Case No: BL-2017-000665

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

NEUTRAL CITATION NUMBER [2024] EWHC 1837 (Ch)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Monday 15th July 2024

Before:

MR. JUSTICE TROWER

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Between:

JSC COMMERCIAL BANK PRIVATBANK	**Claimant**
- and -	
(1) IGOR VALERYEVICH KOLOMOISKY	**Defendants**
(2) GENNADIY BORISOVICH BOGOLYUBOV	
(3) TEAMTREND LIMITED	
(4) TRADE POINT AGRO LIMITED	
(5) COLLYER LIMITED	
(6) ROSSYN INVESTING CORP	
(7) MILBERT VENTURES INC	
(8) ZAO UKRTRANSITSERVICE LTD	

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TIM AKKOUH KC and **CHRISTOPHER LLOYD** (instructed by **Hogan Lovells**) appeared for the **Claimant.**

CLARE MONTGOMERY KC and **TIM JAMES-MATTHEWS** (instructed by **Enyo Law**) appeared for the **Second Defendant.**

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Approved Judgment

Transcript of the Stenograph Notes Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE TROWER:

1. This is an application by the claimant, JSC Commercial Bank Privatbank ("the Bank") represented by Mr. Tim Akkouh KC and Mr. Christopher Lloyd, for permission to disclose to the Ukrainian Bureau of Economic Security ("the BES") two schedules to its re-re-re-re-amended particulars of claim, pursuant to an order made by Investigating Judge Romanyshena of the Shevchenkivskyi District Court of Kyiv, dated 16 May 2024 ("the May Order"). It was made in certain criminal proceedings in Ukraine.

2. The hearing of the application finished on Friday afternoon, and I am delivering judgment orally on Monday morning as the Bank argues that it needs to know how to proceed before the expiry of a deadline tomorrow.

3. The application is opposed by both the first defendant D1 and the second defendant D2, although D1 did not instruct counsel to appear at the hearing. There is evidence in the context of another outstanding application that D1 is currently in prison in Ukraine and his English solicitors have difficulty in taking instructions from him. However, they regard themselves as instructed generally to oppose applications relating to preserving the confidentiality of D1's asset disclosure.

4. The application is unusual for a number of reasons. It relates to schedules to a pleading rather than documents or witness statements, it is made after the conclusion of the trial, but before judgment has been delivered and the information contained in the schedules came into the public domain during the course of the trial in support of the Bank's case on a number of relevant issues of substance.

5. The Ukrainian criminal proceedings are a pretrial investigation in relation to D1. It appears from the May Order that the conduct being investigated in Ukraine relates to what is alleged to be the recording of non-existent cash transactions in the books of the Bank. This aspect of the criminal conduct is alleged to include the forging of documents and the making of knowingly false statements relating to fictitious cash deposits amounting to some UAH 5.877 billion. It also appears from the May Order that D1 is alleged to have misappropriated that amount from the Bank and paid those monies out of Ukraine to a number of third parties.

6. The May Order was made by a judge at a hearing in open court on the request of the senior detective of the BES, seeking,

> "temporary access to things and documents with the possibility to obtain their copies which are held by the Bank".

7. It records a number of factual findings, including a specific finding by the Investigating Judge that:

> "The documents referred to by the detective in the request are relevant to the criminal proceedings, will be of material importance for ascertaining the facts of the crime independently as well as in conjunction with other evidence."

8. The Investigating Judge then granted the request pursuant to a number of articles of the Criminal Procedure Code of Ukraine, in particular articles 159-164.

9. The operative parts of the May Order are:

> "to allow the detectives of the group of detectives of the main unit of detectives of the Bureau of Economic Security of Ukraine, … temporary access to documents with the possibility to obtain copies thereof that are in possession of the bank and which contain banking secrets and relate to the opening and maintenance of the bank accounts of the following business entities ... for the period 01 January 2013 to 31 December 2014".

10. The May Order then sets out a list of the documents to which the Bank is to allow access. That list includes internal bank documentation such as print-outs recording the movement of money, applications for the opening and closing of accounts, payment orders, requests for cash withdrawals and the like.

11. The last item on the list is of a different quality from the rest and is the document with which this application is concerned. It is described as:

> "Claims filed by JSC CB Privatbank [and then a code is included] with the High Court of Justice of England and Wales regarding the possible fraudulent misappropriation of the Bank's money by the former shareholders Kolomoisky IV, Bogolyubov GB and others with all the schedules with the possibility to review and copy them (seize copies thereof)."

12. It is then provided that the term of the ruling shall not exceed two months from the date it is rendered, and the following further sentence appears:

> "To explain to the person in whose possession the things and documents are, which pursuant to part 1 of Article 166 of the Criminal Procedure Code of Ukraine, in the event of failure to enforce a ruling for temporary access to things and documents, the court, upon a request from a party to the criminal proceedings which was granted access to such things and documents based on a ruling, may render a ruling for permitting a search pursuant to the provisions of this Code in order to discover and seize the said things and documents."

13. The Bank has construed the May Order as compelling it to disclose to the BES copies of the claim form and the particulars of claim in these proceedings together with its accompanying schedules. It says that it does not consider that it requires the defendant's consent or the court's permission before disclosure of the statements of case themselves together with schedules 1-3 and 6, and neither D1 nor D2 has said that it does.

14. However, the Bank takes a different view in relation to schedules 4 and 5. It considers that in the absence of the defendants' consent, which has not been provided, the permission of the court is required.

15. These schedules contain particulars of the Bank's pleading that each of three entities alleged to have acted as undisclosed principals for the third defendant, the fourth

defendant and the fifth defendant in relation to the matters in issue in these proceedings was owned and/or controlled by D1 and D2.

16. Part 1 of each schedule identifies connections between the third, fourth and fifth defendants and a number of individuals. Part 2 of schedule 4 identifies the connection between those individuals and D1 and part 2 of schedule 5 identifies the connections between those individuals and D2. The facts alleged in these schedules are a material aspect of an important part of the Bank's case: the extent to which entities involved in the misappropriation of in excess of 1.9 million USD of its monies were owned or controlled by its former controlling shareholders D1 and D2.

17. It is of importance to the current application that some, although by no means all of the information recorded in both of these schedules is derived from D1 and D2's asset disclosure given in response to a worldwide freezing order originally made on 19 December 2017 and remade by the Court of Appeal on 15 October 2019. That information is therefore not just relevant to disclosure issues to be determined at trial; it is also derived from asset disclosure made at the time of the worldwide freezing order which is protected by a standard form collateral use undertaking given at that stage.

18. The form of the undertakings given to Nugee J on 19 December 2017 and the Court of Appeal were that the Bank,

> "… will not without the permission of the court use any information obtained as a result of this order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction other than this claim."

19. Both of the schedules were also marked on their face as containing confidential information subject to the restrictions set out in an order of Nugee J dated 19 January 2018. This marking was a reference to a further order in which the court had directed a confidentiality club for documents or information relating to D1 and D2's assets located in Ukraine and/or Russia. Nugee J's January order also contained a recital recording that the Bank accepted that CPR 31.21(1) applied to the information disclosed pursuant to the general disclosure orders made by paragraphs 8 and 9 of the worldwide freezing order.

20. By an order I made on 8 July 2021, this confidentiality club was terminated with immediate effect. This termination permitted the general dissemination within the Bank of documentation which previously had been restricted. But it did not affect the operation of CPR 31.22 and did not vary the collateral use undertaking that had been given by the Bank at the time the worldwide freezing order was made and given again to the Court of Appeal in October 2019.

21. The fact that the termination of the confidentiality club did not have that effect was emphasised by me at the end of the judgment in which I gave my reasons for its termination. I made clear that those of the Bank's offices and employees who are granted access to the disclosure documents for the purposes of these proceedings:

> "are not permitted to use the information disclosed to them either pursuant to the worldwide freezing order, or as a result of the first and second defendant's

compliance with their extended disclosure obligations, for any purpose other than the proper conduct of these proceedings."

22. Although the Bank's application notice relies on the court's statutory power to consent to disclosures which would otherwise be prohibited by CPR 31.22 and CPR 32.12, the application was argued by both sides on the basis that the real question is whether the court should release the Bank from the collateral disclosure undertaking recorded in the worldwide freezing order. I should explain why that is the case.

23. In the normal course a party is no longer subject to the restrictions contained in CPR 31.22 and CPR 32.12 not just when the court gives permission for some other use, but also and automatically, where a document or witness statement comes into the public domain. Thus there are exceptions to the statutory restrictions against collateral use of a disclosed document or witness statement in two circumstances: (1) in the case of a disclosed document to which CPR 31.22 applies, where it is read to or by the court, or referred to at a hearing which has been held in public (CPR 31.22(1)(a)) and (2) in the case of a witness statement to which CPR 32.12 applies where it is put in evidence at a hearing held in public (CPR 32.12(2)(c)).

24. However, in the present case, the court made an order on 7 July 2022, which was after the confidentiality club had been terminated, that the disclosure of D1 and D2's lists of assets located in Ukraine and Russia, including any extracts from those documents and any further updates or addenda, were not to be regarded as having entered into the public domain by reason of having been read to or by the court at any hearing in these proceedings and shall remain subject to the restrictions in CPR 32.22(1) and/or 32.12(1) and (3) as applicable.

25. The effect of this order was that the information or documentation concerned is deemed not to have been referred to or put in evidence at a public hearing for that purpose, with the consequence that the rule-based restrictions on collateral use were preserved, but they include of course the court's ability to give permission to the contrary.

26. Unusually, this order extended to the trial. The documentary evidence and written submissions read by the court at that stage contained widespread references to information which up to then had been protected by CPR 31.22.

27. Thus, much of the information contained in Part 1 of each schedule was contained in structure charts in relation to each of the three principals, and the position of ten of the 11 individuals referred to in part 2 of each schedule was dealt with in detail in the Bank's written opening submissions and in some cases reiterated in the Bank's written closings.

28. The links referred to in the schedules between the 11 individuals and other important trial documentation such as the Rokoman spreadsheet and the Luchaninov e-mail was also referred to extensively at the trial itself. More generally, the Bank made extensive submissions both in writing and orally in relation to D1 and D2's ownership and control of the alleged principals. As I have already said, the Bank's allegations relating to those connections were a material aspect of an important part of the case.

29. I have no doubt that if the only restriction on the collateral use of the documents recording the information had been CPR 31.22 or 32.12, those restrictions would no longer apply in relation to Schedules 4 and 5 on the grounds that the documents and information contained in them had entered the public domain in the sense contemplated by those rules. If that were to have been the case, there would have been no need for the Bank to seek this court's permission to comply with the May Order.

30. However, in the light of the collateral use undertaking given at the time of the worldwide freezing order and the disapplication of the public domain exception in CPR 31.22 by reason of the 7 July order, it is accepted by both parties that permission is required. Nonetheless, although the consequence of the documents coming into the public domain does not automatically disapply the restriction on collateral use, I consider that it remains an important discretionary factor in the court's determination of whether or not the permission sought by the Bank ought to be granted.

31. Against that background, there is a measure of agreement on the basic principles applicable to the Bank's application.

32. Both parties agreed that the prohibition on collateral use of documentation disclosed by compulsion exists for important policy reasons. Two are of particular importance.

33. The first is that the prohibition on collateral use serves an important role in recognising and protecting a person's private right to keep their own documents to themselves. As the compelled disclosure of private and confidential documentation amounts to a significant interference with the rights of the disclosing party, it should be subject to appropriate protections of which the prohibition on collateral use is an important one.

34. The second is that the prohibition on collateral use serves to encourage those with documentation to make full and frank disclosure for the purposes of legal proceedings, whether or not the documents are helpful, on the footing that those documents will not be used save for the purposes of the proceedings in which disclosure was made. This serves to promote the administration of justice.

35. It is also not in dispute that the prohibition on collateral use extends not just to the use of the documents themselves, but also to the use of the information contained in the documents (see *Crest Homes plc v Marks* [1987] AC 829 at 854 and *I G Index v Cloete* [2015] ICR 254, at paragraph 40), a principle which is recognised in the present case by the terms of the worldwide freezing order undertaking prohibiting as it does the use for collateral purposes of information obtained as part of the defendants' asset disclosure.

36. When an application is made for permission to use documents to which the prohibition applies, the test also was established in *Crest Homes* (see the speech of Lord Oliver at 859G to 860C). The applicant must establish cogent and persuasive reasons why the undertaking should be released. There must be special circumstances and the release should not occasion injustice to the person who gave the disclosure (in this case D1 and D2).

37. The consequence of these principles is, as Hildyard J observes in *ACL v Lynch* [2019] EWHC 259 (Ch) that the court must be circumspect and protective of the policy which underpins the prohibition.

38. Against that background, the Bank relies on four essential points as to why it is established special circumstances without injustice to D1 and D2 and therefore why the relief should be granted.

39. Mr. Akkouh's first point relates to the fact that the Bank has been served with the May Order. He submitted that the court will normally release a collateral undertaking in response to a request from the criminal authorities. On any view, this is an important factor.

40. The point was explained in *Marlwood Commercial v Kozeny* [2005] 1 WLR 104 in the following passage from the judgment of Rix LJ at paragraph 52:

> "... the public interest in the investigation or prosecution of a specific offence of serious or complex fraud should take precedence over the merely general concern of the courts to control the collateral use of compulsorily disclosed documents. If such an offence had been suspected of having been committed in this country, the public interest would be in saying that it could be investigated here if this is where the relevant documents were. And if the offence had been committed abroad, the same interest in the comity of nations and the same respect which one sovereign has for another, which in the general context of long-arm jurisdiction might operate in favour of the foreign resident, in such a case operates against him. In such circumstances the public interest in proper disclosure in civil litigation does not require that documents necessary to the investigation of serious fraud should be unavailable. Moreover ... the court's exceptional permission for relaxing the rule against collateral use in cases of serious fraud in the international context does not give cause for thinking that proper disclosure in the general run of cases will be undermined."

41. This point is well established. As Millett J had said in *Bank of Crete v Koskotas* No. 2 [1992] 1 WLR 919, at 916C:

> "Save in exceptional circumstances, it would not be right to authorise the bank voluntarily to make use of the material for any other purpose. However, the voluntary disclosure is one thing; disclosure under compulsion of law is another."

42. There was some similarity between the circumstances with which the Court of Appeal was concerned in *Marlwood* and the present case in that, as Rix LJ explained at the beginning of his judgment, the conflict arose in an international context in which the documents in question had been brought into this jurisdiction from abroad by a foreign litigant, while the investigation in question was being conducted abroad from where the request for assistance in the production of those documents had originated.

43. In its application, the Bank had said that it had been informed by its Ukrainian counsel that the wording of the May Order, and in particular the reference to the term of the ruling not exceeding two months from the date it is rendered, meant that the order would remain effective for two months from the date on which it was made. It then

went on the say the consequence of this is that the Bank must comply with the disclosure order made against it within that time, i.e. by the 16 July 2024. It also said that any failure by the Bank to comply with the order could constitute a criminal offence under article 382 of the Criminal Code of Ukraine. This provides that intentional non-performance of a court decision or order is punishable by a fine or imprisonment for a term of up to three years.

44. D2 does not accept this is the effect of the May Order. Ms. Montgomery submitted that it is not at all clear on the evidence that the Bank is subject to any relevant compulsion (or what she called an immediate obligation) as a matter of Ukrainian law.

45. In support of that submission, she relied on the expert evidence from Mr. Dimitri Marchukov, who had given evidence at the trial, in which he expressed the opinion that the May Order as such is not a disclosure order and does not directly impose any obligation on the possessor of the documents to provide them.

46. He said that it gives the right to the investigator to seek and obtain temporary access to the documents at an identified place in Kyiv, but it is only if the investigator exercises his right by exercising the order in accordance with the procedure envisaged in the Criminal Procedure Code that the obligation on the part of the possessor of the documents will arise. It therefore follows that no obligation on the part of the Bank arises until such time as the BES detectives seek to execute the May Order.

47. He also noted that it is not unusual for investigators in Ukraine to fail to exercise the right to temporary access within the time specified by the court and that it is always open to the detectives to choose not to exercise the right to temporary access if there are problems arising out of legal prohibitions in foreign jurisdictions.

48. From a simple reading of the May Order, I can, anyway in part, understand why it is that Mr. Marchukov takes the view that the order does not require disclosure by the Bank by 16 July if it is right that the BES has not sought to execute its entitlement to temporary access and to take copies. If that is correct, there is no present question of the Bank committing an offence.

49. Ms. Montgomery also submitted that there was no compulsion on the Bank for a slightly different reason. She said that the schedules are not in the possession of the Bank because they were still subject to the terms of the collateral use undertaking. She said it was not open to the Bank to ask its solicitors for the schedules so that they could be given to the investigators. She also submitted that no disclosure under the order would be subject to a reasonable excuse defence. She said that Mr. Marchukov's decision justified a conclusion that no offence is committed unless there is an intentional failure and that this would not be the case if there was a competing legal obligation in the form of the undertaking against collateral use.

50. Mr. Akkouh does not have any direct evidence to controvert what Mr. Marchukov says but he points out that Mr. Marchukov was unable to confirm in terms that a failure to comply with the order does not amount to a crime. The significance of that point is only partially met by Ms. Montgomery's submission that even if there were to be a theoretical criminal liability, the evidence was that such liability was unlikely to be satisfied if a party is legally prohibited from using the information, which she submitted would be the case in the present instance.

51. The Bank also adduced evidence on information and belief from its English solicitor who had spoken to the Bank's Ukrainian counsel. He made the point that Article 165 of the Civil Procedure Code which deals with the transmission of orders on the temporary access to things and documents and on which the May Order is based provides that the person specified in such an order is "obliged to provide temporary access to the things and documents specified in the order to the persons specified." It follows that once sent to the Bank, as occurred in the present case, the order gives rise to a legal obligation on the Bank which it is required to perform as a matter of Ukrainian law. The order must be presented to the Bank and the normal practice is simply to send to a bank the order which has been made without attending at its premises but once received it must be complied with.

52. It seems to me that this approach is anyway consistent with the provisions in the order that explicitly draw the recipient's (i.e. the Bank's) attention to the right of the BES to apply for an order permitting a search in the event of non-compliance. The very reference to that indicates that an obligation has already arisen.

53. In my judgment, the court is faced with a conflict of evidence on this application which I am not in a position to resolve. There is credible evidence going both ways on the question of whether the May Order has placed the Bank under an immediate enforceable obligation to produce the schedules to the BES and, if so, its precise nature.

54. This is similar to the situation in which Bryan J found himself in *National Bank v Mints* [2020] EWHC 3253 (Comm). He had earlier cited, at paragraph 18, the *Bank of Crete* case and a passage from *Gee on Commercial Injunctions* from which he had concluded that the special circumstances test will be readily met where the person subject to the undertaking is obliged under applicable foreign law to disclose the material in question to a foreign criminal authority. Bryan J then went on to hold at paragraphs 149151 that it would be invidious to put the claimant in the position of having to face a stark choice, viz. risk of being in contempt of court in the English proceedings or risk of criminal sanction on the basis of its legal advice in the foreign jurisdiction. He was satisfied, and I agree that such a situation - a double risk - gives rise to a sufficient special circumstance capable of justifying, having regard to all the other circumstances of the case, a release from the undertaking against collateral use.

55. This is more particularly the case where, even if Mr. Marchukov is correct, the order having been made, it is liable to be executed and indeed remade at any time. In short, even if a test of compulsion by an immediately enforceable foreign order may not yet be satisfied, it is plain that there is a very strong possibility that the Bank may be put in a position where it is required to comply at any time. Even on Mr. Marchukov's evidence, as the question of execution is still hanging like a sword of Damocles over the Bank, with a clear possibility of a search order being made whether or not a criminal offence is actually committed, in my view this simply serves to reinforce the material level of compulsion to which the Bank is now subject.

56. Ms. Montgomery placed considerable reliance on the decision of Hildyard J in *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch). In that case, Hildyard J refused to release a claimant from a collateral use undertaking which was said to be necessary in the light of a subpoena issued in the name of a grand jury of the US District Court for the Northern District of California against another company in its group.

57. There are a number of aspects of the decision which mean that it is less helpful as general guidance on the correct approach than might otherwise be the case and underline the fact that cases in this area have to be decided with very careful attention to their own facts. In particular, there was a dispute as to whether or not the claimants in the English proceedings were actually bound by the order. The judge expressed the view that the legal opinion to the effect that it was not, was very likely to be right. That is not an issue in this case. Secondly, and unlike the current application, the application in the *ACL* case was a pre-trial application and the judge was understandably very concerned about the US prosecutor's attempt to obtain disclosure of witness statements which had not yet been adduced in evidence, a matter which was plainly highly prejudicial to the defendant. Thirdly, it is also very clear that the judge was particularly concerned about the very wide terms of the subpoena and made a finding that the court itself had not been involved in its formulation. Neither of these second and third factors are present in this case where the BES application was subject to scrutiny in open court by a judge and relates to a single series of documents including two schedules. These are all important points of distinction from the present case.

58. One further point which appeared at first blush to be similar to the present case was the judge's concern that the consequence of the width of the subpoena was that there had been no attempt to tie the request to any issues for further investigation. The May Order does not identify the relevant issues either.

59. However, I do not think that this is a point which goes very far, both because the relevant parts of the May Order are focused on documents including two schedules which are not themselves voluminous, and it contains an express finding by a judge that the documents are relevant. Unlike *ACL v Lynch* this is not a case in which I can conclude that the prosecutors were attempting to perfect a course that had already been set in a case in which they had already received disclosure of many millions of documents.

60. Ms. Montgomery also submitted that the fact that the schedules were a small and narrow part of a compendious item was a point which supported D2's position. She said that the court could not be satisfied that the Ukrainian judge was herself satisfied that the schedules themselves as opposed to the remainder of what amounted to the Bank's claim were really regarded by the Ukrainian judge as necessary.

61. There is some force in this point, but in my view, it is also important to recognise that an applicant in the position of the Bank will often not be in a position to establish necessity in any absolute sense of the word. As Mr. Akkouh submitted, necessity is not of itself part of the test: the test is special circumstances. Of course, if the court can see that there is no explanation for why the material is required by the foreign investigator, and there is no scrutiny by a foreign court, that will tell against the grant of relief and sometimes be determinative. That is what occurred in *ACL v Lynch* but in my judgment, it is not this case.

62. The nature of the document itself is also relevant. Ms. Montgomery submitted that the court has already identified the nature of the confidentiality concerns. She said that the more confidential the documents are the more the court should be concerned to ensure that the necessity which was said to underpin the compulsion was justified.

63. There is some force in this point as well, although it does not in my view lead to the conclusion that the compulsion in the present case is, as Ms. Montgomery submitted, a weak one. The Ukrainian judge was very clear that the documents concerned are of material importance for ascertaining the facts of the crime independently as well as in conjunction with other evidence. This court is not in a position to challenge that conclusion, not least because it appears on its face to be well-founded.

64. Indeed, although the criminal allegations focus on different facts to those in issue in England, having regard to the time period with which the Ukrainian proceedings are concerned and their nature, including the fact that in both these proceedings and the Ukrainian criminal proceedings there is the same alleged victim in the form of the Bank, there is every reason to believe that details of the way in which the Bank's claim was made in these proceedings are of direct relevance to the criminal investigation. It seems to me that in circumstances in which the Bank is put in the invidious position of being faced with two competing obligations, principle does not require the Bank to go any further than it has in explaining the necessity.

65. There was one difference between this case and *Marlwood* on which Ms. Montgomery placed considerable reliance. Her submission also related to her argument, to which I shall come later, that the May Order should have been sent by way of international Letter of Request given the issues of comity that arise.

66. In *Marlwood*, the applicant seeking to be released from the undertaking against collateral use had been served with a notice under section 2 of the Criminal Justice Act 1987. The court both referred to and relied on the safeguards built into the operation of the legislation both at the stage at which the Secretary of State referred the request to the Serious Fraud Office, and the stage at which the Director of the SFO satisfied himself there was good reason to exercise his powers under section 2.

67. However, I do not accept that this latter consideration was a prerequisite to the exercise of the power in aid of the foreign criminal investigation and, to be fair, I do not think that Ms. Montgomery put her case that high. It was relevant in that case, but it is no more than one of the considerations which weighs in the overall balance.

68. In my view, this is apparent from the discussion of the underlying principle by Millett J in *Bank of Crete* at page 926 in which no such process had been invoked and in which the issue arose in the investigation of a fraud in relation to which the Bank was required to prepare certain audit reports. Millett J placed much emphasis on the fact that this court should not place obstacles in the way of the proper performance by the bank of its obligations under the foreign law. This decision was cited with approval in *Marlwood*.

69. Mr. Akkouh's second reason is that, irrespective of the March order, and whether or not the March order must be complied with before 16 July, the investigation of fraud in the Ukrainian criminal proceedings is in the public interest, which is a factor that weighs in favour of the court exercising its discretion to allow disclosure.

70. He said that in assessing the weight to be attached to this consideration, it is important that the May Order includes a specific finding by the Investigating Judge that the documents referred to by the detective in the request are relevant to the criminal

proceeding, albeit of material importance for ascertaining the facts of the crime independently as well as in conjunction with other evidence.

71. I agree with that submission. It draws support from the decision of the Court of Appeal in *Marlwood* and I can cite a short passage from the judgment of Rix LJ at paragraph 47 in which he says the following:

> "In any event there is every reason for supposing that in the absence of any special factor in the individual case, the public interest in the investigation and prosecution of serious fraud outweighs the general concern of the courts to control the collateral use of documents produced compulsorily on disclosure."

72. The same point was made again in paragraph 52 of his judgment, although in that instance it followed on from a discussion of the significance in that case of the statutory procedures which had been followed; as I have already mentioned, this is a point to which I will return.

73. Mr. Akkouh's third reason for special circumstances is that in any event schedules 4 and 5 have been referred to in open court in these proceedings.

74. He submitted that even where CPR 31.12(1)(a) is not directly engaged because of the 7 July order, where a document has come into the public domain by virtue of being read by the judge at trial or referred to in open court, that is a significant factor in deciding whether to release the collateral use undertaking.

75. Underpinning this fact is that once the document is no longer private or confidential because of the way it has been dealt with in legal proceedings, the first of the two significant policy grounds for the prohibition on collateral use that I cited earlier in this judgment falls away.

76. He said that the fact that the public policy against collateral use is much diminished in those circumstances is illustrated by the terms of CPR 31.22(1)(a) in any event. He also submitted that this was the case whether or not the document was read out in open court. All that matters is that it should have been read by the judge before or during the course of the hearing, a point illustrated and made by Bryan J in *Mints*, at paragraph 42, by reference to passages from the White Book.

77. Much of the jurisprudence in this area has been developed in the context of release of the collateral use undertaking before the proceedings have come to trial. I have already touched on this point, but I agree that where the trial has been concluded, and, crucially for these purposes, where the information has in large part been utilised in evidence and submissions at the trial, the public policy considerations in favour of protecting collateral use have much less significance.

78. As Bryan J said in *Mints* at paragraphs 153-154, undertakings can be released by the court and would be released once the material has entered the domain for a public hearing, subject to retaining the power to retain confidentiality. He then said this:

> "If sufficient good reason was shown then equally the position is very different according to whether or not material has already

> entered the public domain at a hearing in public. If it has, the burden is on the person applying for the continuation of confidentiality to justify, which must be done through submissions and evidence. I am not convinced and do not consider that the defence have discharged the burden for the continuation of confidentiality in terms of good reason. Certainly, in the English proceedings they made no made no attempt to keep that information as confidential and not in the public domain, as a result of which a large amount of this information has entered the public domain."

79. Ms. Montgomery submitted that she gained support for D2's case from those passages in the speech of Lord Diplock and Lord Keith in Home Office v Harman [1983] 1 AC 280, at 305 and 307, in which it was made clear that the collateral use undertaking did not terminate automatically when the document came into the public domain. She then submitted that the same still applied in the present case in the light of the 7 July order. I do not think this helps D2's case. It is not in issue that the effect of the 7 July order meant that the documents were not deemed to come into the public domain so as to give rise to that automatic consequence for which CPR 31.22(1)(a) provides. That does not affect however the fact that the documents were in fact referred to at a public hearing, with the consequence that, as a matter of fact, they have in large part lost any confidentiality they might otherwise have had. In my view, notwithstanding the 7 July order, that remains a highly relevant factor in determining whether the permission now sought should be granted.

80. I have already explained the position on the facts, and I am satisfied that with a few *de minimis* exceptions the entirety of the information contained in schedules 4 and 5 has already come into the public domain. In those circumstances, I agree with Mr. Akkouh's submissions that this alone is a powerful consideration and a strong reason why permission should be granted.

81. I should add the following to this aspect of the case. The documents sought to be disclosed are a statement of case and its schedule. In the normal course the statement of case as a document would not be covered by the implied undertaking at all and is in any event available for inspection by any member of the public CPR 5.4C(1)(a). However, CPR 5.4C distinguishes between a statement of case and documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it, to which the rule permitting inspection to the public at large is not available.

82. One issue which arose at the hearing, but was not explored in any detail, was whether a schedule, such as schedule 4 or 5, is part of the statement of case. It might be thought that it is because it simply operates as a convenient means of particularising the allegations made in paragraph 12A of the particulars of claim.

83. Ms. Montgomery submitted that this was not correct and said that the schedules were documents filed with or attached to the statement of case. She relied on *HRH Duchess of Sussex v Associated Newspapers* [2021] WLR 4762, at paragraph 47, in which Warby J concluded that such a schedule would not be open to permission without an application under CPR 5.4C for that purpose.

84. I have some doubt about this conclusion where the schedule is a straightforward particularisation of some part of a party's case. But as on any view, the court is able to either refuse or grant permission for public inspection whatever the answer, I will follow Warby J's conclusion and proceed for present purposes on the basis that the schedules could not have been inspected by the public as of right, and without permission, whether or not the 7 July order had been made.

85. Mr. Akkouh's fourth reason is that D1 and D2 have not identified any specific prejudice or injustice they might suffer, and he stressed that the prejudice must be unjust. It is said that to that extent the general public interest in the collateral use restriction is outweighed by the public interest in investigating and prosecuting fraudulent conduct.

86. Ms. Montgomery submitted that this is wrong because the schedules are based on private and confidential financial information derived from the defendant's compulsory asset disclosure on the explicit understanding that it will be kept confidential. There is said to be an obvious prejudice for D2 in his private and confidential financial information being shared with the BES in this way, more especially as he is not the person under investigation in Ukraine, a point which is obviously not open to D1.

87. More particularly, she points out that once the information contained in the two schedules has been transferred to Ukraine, it will no longer be subject to the same protections to which it is subject in England. Once the May Order has been executed the collateral use undertaking will no longer serve its purpose in relation to these schedules.

88. It seems to me that there is some substance in Ms. Montgomery's point, not least because the investigation relates to the affairs of D1 and not the affairs of D2.

89. However, its weight is much diminished by the fact that the information has already entered the public domain to the extent I already described. It was always open to any journalist or other member of the public sitting in court to write down what was being said about the underlying information and the public interest in transparency where that information is material to issues under consideration is a very strong one (see *Cape Intermediate Holdings v Dring* [2019] UKSC 38 at paragraph 43) as applied in this context by Bryan J in *Mints*, at paragraphs 14, 42 and 142ff. As Bryan J said at paragraph 146 of his judgment, where documents are in fact in the public domain that is a very strong factor in support of the underlying undertaking being released because material has lost its confidential status.

90. This case is therefore far removed than the situation in *ACL v Lynch* in which the prejudice giving rise to the injustice was facilitating one side to do what Hildyard J called "peering into the defendant's case" at a stage in the proceedings in which that would have given the claimants an unjustified advantage.

91. As I explained in paragraphs 93 to 96 of my judgment terminating the confidentiality club ([2021] EWHC 1910 (Ch)), I accepted the Bank's submission that there was no real risk of harm to D1 and D2's interests in the Ukrainian and Russian assets which were at the root of the issues in relation to the schedules. I agree that the evidence of a risk that corporate raiding may happen in the future was speculative, one of the main issues that was argued at that stage, and I took the view that D1 and D2 had not

established by cogent evidence that, even if information relating to their relevant assets were to be leaked, there is no evidence that this information would be used either unlawfully by organs of the Ukrainian state in order to seize them, or to mount a corporate raid of the type described.

92. In my judgment, the essence of these findings still holds good, and they continue to apply irrespective of the existence of 7 July order. All that the order achieves is that the public domain exception in CPR 31.22 does not apply automatically. It does not of itself affect the significance of the underlying loss of confidentiality, being the alleged injustice, to the issue with which the court is now concerned.

93. The consequence of these considerations is that although I accept that D1 and D2 may suffer some prejudice in the broad sense articulated by Ms. Montgomery, I agree that it is not prejudice which amounts to injustice to them as identified in *Crest Homes*.

94. Turning then to D2's additional points, the first is that the May Order should have been sent by way of international Letter of Request given the issues of comity that arise. D2 relies on the European Convention on Mutual Assistance in Criminal Matters dated 12 June 1962 to which the United Kingdom and Ukraine are both party.

95. The way the point was put by Ms. Montgomery in her submissions is that the court ought to refuse the application because the approach taken by the BES reflects an irregular and improper attempt to circumvent ordinary mutual legal assistance arrangements and the important protection for D2's rights which are attendant upon such arrangements. Both the BES and the Bank should have appreciated, she said, that this was the case because the description of the claim made clear that the material was in the possession of a litigant before the court in English proceedings.

96. To set this point in its proper context, it is important that the Bank clarified in its recent evidence and its skeleton argument that, as a matter of fact, schedules 4 and 5 themselves has not yet been provided to the Bank in Ukraine, although much of the data contained within schedules 4 and 5 has been transferred. The reason for this slightly surprising state of affairs is that the schedules were originally subject to the confidentiality club restrictions and when that was terminated no copies of the schedules were sent to Ukraine for use by the Bank in the proceedings.

97. It therefore follows that like D2's second point, this argument is based on the proposition that the May Order permits the BES to attend the Bank's premises in Kyiv or send the May Order to the Bank's premises in Kyiv in order to secure temporary access to documents held by Hogan Lovells in England. It was submitted by Ms. Montgomery on behalf of D2 that this manner of proceeding was wholly inappropriate and one to which this court should not lend its aid. Given the circumstances the matter should have been pursued in accordance with the mutual legal assistance arrangements currently extant between Ukraine and the United Kingdom.

98. She said that this was a matter for the Bank as much as it was for the BES because the Bank should have responded to the BES's request by explaining that the schedules were not in Ukraine and were subject to a collateral use undertaking in England. They should therefore have discussed the position with the BES and indicated that it ought to seek mutual legal assistance from the UK.

99. In her submissions on this point Ms. Montgomery explained that, as a matter of English law, requests under the Convention are dealt with under the Crime (International Co-operation) Act 2003. The procedures under that Act involved the United Kingdom central authority considering the request for assistance under section 13. On receipt of a request the central authority can direct the police to exercise the powers identified in section 16 and apply for a production order under Section 8 of the Police and Criminal Evidence Act 1984.

100. If an application for a production order is then to be made, the court must be satisfied that the offence which is the subject of the foreign criminal investigation satisfies the dual criminality requirement, i.e. that it constitutes an offence under the law of the country outside the United Kingdom and would have constituted an indictable offence under English law if it had occurred in England and Wales.

101. Ms. Montgomery then submitted that, so far as D2 is aware, Ukraine has made no request to the United Kingdom for mutual legal assistance under the Convention; there was no suggestion from the Bank that it had.

102. She then said that the consequence of this circumvention of the structures of the regime were that the Ukrainian authorities have not provided the information which would otherwise be necessary to justify the request, the object of and the reason for the request, i.e. the offence which is the subject of the investigation or proceeding, and a summary of the facts. I was shown the standard form of application which appears to require the provision of a more significant level of information to the central authority than is apparent from the May Order

103. She said that the further consequence is that D2 has been deprived of protections inherent in the 2003 Act, including in particular consideration by the central authority and the director of the SFO of the matters to which I have already referred and consideration of whether the dual criminality requirements are satisfied in respect of the offences which are the subject of the investigation.

104. She also submitted that, because the request was not made by way of a mutual legal assistance request, D2 was deprived of what is called speciality protection which requires the foreign requesting authority who wishes to use evidence obtained from the United Kingdom for a different purpose, to make a formal request explaining how it intends to use the information and why it wishes to do so.

105. Mr. Akkouh's initial response to this was to draw attention to the fact that the May Order is made by a Ukrainian judge, in relation to a Ukrainian criminal investigation, seeking information from a Ukrainian bank. The schedules have not been sent to Ukraine, but it is inevitable that much of the information will already be in the hands of the Bank in Ukraine. He also said that the schedules are in the Bank's possession and control even though not in Ukraine. The Bank's solicitors could have been required by their client to send them to Ukraine at any time. In those circumstances, there can be no question of the May Order being a circumvention of any mutual legal assistance arrangements, let alone an irregular or improper one.

106. In broad terms I agree with that submission. I do not consider that the question of what is in the possession of the Bank is affected by the separate question of any collateral

use undertaking which may require it not to deal with the documents or information in a particular way.

107. Mr. Akkouh also submitted that there was nothing to indicate any policy that the existence of one particular way of achieving or requiring assistance in evidence gathering for the purposes of a criminal investigation might serve to exclude others. Indeed, he pointed to a bilateral mutual legal assistance agreement involving the United Kingdom and Ukraine on which Ms. Montgomery did not in the event rely (it was concerned with restraint and confiscation of proceeds of criminal activity other than drug trafficking) which spelt out that assistance could be provided by the parties pursuant to other agreements or informal arrangements.

108. I was shown nothing which required the Ukrainian authorities to act under the Convention in the circumstances of this case and it seems to me that in the absence of a legal impediment, the fact that there may be alternative procedures for achieving the same result will not normally require an applicant to take the one which is least convenient to it.

109. However, Ms. Montgomery submitted that *Marlwood* demonstrated that the safeguards inherent in the mutual legal assistance regime were an important consideration for the court when it determined that the collateral use of documents should normally be permitted in support of a foreign law enforcement request. It was in that sense a significant aspect of the discretionary balancing exercise.

110. It was said that in the present case there are no such safeguards. In particular, unlike what would occur in the operation of established mutual legal assistance arrangements, (a) that the request is not made to and scrutinised by a member of the executive; (b) that there has been no compliance with any statutory preconditions; and (c) that the BES has given no reasons for acting outside the established mutual arrangements.

111. Ms. Montgomery also submitted that it was of particular importance that where a request for documents is made pursuant to conventional mutual legal assistance arrangements, the subject of the investigation has the benefit of speciality protection, as I have already described.

112. I think that it is important in this context to recognise that an application to permit the collateral use of documents in support of an enforcement investigation, whether domestic or foreign, engages two important public interests. The first is the interest of the parties to the litigation reflected in the implied undertaking against collateral use. The second is the public interest in the investigation of crime.

113. However, I do not agree that the only reason that the latter public interest prevailed in *Marlwood* was that the relevant disclosure was made pursuant to the ordinary mutual legal assistance arrangements which themselves were subject to the attendant safeguards identified by the Court of Appeal in that case. It was clearly a factor, but there is nothing to indicate that it was in any way determinative or that it was a necessary precondition for the permission to be granted.

114. Indeed, it seems to me if that were to be the case the Court of Appeal would have said as much when considering the decision of Millett J in *Bank of Crete* (and I pause to note that the Convention was by then in force in both Greece and the United

Kingdom). Quite the contrary, Rix LJ cited and discussed that decision with approval, recognising that the competing duty requiring disclosure in that case was not one which the English court could control.

115. In short, it seems to me that the reason the Court of Appeal considered the safeguards issue in *Marlwood* was not because a co-operation regime was being operated in this case. I do not think it is possible to extrapolate from this that such a regime must always be followed, more particularly where the confidentiality club is no longer extant, and there is no reason to consider and no evidence from D1 or D2 to demonstrate that once the schedules are in Ukraine they will be used for some other purpose.

116. It follows that in my view, whether that or any other available process should have been used in any particular case is part of the balancing exercise and will often be an important part of that exercise, but how much weight it should ultimately be given will depend on all the circumstances. In the present case, I do not regard it as a factor which outweighs the cogent and persuasive reasons advanced by Mr. Akkouh for why special circumstances have been established.

117. The second argument advanced by D2 is that relief should not be granted because permitting the Bank to disclose schedules 4 and 5 would be incompatible with his rights guaranteed by chapter V of the General Data Protection Regulation GDPR.

118. The argument starts with Article 44 of the GDPR. This prohibits a transfer of personal data outside the United Kingdom, a form of data processing, unless the conditions laid down in chapter V are complied with by the controller of the data.

119. "Personal data" means any information relating to an identified or identifiable natural person. It is not in issue that although much of what is contained in schedules 4 and 5 is not personal data of either D1 or D2, there is information in the two schedules which is their personal data within the meaning of the GDPR. To that extent, the GDPR is engaged where anything amounting to the processing of that data by the relevant data controller (in this case the Bank's solicitors Hogan Lovells, who have custody of the schedules0, is to occur.

120. Initially the Bank did not accept that the schedules can only be sent to Ukraine if the requirements of chapter V of the GDPR are complied with. It submitted that the reason for this is that the data within them has already been transferred to the Bank in Ukraine in a different form.

121. D2 disagrees. Ms. Montgomery submitted that the data will be being processed as a part of the transfer even if the data itself (albeit not the schedules) has already been transferred to Ukraine.

122. As I understood it, Mr. Akkouh did not ultimately press this argument with any force, but insofar as he did so I would have disagreed. I think the language of chapter V covers the transfer of data to a third country with an intention for it to be processed thereafter. There is nothing to indicate that, because the data may already be held there, albeit recorded in a different form, the provisions of chapter V do not have to be complied with. As schedules 4 and 5 themselves have not yet been provided to the

Bank in Ukraine, the GDPR is potentially engaged, even though much of the information contained within schedules 4 and 5 has already been transferred.

123. There are a number of provisions which, not notwithstanding the general restriction in Article 44, would permit a transfer. Some of them do not apply.

124. Thus, it is common ground that Ukraine is not the subject of adequacy regulations for the purposes of Article 45, and there is no suggestion that Hogan Lovells have provided for appropriate safeguards within the meaning of Article 46. It therefore follows that if compliance with the May Order amounts to a transfer outside the United Kingdom for the purposes of chapter 5, it is only lawful if one of the derogations under Article 49 applies. It is also common ground that the burden is on the Bank to establish that they do.

125. The derogations relied upon by the Bank under Article 49(1) are (d) that the transfer is necessary for important reasons of public interest and (e) that the transfer is necessary for the establishment, exercise or defence of legal claims.

126. One of the oddities about this case is that the formulation of Article 49(1)(e) means that it is most improbable that a transfer from the UK to the Bank in Ukraine would have been treated as a breach of the GDPR at an earlier stage because there would have been no answer to the Bank's response that the transfer of a schedule to a statement of case was necessary (as that word is used in this context) for the establishment or exercise of legal claims (Article 49(1)(e)), i.e. these proceedings.

127. However, the way the Bank explained its case was that the derogation under Article 49(1)(e) applied because it was necessary for the transfer to be made to establish if the overseas prosecutor had a legal claim. Mr. Akkouh said that the guidance on international transfers from the Information Commissioner's office confirms that this is the case.

128. That guidance spells out that the exception does not require that proceedings are started, or that formal steps have been taken by an administrative or regulatory body. It went on to say that a mere possibility of a legal claim is not enough but that

> "the exception applies if you or another person involved in the legal claim have received a request for information from an overseas regulator with a view to it potentially taking formal action."

129. Other guidance on the application of the derogations is contained in the ICO guidance, which includes the following passage in relation to the important concept of necessity:

> "The relevant exceptions contain the word 'necessary'. This does not mean that the transfer has to be absolutely essential. However, it must be more than just useful in standard practice. It must be a targeted and proportionate way of achieving a specific purpose. The exception does not apply if you can reasonably achieve the same purpose by some other means.
>
> "It is not enough to argue that the transfer is necessary because you have chosen to operation your business in a particular way.

> The question is whether the transfer is objectively necessary and proportionate for the stated purpose, not whether it is a necessary part of your chosen methods. Because the exception must be both necessary and proportionate, you can take into account the reason why the transfer is needed, the alternatives available, the protections which will be in place and the potential harm to people."

130. Against that background, D2 argues that neither of the derogations apply because the test of necessity is not satisfied. D2 submits that there is nothing in this application which demonstrates that the provision of schedules 4 and 5 is necessary and proportionate for the purposes either of the public interest in the investigation of crime, or for the establishment of legal claims.

131. In particular, Ms. Montgomery submits on his behalf that the Bank has not explained firstly the reason why the transfer is actually needed, i.e. there is no explanation of the relevance of schedule 4 and 5 to the criminal investigation; secondly, the alternatives available, i.e. whether the BES has sought to obtain the information from other means; or thirdly, the protections which will be available upon transfer of the personal data outside the United Kingdom.

132. The Bank's first answer to this submission was made in its skeleton argument but was not developed in oral argument. It submitted that D2 did not take a point on data protection at the time of termination of the confidentiality club. The purpose of the application to terminate the confidentiality club was to enable the Bank to provide information concerning D1 and D2's assets to the Bank in Ukraine. The Bank submitted that, if D2 had wanted to argue that the provision of information concerning his assets to the Bank would breach the GDPR, he ought to have raised the point in 2021 and, not having done so, is estopped from taking the point at this stage.

133. This form of estoppel was explained by Popplewell J in *Orban v Ruhan* [2016] EWHC, 850, at paragraph 82, where it was described as a well-established principle often applied in relation to contested interlocutory hearings, that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief.

134. The relief sought at the time the court terminated the confidentiality club was different in its form to the relief sought in the present application, although in its outcome it was intended to give rise to a very similar result. The question which arose at that stage was whether it was permissible for documentation and information that had been subject to the restrictions of the confidentiality club could be transferred more generally to the Bank and, in particular, to employees who had not until then been authorised to come into possession of it. On one view that is exactly the same as the element of the relief sought on this application which involves the transfer of personal data from Hogan Lovells to the Bank in Ukraine, which is the only aspect of this application to which the GDPR argument applies.

135. However, I do not think that this means that the estoppel argument should prevail because the circumstances are now very different. The documentation to which this application relates is much more confined and the reasons for seeking a transfer are new and quite different from the reasons for ending the confidentiality club. As

Ms. Montgomery submitted, if the defendants had sought to make the argument which D1 and D2 now make at that stage, they would have been met with an irrefutable argument in response that the derogation in Article 49(1)(e) applied because it was accepted that it was then necessary for the confidentiality club to be lifted in order to enable the claim in these proceedings to proceed.

136. Turning more specifically to the two derogations, I can first consider Article 49(1)(d). The Bank simply submitted that a transfer is necessary to enable it to comply with an order made in the context of proceedings for an investigation by the BES into frauds perpetrated by D1 on the Bank. If that is the issue with which Article 49(1)(d) is concerned, there is a strong public interest in the investigation and prosecution of fraud.

137. But Ms. Montgomery submitted that Article 49(1)(d) was not engaged because the derogation where the transfer is necessary for important reasons of public interest is concerned with what she called "public interest obligations to transmit by public authorities". It is not concerned with the public interest in pursuing crime in the sense explained in *Crest Homes*. In short, the public interest relates to the transmission itself not the underlying purpose for which the transmission is made. Ms. Montgomery said that there was no law on this point and the point was not argued out in any detail, but I am bound to say that this strikes me as a surprising distinction to make. However, in light of the view that I take of the derogation in Article 49(1)(e), it is not necessary for me to reach a conclusion on the point and, given the speed with which this case has had to be argued and decided, I decline to do so.

138. As to Article 49(1)(e), the Bank submitted that it is absurd to suggest that a transfer to Ukraine is not necessary for the establishment exercise or defence of legal claims in circumstances in which the data transfer said to be prohibited is a transfer by English solicitors to their foreign client of copies of their client's own pleadings and annexures to them.

139. I agree that there is some force in this submission, although one of the striking aspects of this case is that, notwithstanding the termination of the confidentiality club, it has been possible for the Bank to proceed with this litigation up to and beyond the conclusion of the trial without sight of schedules 4 and 5. That fact rather gives the lie to the suggestion that sight of the schedules was in fact necessary for that purpose.

140. A more compelling answer is to focus on the claim in respect of which Article 49(1)(e) is said to apply. The relevant claim is the proceeding which led to the May Order, which is an order of a foreign court seeking information with a view to the investigation of D1's fraudulent conduct.

141. Taking this approach to Article 49(1)(e) is entirely consistent with the ICO guidance, which makes clear that the exception applies if the data controller and another person involved in a legal claim have received a request for information from an overseas regulator with a view to potentially taking formal action.

142. In her submissions on this part of the argument, Ms. Montgomery concentrated on the issue of necessity. She said that the court could not be satisfied that the test was met because it was not established by the Bank that the transfer is objectively necessary for and proportionate to the stated purpose. Although she did not submit that I should rule

that the derogation did not apply, and that therefore there would be a breach if the transfer were to be permitted, she said that I cannot be satisfied on the present state of the evidence that the derogation is satisfied. She said that it appears that the point has not been properly considered, and that for this reason I should not grant the relief sought.

143. I do not agree that Ms. Montgomery is correct on this point. In my view, her submission pays insufficient regard to the way in which the court should approach the concept of necessity under Article 49(1)(e) in accordance with the ICO guidance. I think that compliance with the terms of the May Order is a targeted and proportionate way of achieving the specific purpose of acting towards the establishment exercise or defence of legal claims. The evidence shows that this case is concerned with the type of claim contemplated by the guidance, and in respect of which a foreign judicial body has satisfied itself that the documentation will be of material importance for ascertaining the facts of what is alleged to be the crime.

144. In these circumstances, I have reached a clear view that the GDPR does not provide an impediment to grant of the relief sought by the Bank. Furthermore, in the light of the discharge of the confidentiality club, and the fact that the information is in the public domain, the fact that the schedules do in fact contain personal data is not a reason which weighs heavily in the balancing exercise when determining the right order to make.

145. More generally, I have reached the conclusion that neither the point raised by D2 on the circumvention of the mutual legal assistance arrangements that the United Kingdom has with Ukraine, nor the point based on the GDPR, gives rise to an objection to the permission sought. They both give rise to considerations which ought to be weighed in the balance when considering in the exercise of my discretion whether I should refuse to grant the permission sought by the Bank, but that is the limit of their impact.

146. Pulling these threads together, I accept that the May Order is not a trump card, the phrase that was used by Hildyard J in *ACL v Lynch*, but, in my view, it has very considerable weight, most particularly when taken in conjunction with the fact that the information contained in the schedules is already in the public domain, and the confidentiality club has been terminated. In the circumstances, the fact that the automatic consequence under CPR 32.31 is disapplied does not have significant impact on the outcome now that an application for permission to grant access to the BES has been made.

147. I consider having regard to the terms of the May Order, the nature of the schedules sought to be disclosed, the information contained in them and the fact that the information is already in the public domain, the public interest in the investigation of the alleged fraud substantially outweighs the concern of the courts to control the collateral use of compulsory disclosed documentation.

148. In my judgment the consequence is that the Bank has satisfied the applicable burden for establishing that there are special circumstances for the permission they seek and that there is no prejudice amounting to injustice to D1 and D2 if the order sought is made. I shall grant relief accordingly.

(**Proceedings continued, please see separate transcript**)

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Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com