Neutral Citation Number: [2025] EWHC 488 (KB)

Case No: KF-2024-009883

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER (JURISDICTIONS) ACT AND OF PART 34 OF THE CIVIL PROCEDURE RULES 1998

AND IN THE MATTER OF THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL AND COMMERCIAL MATTERS

AND IN THE MATTER OF CIVIL PROCEEDINGS NOW BEFORE THE COMMERCIAL COURT OF KYIV, UKRAINE CASE No.910/17306/21

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:28 February 2025

Before :

SENIOR MASTER COOK

- -

Between :

THE BANK OF ENGLAND

Applicant

- and -

TREASURY SOLICITOR

Respondent

- -
- -

Jason Pobjoy (instructed by **Allen Overy Shearman Stirling LLP**) for the Applicant
The Respondent did not attend and was not represented

Hearing date: 28 February 2025

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Approved Judgment

Senior Master Cook:

The application and evidence in support.

1. This is an application dated 6 February 2025 made on behalf of the Bank of England to set aside my Order dated 16 January 2025 pursuant to the Order's final paragraph which provided that any person affected by it may apply to the Court within 21 days to set aside, vary, or stay the Order.

2. My Order related to a letter of request made pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters from the Commercial Court of Ukraine, seeking "*a copy of the request for recognition received by the Bank of England from the National Bank of Ukraine (NBU) to recognise the exchange of monetary obligations (bail-in) under four loans made by UK SPV Credit Finance plc (UK SPV) to PrivatBank, with all the documents attached thereto*"

3. The application is made on the basis that the disclosure required by the order is prohibited by a combination of section 348 of the Financial Services and Markets Act 2000 and s.89L of the Banking Act 2009 and/or would infringe the sovereignty of the United Kingdom. It is supported by the witness statement of Andrew Denny dated 6 February 2025. The Treasury Solicitor, the Respondent, has informed the court it does not oppose the application and has not attended before me today.

4. Additionally, a letter dated 25 February 2025 from Quinn Emanuel, solicitors acting on behalf of PrivatBank, was placed before the court. This letter made it clear that PrivatBank opposes the production of the information by the Bank of England for the same reasons advanced by the Bank and expressed further concerns about the Ukrainian proceedings:

> "including that their potential effect (if not their intention) may be to advance the interests of PrivatBank's former beneficial owners, Messrs Kolomoisky and Bogolyubov, against whom multiple substantial claims are being brought (including in the English High Court) alleging that they have misappropriated billions of dollars from PrivatBank. PrivatBank notes that these former owners held some of the Notes that were the subject of London-seated arbitration claims, and claims based on those Notes were barred by reason of illegality as noted by Zacaroli J in **Madison Pacific Trust Limited v Shakoor Capital Limited**, [2020] EWHC 610 (Ch)."

Factual Background

5. I take the following background from Mr Denny's witness statement. In 2016, the decision was taken by the Ukrainian authorities to nationalise and recapitalise PrivatBank. As part of this nationalisation, certain of PrivatBank's liabilities to certain of its creditors were written down and converted to equity in a process known as bailing in. This process included four English law governed loans from UK SPV Credit Finance Ltd to PrivatBank. The UK SPV loans were funded by the issue of notes and a number of noteholders were therefore affected.

6. In June 2017, the National Bank of Ukraine requested that the Bank of England recognise the Bail-in under s 89H of the Banking Act 2009 so as to give it legal effect in the United Kingdom. The Bank of England recognised the Bail-in and HM Treasury provided its approval of this recognition on 14 May 2021.

7. Since then, as is apparent from the Judgment of the Commercial Court of Kyiv dated 14 August 2024 attached to the Letter of Request, Shakoor Capital Limited brought a claim in the Commercial Court of Kyiv seeking to invalidate the Share Purchase Agreement No.63/2016 between PrivatBank and the UK SPV giving effect to the Bail-in.

8. One of the parties to the Ukraine proceedings is Concorde, one of the impacted Noteholders. Concorde's position in the Ukraine proceedings is that the Bail-in should be invalidated under Ukrainian law, on the basis that the rights of the UK SPV to repayment of the loans were encumbered, on the basis that the loans from the UK SPV were funded by notes issued to Noteholders and security was granted in favour of Noteholders over proceeds of any repayments received by the UK SPV from PrivatBank.

9. In the context of the Ukraine Proceedings, Concorde applied for disclosure of "*a copy of the request for recognition received by the Bank of England from the National Bank of Ukraine to recognise the exchange of monetary obligations (bail-in) under four loans made by UK SPV Credit Finance plc to PrivatBank, with all the documents attached thereto"* (the requested documents) pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters. The Commercial Court of Kyiv subsequently granted the application for a letter of request which was received by the Foreign Process Section at the Royal Courts of Justice on 14 November 2024.

10. Concorde has not instructed solicitors in England to apply to the court to enforce the Letter of Request under the Evidence (Proceedings in Other Jurisdictions) Act 1975 but rather the Letter of Request was passed to the Treasury Solicitor, under paragraph 6.4 of Practice Direction 34A of the Civil Procedure Rules. The Treasury Solicitor forwarded the request to me as Central Authority under the Hague Evidence Convention. The Treasury Solicitor served my order on the Bank of England on 16 January 2025.

11. Whilst a copy of this application has been served on the Treasury Solicitor it would appear it has not been served upon the Ukrainian Central Authority under the Hague Evidence Convention or the Kyiv Commercial Court.

The legal framework

12. The legal principles governing the exercise of the Court's powers to provide mutual legal assistance following the receipt of a letter of request are well-established, see ***Aureus Currency Fund LP v Credit Suisse Group AG*** [2018] EWHC 2255 (QB) at §§30-41 (Senior Master Fontaine); and ***Atlantica Holdings Inc and others v Sovereign Wealth Fund Samruk-Kazyna JSC and others*** [2019] 4 WLR 62 (Knowles J).

13. When dealing with a request for evidence from a foreign court, the English court must first decide whether it has jurisdiction to make an order to give effect to the request;

and second, if it has, decide whether as a matter of discretion it ought to make or refuse to make the proposed order.

14. The Court's jurisdiction to make an order for evidence derives from s.1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("1975 Act"). Three conditions must be satisfied:

    i) there must be an application for an order for evidence to be obtained in England and Wales;

    ii) the Application must be made pursuant to the request of a court exercising jurisdiction outside England and Wales; and

    iii) the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.

15. If these three jurisdictional conditions are satisfied, the question of discretion under s.2 of the 1975 Act arises. Section 2(1) confers the power on the High Court (in England and Wales) to make an order for obtaining evidence to give effect to the letter of request. Section 2(2) specifies the forms of order which may be made, subject to the limitations in the section. Section 2(3) precludes the court from making an order requiring any "*particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates)*". The effect of s.2(3) is that an English court cannot make an order for evidence where such an order would be impermissible under English law if the same document were sought in English proceedings.

16. An English court will "*ordinarily given effect to a request from a foreign court for assistance so far as is proper and practicable to do so and to the extent that is permissible under English law*", see the court's observations in ***Atlantica*** at §58 and ***Aureus*** at §30. This approach reflects the principles of judicial and international comity.

17. An English court "has *power to accept or reject the foreign request in whole or in part, whether in relation to oral or documentary evidence The court can and should delete from the foreign request any parts that are excessive either in relation to a witness's evidence or in relation to any documents sought. The English court will act on the principle that it should salve what it can but should decline to comply with the foreign request in so far as it is not proper or permissible or practicable under English law to give effect to it*", see the commentary to the White Book at 34.21.2.

18. An important limitation on the discretion of the English court to make an order for obtaining evidence is where such an order would constitute a breach of UK sovereignty: see, the White Book §34.21.4. This reflects Article 12 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which provides that the execution of a letter of request may be refused to the extent that "*the State addressed considers that its sovereignty or security would be prejudiced thereby*".

<u>Financial Services and Markets Act 2000 and Banking Act 2009</u>

19. Section 348 of the Act provides:

> "(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –
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> (a) the person from whom the primary recipient obtained the information; and
>
> (b) if different, the person to whom it relates.
>
> (2) In this Part "confidential information" means information which
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> (a) relates to the business or other affairs of any person;
>
> (b) was received by the primary recipient for the purposes of, or in the discharge of any functions of the FCA, the PRA or the Secretary of State under any provision made by or under this Act; and
>
> (c) is not prevented from being confidential information by subsection (4)."

20. Section 348(5)(aa) of the Act identifies the "Bank of England" as a "primary recipient".

21. Section 349 of the Act sets out several exceptions to s.348. Section 349(1) provides:

> "(1) Section 348 does not prevent a disclosure of confidential information which is:
>
> (a) made for the purpose of facilitating the carrying out of a public function; and
>
> (b) permitted by regulations made by the Treasury under this section."

22. The regulations referred to under s.349(1)(b) are the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 ("FSMA Regulations"). The relevant exception for current purposes is that contained in regulation 5, which concerns "[*d]isclosure for the purposes of certain other proceedings*". Regulation 5(1) provides:

> "(1) Subject to paragraphs (4) and (5), a primary recipient of confidential information, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to—
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> (a) a person mentioned in paragraph (3)2 for the purpose of initiating proceedings to which this regulation applies, or of facilitating a determination of whether they should be initiated; or

> (b) any person for the purposes of proceedings to which this regulation applies and which have been initiated, or for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end."

23. The "*proceedings to which this regulation applies*" are those set out under regulation 5(6):

24. 6) The proceedings to which this regulation applies are—

> "(a) civil proceedings arising under or by virtue of the Act, an enactment referred to in section 338 of the Act, the Banking Act 1979, the Friendly Societies Act 1974, the Insurance Companies Act 1982, the Financial Services Act 1986, the Building Societies Act 1986, the Banking Act 1987, the Friendly Societies Act 1992 or the Investment Services Regulations 1995;
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> (b) proceedings before the Tribunal.;
>
> (c) any other civil proceedings to which one of the regulators is, or is proposed to be, a party;
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> (d) proceedings under section 7 or 8 of the Company Directors Disqualification Act 19866 or article 10 or 11 of the Companies (Northern Ireland) Order 1989 in respect of a director or former director of an authorised person, former authorised person or former regulated person; or
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> (e) proceedings under Parts I to VI or IX to X of the Insolvency Act 1986, the Bankruptcy (Scotland) Act 1985 or Parts II to VII or IX or X of the Insolvency (Northern Ireland) Order 1989 in respect of an authorised person, former authorised person or former regulated person."

25. Section 352 of the Act makes it a criminal offence to disclose information in breach of section 348, it being a defence pursuant to section 352(6)(b) for the accused to prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

26. Sections 348 and 349 of the Act have been extended to capture information received for the purposes of, or in the discharge of any functions of, the Bank of England, by operation of s.89L of the Banking Act 2009 ("Banking Act"): see, in particular, s.89L(2) which provides that s.348 has effect as if in subsection 2(b), after "Act", there was inserted "*or of the Bank of England under Part 1 of the Banking Act 2009 or the Bank Recovery and Resolution (No 2) Order 2014*".

Decision

27. Having considered the relevant legal framework, I accept the submissions made by Mr Pobjoy on behalf of the Bank of England.

28. The Bank of England is a "*primary recipient*" for the purposes of s.348(1) and s.348(5)(aa) of the Financial Services and Markets Act 2000.

29. I am satisfied the Requested Documents fall within the autonomous definition of "confidential information" in s.348(2) of the Financial Services and Markets Act 2000 when read with s.89L of the Banking Act 2009:

    i) The Requested Documents "relates to the business or other affairs of any person" (namely National Bank of Ukraine and PrivatBank).

    ii) The Requested Documents were received by the Bank of England as part of the NBU's recognition request under s.89H of the Banking Act 2009, which falls within Part 1 of that Act. They were therefore received by the Bank of England "*for the purposes of, or in the discharge of any functions … of the Bank of England under Part 1 of the Banking Act 2009*…"

30. National Bank of Ukraine (the "*person from whom the primary recipient obtained the information*") has indicated that it does not consent to disclosure of the Requested Documents, see the letter from National Bank of Ukraine dated 8 January 2025. Specifically, National Bank of Ukraine has stated: "*The Requested Documents are covered by the confidentiality provisions of Section 348 of the Financial Services and Markets Act 2000, as applied by Section 89L of the Banking Act 2009. Accordingly, we expect the Bank of England to resist any application, whether under the Evidence (Proceedings in Other Jurisdictions) Act 1975 or otherwise, for disclosure of the Requested Documents in accordance with the Letter of Request*". Section 348(1)(a) of Financial Services and Markets Act 2000 therefore applies.

31. PrivatBank (the "*person to whom it relates*") has also indicated that it does not consent to disclosure of the Requested Documents. Mr Denny indicated in paragraph 10 of his witness statement that the Bank of England was attempting to ascertain PrivatBank's position. In the letter of 25 February 2025 PrivatBank has indicated that it does not consent, and in the event that the Bank of England's application is dismissed, it would wish to be validly served with the Order, so that it might have the opportunity to object to the production of the Requested Documents, including on the additional bases set out in the letter at paragraph 4 above.

32. None of the exceptions provided for under s.349 of Financial Services and Markets Act 2000 and/or the Financial Services and Markets Act Regulations 2001 apply:

    i) The disclosure is not "*made for the purpose of facilitating the carrying out of a public function*" for the purpose of section 349(a) of Financial Services and Markets Act 2000. Disclosure of documents to a claimant for use in private litigation does not form part of the Bank of England's public functions.

    ii) None of the exceptions in regulation 5 of the Financial Services and Markets Act Regulations 2001 apply. Disclosure is not to a person mentioned in regulation 5(3), and so regulation 5(1)(a) does not apply. Although regulation 5(1)(b) permits disclosure to "*any person for the purposes of proceedings to which this regulation applies and which have been initiated, or for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end",* that exception is circumscribed by regulation 5(6). None of the list of proceedings set out

under regulation 5(6) is engaged. In particular, the Bank of England is not, and is not proposed to be, a party to the Ukraine Proceedings.

33. In the circumstances, I conclude the Bank of England is prohibited, by primary legislation, from disclosing the Requested Documents on the basis that in circumstances where an English court could not compel disclosure of the Requested Documents, s.2(3) of the 1975 Act precludes such an order being made in response to the Letter of Request. My Order should therefore be set aside.

34. That is sufficient to dispose of the application, however for the sake of completeness, I also accept Mr Pobjoy's submission that the disclosure requested would constitute a breach of UK sovereignty.

35. The Bank of England is the United Kingdom's central bank. It performs vital regulatory functions. As the Courts have repeatedly recognised, the maintenance of confidentiality, including that provided under Financial Services and Markets Act and the Banking Act, are of vital importance to the discharge of the Bank's supervisory and regulatory responsibilities, see for example paragraphs 30 to 35 of the Judgment of Arden LJ in ***Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd & Ors*** [2006] EWHC 3249 (Ch). The Bank of England regularly engages in information sharing arrangements with regulators around the world, often pursuant to Memorandums of Understanding with strict confidentiality obligations. If the Bank of England were compelled to disclose the Regulated Documents there is a real risk that its ability to interact in confidence with other central banks and resolution authorities would be hampered, which, in turn, risks prejudicing the sovereignty of the United Kingdom.

36. In these circumstances the request may additionally be refused under Article 12 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.