

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2022/0007

BETWEEN:

AO ALFA-BANK

Claimant

and

KIPFORD VENTURES LTD

Defendants

Appearances:

Mr. Andrew Willins and Ms. Tamara Cameron of Appleby (BVI) Ltd appearing (a) for the Claimant on the substantive matter and (b) for Appleby (BVI) Ltd on its application to come off the record

Mr. Alain Choo-Choy QC, with him Ms. Claire Goldstein and Mr. Zac Van Horn for the Defendant on the substantive matter

No other appearance on the application to come off the record

Mrs Fiona Forbes-Vanterpool on behalf of the Attorney General who made written submissions

2022 June 15
 June 23

JUDGMENT

- [1] **JACK, J [Ag.]:** On 15th June 2022 I heard two applications: (1) an application by Appleby, the legal representatives of Alfa-Bank, the claimant, to come off the record; and (2) an application by Alfa-Bank for hearings currently listed on 28th and 29th June and 5th July 2022 to be vacated. For reasons which I gave orally, the

application to come off the record was adjourned with liberty to apply and the other matters were relisted for 11th and 12th October 2022.

- [2] This judgment deals with one matter which is causing concern within the legal profession. Alfa-Bank is the subject of sanctions imposed following the Russian invasion of Ukraine. The sanctions regime does not prevent legal practitioners from acting for sanctioned entities. However, in order to be paid the law firm must obtain from His Excellency the Governor, a licence approved by the Secretary of State, so to enable payment of its fees by the sanctioned entity. In the current case, the Governor's Office provided to Appleby a draft of a licence for Appleby's comments on 9th June 2022. This had not yet received the approval of the Secretary of State. On 15th June 2022 the Governor's office indicated that a time estimate in relation to the Secretary of State's consideration of the licence application could not be given, but that consideration of the application by the Secretary of State was likely to be measured in weeks rather than days.
- [3] In **VTB Bank v Taruta**,¹ this Court dismissed an application by legal practitioners to be removed from the record and held that a legal practitioner acting on an existing retainer has a duty to apply for a licence. Appleby was engaged by Alfa-Bank well before the imposition of sanctions and consistently with that duty, applied for such a licence. There was, however, an issue as to whether Appleby could lawfully do *any* legal work for Alfa-Bank in the period before a licence was granted. Appleby was not prepared to act *pro bono* except insofar as its duties required it to do so. The concern of law firms in this situation was that by doing the alternative, namely working in the expectation of receiving payment once a licence was granted, the firm might be giving the sanctioned entity "credit" during the period between the firm doing the work and receiving the licence to enable payment of their fees. Providing "credit" (within the meaning of the legislation) to a sanctioned person is a criminal offence under the sanctions legislation: see

¹ [2022] ECSCJ No 85

regulations 11 to 15 in Part 3 of **The Russia (Sanctions) (EU Exit) Regulations 2019**.²

- [4] Some uncertainty had been caused by the terms of the Guidance issued by the Office of Financial Sanctions Implementation (“OFSI”), which is part of Her Majesty’s Treasury.³ Para 6.5 of the Guidance says:

“• Both legal fees and disbursements must be reasonable. It is for the applicant to demonstrate to OFSI that the legal fees and disbursements are reasonable.

• In most cases, you can provide legal advice to or act for a designated person without an OFSI licence, however, you cannot receive any payment for that advice without first obtaining an OFSI licence.

• OFSI can only authorise payment of reasonable legal fees and disbursements in relation to legal services provided to a designated person. You are strongly encouraged to apply for a licence in advance of providing substantive legal services in order for you to have certainty as to the fees that will be recoverable whilst the designated person remains listed.”

This says that doing legal work before payment is permissible. However, para 6.6.1 provides:

“Legal advice

Generally, you won’t be prohibited from providing legal advice under an asset freeze. However, the payment for legal services and the provision of legal services on credit do require an OFSI licence.”

- [5] Section 60 of the United Kingdom **Sanctions and Anti-Money Laundering Act 2018** (‘SAML’)⁴ provides:

² SI 2019 No 855, applied in this Territory by The Russia (Sanctions) (Overseas Territories) Order 2020 (SI 2020 No 1571).

³ “UK FINANCIAL SANCTIONS General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018” (December 2020), available on-line at www.gov.uk/government/publications/ofsi-guidance-html-documents/uk-financial-sanctions-general-guidance-for-financial-sanctions-under-the-sanctions-and-anti-money-laundering-act-2018 (accessed 21st June 2022).

⁴ 2018 c. 13.

“(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.”

[6] The question is whether doing work before billing and before payment falls within the definition of “funds” in section 60(1)(e). The Court asked the Attorney-General’s Chambers for assistance on this point. Mrs. Fiona Forbes Vanterpool, International Relations Counsel for the Attorney General, provided a Memorandum which represents the views of Her Majesty’s Government. I am very grateful for the help given by her and Ms. Dawn Smith, the Attorney General.

[7] Mrs. Forbes Vanterpool says that her and the Attorney General’s opinion is:

“1. The provision of legal services in the absence of a licence to enable payment of legal fees is not ‘credit, rights of set-off, guarantees, performance bonds and other financial commitments’ within the meaning of ‘funds’ under the section 60(1)(e) of SAMLA.

2. The provision of legal services is not dealing with funds owned, held or controlled by a designated person or on behalf of or for the benefit of a designated person in breach of the Regulations.”

[8] They first set out the facts:

“We are instructed that the law firm of Appleby... is acting as counsel for Alfa Bank, in connection with litigation proceedings before the Commercial Division of the High Court ... initiated by Alfa Bank for the recovery of monies which it asserts were fraudulently obtained under a loan agreement and laundered through the BVI Company, Kipford...

On 23 March 2022, subsequent to the commencement of the Litigation Proceedings, Alfa Bank was designated for sanctions by the United Kingdom under the [2019 Regulations]. Thereafter, on 1 April 2022, Appleby applied to the Governor for a financial sanctions licence pursuant to Regulation 66 and Schedule 5 Part 1 paragraph 3(a) of the Regulations to enable the payment of their professional legal fees and expenses for acting as counsel for Alfa Bank.”

They set out the relevant statutory provisions and ask “Whether the provision of legal services in the absence of a licence amounts to credit?” They answer:

“The definition of ‘funds’ for the purpose of the Regulations includes, ‘credit, rights of set-off, guarantees, performance bonds and other financial commitments’ under section 60(1)(e) of SAMLA. However, SAMLA does not provide a definition for the word ‘credit’. The court is therefore required to interpret the meaning of the word within the context of section 60(1)(e) of SAMLA.

Literal rule of statutory interpretation

A useful starting point in the interpretation of any statute is to examine and interpret the words of the statute in their natural and ordinary sense. Accordingly, the court should only depart from the literal meaning of the words in a statute where the outcome of its strict application leads to an absurdity.”

They then cite **Pinner v Everett**⁵ and **Charles Savarin v John Williams**,⁶ before discussing the “*ejusdem generis* rule of statutory interpretation”:

“[T]he phrase ‘credit, rights of set-off, guarantees, performance bonds and other financial commitments’ should be interpreted with reference to the *ejusdem generis* rule of statutory interpretation. This rule applies where a statutory provision or written instrument particularises two or more species of persons or things and all of the particularised species share essential characteristics from which a common genus can be identified.

⁵ [1969] 3 All ER 257 at pp 258-259 (Lord Reid).

⁶ (1995) 51 WIR 75 at pp 78-79, [1995] ECSCJ No 46 (Eastern Caribbean Court of Appeal).

If the particular words which particularise the species are followed by general words, this is usually an indication of a legislative intention to confirm the general words to persons or things of the same species as those particularised.

They cite **Quazi v Quazi**⁷ and submit:

“[T]he *ejusdem generis* rule applies in the instant case since one is attempting to deduce a genus or class of items included from specific items mentioned in the legislative provision. As stated by the court in **Director of Public Prosecutions v Jordan**:⁸

‘...the structure of the sentence makes it clear that other objects or which is the same argument, the nature of the general concern fall within the same are, the other matters to which the state is intended to apply cannot fall in the totally different area.’

With these legal principles in mind, it is our view that one must interpret the word credit in the context of the section 60(1) and the statute as a whole. The primary objective of the Regulations 11 to 15 is to prevent dealing with the funds or economic resources of sanctioned persons... SAMLA defines ‘funds’ to mean ‘financial assets and benefits of every kind, including (but not limited to)... credit, rights of set-off, guarantees, performance bonds and other financial commitments.’

We submit that the word credit is used here in the context of a financial commitment such that the reference to ‘credit, rights of set-off, guarantees, performance bonds and other financial commitments’, should be read *ejusdem generis* to mean other financial commitments of a like or similar nature. The section does not appear to contemplate or envision the provision of legal services to be paid at a future date (provided that a license is obtained).

We further submit that the legislature could not have intended to prohibit the provision of legal services in the absence of a licence to enable payment of legal fees as a ‘financial commitment’ similar to credit, rights of set-off, guarantees and performance bonds. This must be so given that provision of legal services to a sanctioned person is not prohibited by the Regulations.

To interpret the section otherwise, would lead to an absurdity, particularly where legal services are provided as a matter of urgency, since no legal practitioner would be permitted to provide legal services without first obtaining a licence to enable payment of their fees prior to providing legal services. If

⁷ [1980] AC 744 at pp 807-808 (Lord Diplock).

⁸ [1969] 1 WLR 1266 at p 1273, [1976] 3 All ER 775 at p 780.

the legislature intended this result, it would have expressly prohibited the provision of legal services in the absence of a financial sanctions licence.

It is further submitted that the inclusion of the phrase 'other financial commitments' in the definition of 'funds' is intended to prohibit sanctioned persons from using credit in lieu of money to engage in activities prohibited by the Regulations. Accordingly, Appleby's assertion⁹ that their inability to receive payment from Alfa Bank without a licence amounts to the provision of legal services on credit in breach of the Regulations appears misplaced.

In any event, Appleby has in fact applied for a licence to enable payment of their legal fees from the person designated for sanctions. Provided that Appleby does not seek to deal with the funds of the person designated for sanctions prior to obtaining the licence, we do not anticipate any breach of the Regulations."

[9] I respectfully agree. The provision of legal services and then billing for the services in the usual way does not amount in my judgment to the giving of credit within the meaning of section 60(1)(e) of SAMLO. As a matter of ordinary language, a provider of services who does work and then bills for it, is not advancing a credit to the client. This is so, whether or not the client subsequently pays for that work.

[10] There are two further considerations which reinforce this view. The first is that, if there is doubt about the true construction of a statutory provision which creates a criminal offence, the provision must be interpreted in favour of the liberty of the subject.

[11] The second is that section 16(9) of the **Constitution**¹⁰ provides:

"For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court or other authority established by law."

⁹ "Appleby's fear" would be more accurate. Appleby in fact share the view of the Attorney-General, but without a determination by the Court the firm could not be sure.

¹⁰ The Virgin Islands Constitution Order 2017 (SI 2007 No 1678).

The sanctions regime does not displace a sanctioned person's constitutional rights: **VTB Bank v Taruta**.¹¹ Sanctioned persons can in my judgment only be given a fair hearing, if they have access to counsel. This is particularly so in the Commercial Division, where a corporate entity must appear by a BVI-admitted legal practitioner: CPR 69B.4(4).

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹¹ [2022] ECSCJ No 85 at [12].