.

Furthermore, VTB were unable to pay the fee necessary to issue an application notice in respect of matters of case management until and unless a licence permitting them to do so was obtained. Interestingly, Mr Justice Foxton demonstrated the pragmatic approach of the English courts in such circumstances, using the court's powers to raise its own motion in the interest of active case management.

While Mr Justice Foxton acknowledged the court's power to permit a director or officer of the company to represent the company as a litigant in person, he recognised that commercial court matters are often sufficiently complex that it would not be appropriate for a party to represent itself, without legal representation:

"Each side is claiming some \$30m from the other. On any view, it is significant litigation. [Outline of procedural timetable] ... Even for a legally represented litigant, that is a very demanding timetable. I am satisfied that the issues arising at the trial are not matters which the director of a Swiss commodities trader is realistically going to be able to advance on VTB's behalf."

It was a fortunate coincidence that on the day of the hearing in question, OFSI issued the General Licence that apparently permitted the payment of legal fees by designated entities.

The Judgment helpfully goes on to analyse the ins and outs of the General Licence, highlighting some of its short comings (which those trying to work under the General Licence are all too familiar with).

The General Licence

On 28 October 2022, OFSI issued the General Licence which, in summary, allows solicitors and barristers to receive payment of their fees when representing designated persons or entities without breaching the Russia Regulations and without the need to obtain a specific licence which, as we have seen above, can take many months to come through. All good so far.

However, in the judgment handed down in the VTB Case on 4 November 2022, Mr Justice Foxton provided some analysis on the General Licence and noted the following:

- The General Licence does not permit payments to be made to meet costs orders in favour of the other side or to comply with an order for security for costs;
- Paragraph 7 of the General Licence provides that if at any point in an individual case the limits for the professional legal fees, counsel's fees or expenses are anticipated to be exceeded, the licence will not apply to any further payment of any nature in relation to the entirety of the legal services. Mr Justice Foxton commented that the effect of this provision appears to be that the General Licence will not apply at all (rather than simply not applying to the excess) after the point when it is estimated that the limits will be exceeded;
- Mr Justice Foxton also expressed his (controversial) view that, while the General Licence provides for two separate caps of £500,000 (inc. VAT) for work commenced before and work commences after designation of the relevant person, such caps could not be combined for work undertaken pre- and post- designation under the same engagement. This notwithstanding the somewhat ambiguous nature of OFSI's press release which accompanied the General Licence.

Due to the very significant legal fees anticipated to be incurred by VTB's legal representatives in the VTB Case (resulting in the inapplicability of the General Licence) and the fact that the situation was unlikely to resolve itself any time soon, Mr Justice Foxton adjourned the trial for a further 6 months to November 2023.

Mr Justice Foxton's comments reflect many of the short comings of the General Licence which we and many of our contemporaries have recognised in our own interactions with it and the Russia Regulations more generally.

The General Licence expires on 28 April 2023, after which it is hoped that General Licence 2.0 will be issued, this time, we hope, with greater specificity, a greater apparent understanding of how legal representation in the real-world works, and less ambiguity.

QUENTIN BARGATE - Founder, Chief Executive Officer

Quentin, the firm's founder, leads its superyacht and dispute resolution practice areas. With over 35 years' experience, and a winner of many industry awards, he is widely acclaimed as a leader in the industry.



DOMINIC BULFIN - Director

Dom is a Director in the Firm's superyacht group based in London.

Dom advises owners and their representatives on all aspects of superyacht ownership and management.

JAMES PHILLIPS - Trainee Solicitor

James joined Bargate Murray as a paralegal in early 2022, and became a Trainee Solicitor in September 2022. He graduated from Leeds Beckett University in 2017.



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