Neutral Citation Number: [2020] EWHC 610 (Ch)

Case No: FL-2019-000008

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

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 16 March 2020

Before:

Mr Justice Zacaroli

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Between:

MADISON PACIFIC TRUST LIMITED	**Claimant**
- and -	
(1) SHAKOOR CAPITAL LIMITED	**Defendants**
(2) JOINT-STOCK COMPANY COMMERCIAL BANK PRIVATBANK	

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Sonia Tolaney QC and **Nicholas Sloboda** (instructed by **Boies Schiller Flexner LLP**) for the **Claimant**
Adrian Beltrami QC and **Louise Hutton** (instructed by **Dechert LLP**) for the **First Defendant**
David Wolfson QC, Simon Atrill and **Nick Daly (**instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP)** for the **Second Defendant**

Hearing dates: 27 and 28 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is an application by the claimant, Madison Pacific Trust Limited (the "Trustee") as trustee of two series of notes (the "Notes") issued by UK SPV Credit Finance Plc (the "Issuer"), for directions.

2. The Issuer is an orphan special purpose vehicle, established for the purpose of (inter alia) issuing the Notes. The first series of Notes (the "2010 Notes") was issued pursuant to a trust deed dated 24 September 2010 (the "2010 Trust Deed"). The 2010 Notes were in the aggregate amount of US$200 million and were originally due 23 September 2015, but the maturity date was extended to 23 January 2018 (and in August 2016 a 20% amortisation payment was made). The second series of Notes (the "2013 Notes") was issued pursuant to a trust deed dated 28 February 2013 (the "2013 Trust Deed"). The 2013 Notes are in the aggregate amount of US$175 million and were due 28 February 2018.

3. The funds raised upon the issuance of both series of Notes were advanced by the Issuer to the second defendant, Joint Stock Company Commercial Bank PrivatBank ("PrivatBank"), pursuant to (1) a loan agreement dated 17 September 2010, relating to a loan of US$200 million (the "2010 Loan Agreement") and (2) a loan agreement dated 25 February 2013 relating to a loan of US$175 million (the "2013 Loan Agreement").

4. The Issuer has charged and assigned by way of security all of its interest under the Loan Agreements in favour of the Trustee.

5. The Notes are all limited recourse, payment being dependent upon the extent to which recoveries are made under the Loan Agreements. In particular, by clause 2.4 of the Trust Deed, the obligations of the Issuer are "solely to make payments of amounts in aggregate equivalent to each sum actually received by or for the account of the Issuer from [PrivatBank]". Noteholders were therefore reliant "solely and exclusively upon [PrivatBank's] covenant to pay under the Loan Agreement and the credit and financial standing of [PrivatBank]".

6. The maturity date in respect of both series of Notes has now passed, without payment of principal having been made to the Noteholders. That is a direct result of PrivatBank having failed to repay the amounts due under either of the Loan Agreements.

7. The Loan Agreements are in materially similar terms. They each contain a provision that "any dispute arising out of or connected with" the Loan Agreement "including a dispute as to the validity, existence or termination [of the Loan Agreement] or the consequences of its nullity … shall be resolved … by arbitration in London … in accordance with the LCIA Rules."

8. On 8 November 2017, the Trustee, on its own behalf and on behalf of the Issuer, served two requests for arbitration seeking awards ordering PrivatBank to pay the amounts due under the Loan Agreements. The Trustee acted

following instruction from and indemnification by certain holders of interests in the Notes (the "Instructing Group").

9. PrivatBank advanced two defences: first, that as a result of the nationalisation of PrivatBank in Ukraine and the subsequent 'bail-in', as and when the bail-in is recognised by the Bank of England pursuant to the Banking Act 2009 the obligations of PrivatBank under the Loan Agreements will have been discharged; and, second, that the Loan Agreements are unenforceable for illegality perpetrated by two former owners of PrivatBank (the "Former Owners").

10. In partial awards published in the arbitration relating to each Loan Agreement on 13 June 2019 (the "Awards"), the arbitration tribunal (the "Tribunal") concluded that (subject to the bail-in defence, the determination of which had been postponed) PrivatBank would be required to pay only certain amounts due under the Loan Agreements, for the following reasons:

    i) The Loan Agreements were indeed tainted by illegality. That illegality also infected the Notes to the extent that interests in the Notes had been acquired by the Former Owners or entities under their control.

    ii) Many of those who had acquired interests in the Notes (including the Instructing Group), on the other hand, were innocent. Not only were they not parties to the illegality, they were victims of it.

    iii) The public policy considerations that underlay the defence of illegality under English law required "…a court or tribunal to act to prevent recovery where to allow the claim would be in effect to endorse the fraud and assist in the achievement of the fraudulent purpose. Equally, it can readily be seen that a court or tribunal should aim to protect innocent investors from fraud who would be damaged despite being victims of the fraud if the claims brought for their benefit were to be refused."

    iv) The difficulty the Tribunal faced, in these circumstances, was that the entities actually suing to recover under the Loan Agreements were the Issuer and, as holder of a security interest, the Trustee. As between the Issuer and Trustee (on the one hand) and PrivatBank (on the other) illegality would appear to operate as a binary defence: each Loan Agreement was either enforceable as a whole, or not at all.

    v) The Tribunal considered whether there were other ways of ensuring that innocent holders of interests in the Notes could recover, while preventing the Former Owners and their associated entities from recovering (including applications by the Trustee to court in relation to the proceeds of any repayment of the Loans), but decided that "stopping the funds at source is in the view of the Tribunal a much more attractive and economic solution if it can be achieved."

11. Accordingly, the Tribunal fashioned its Awards as follows:

i) PrivatBank had no liability and should not be required to make any payment to the claimants (the Issuer and the Trustee) "in a sum equal to" the principal value of the Notes which as at 14 June 2019 (the "Relevant Date") were held for the benefit of the Former Owners or entities owned or controlled by them;

ii) PrivatBank was required to pay to the Trustee "an amount equal to the aggregate principal value of the Notes" held as at the Relevant Date for the benefit of the Instructing Group;

iii) The Trustee was required (by paragraph 5.2(3) of the operative part of the Awards) to pay to each member of the Instructing Group pro rata the amount of its respective interest in the Notes; and

iv) A mechanism was put in place for those persons who held an interest in the Notes but fell within neither (i) nor (ii) above, which entailed notices being published requesting such persons to make themselves known to the Trustee and provide information and evidence within 60 days. PrivatBank was given the opportunity to object to any payment being made to such persons, on the grounds that their claims are (on the findings of the Tribunal) infected with illegality. Any dispute was to be resolved by the Tribunal, and PrivatBank was required to pay to the Trustee only where PrivatBank's objection was not upheld;

v) The Trustee was required (by paragraph 6.3(3) of the operative part of the Awards) to pay to each entity referred to in (iv) above where either PrivatBank raised no objection, or the objection was not upheld;

vi) The Tribunal stated, however, that nothing in the Awards required the claimants to make any payment under paragraph 5.2(3) or paragraph 6.3(3) until the Trustee had had an opportunity to make an application to a judge of the High Court, seeking directions "in order to confirm that it will have no further liability under the Trust Deed or otherwise as a result of making the payments envisaged by [the Awards]". In the event that the Court declines to give such confirmation, then the operative parts of the Awards will cease to have effect and the Tribunal retains jurisdiction to deal with the matters raised by the claim and the illegality defence as it may consider appropriate.

12. This is the application by the Trustee which the Tribunal indicated should be made.

The holding structure of the Notes

13. In order properly to explain the problem which the Tribunal sought to resolve by its Awards, and the issues which arise on this application, it is necessary to set out in some detail the structure through which the Notes are held, and the relevant terms of the Trust Deeds. I will do this by reference to the 2010 Trust Deed, but there are no material differences from 2013 Trust Deed.

14. In relation to the 2010 Notes only one Note has been issued, a permanent global note which is deposited with a common depositary who holds it on behalf of Euroclear and Clearstream (the "Clearing Systems"). The Clearing Systems facilitate trading in the Notes by crediting interests in the global note to account holders, or "participants" in the Clearing Systems.

15. The participants hold such interests on behalf of persons in the market who wish to acquire beneficial interests in the global note, the ultimate account holders ("UAHs"). The UAHs may hold their interest directly with a participant in the Clearing System or through one or more intermediaries. All dealings in interests in the notes take place by way of book entries, in the books either of the Clearing Systems, the participants or intermediaries.

16. As a matter of English law, there is a chain of contractual and proprietary relationships between the Issuer and each UAH, as follows (see, for example, *Gullifer and Payne, Corporate Finance Law* (2nd ed) at 389-390). The common depositary has contractual rights (set out in the global note, which incorporates the terms of the Trust Deed). The Clearing System has contractual rights against the common depositary; the participants have contractual rights against the Clearing Systems; and where there are no further intermediaries the UAH has contractual rights against the participant. If there are further intermediaries between the participant and the UAH, then each intermediary has contractual rights against the entity next above it (i.e. closer to the Issuer) in the chain.

17. In addition, the contractual rights of each entity against the entity next above it in the chain are typically held on trust for the entity next below it in the chain. For example, a participant's contractual rights against the Clearing System are held by it for the benefit of the intermediary next below it in the chain. The common depositary's contractual rights under the global note against the Issuer are thus held via a trust and series of sub-trusts for each UAH.

18. In parallel, there is a similar chain of ownership in relation to the security structure, as follows:

    i) By clause 2.3 of the Trust Deed, the Issuer covenanted to pay to or to the order of the Trustee amounts corresponding to principal and interest in respect of the Notes, and the Trustee agreed to hold the benefit of that covenant on trust for the benefit of itself and the Noteholders.

    ii) By clause 4 of the Trust Deed, the Issuer charged and assigned to the Trustee, for the benefit of itself and the Noteholders all of the Issuer's rights, interests and benefits in and to the Loan Agreement. This was as security for all sums due under the Trust Deed (in particular the covenant of the Issuer to the Trustee in clause 2) and the Notes.

    iii) The immediate beneficiaries of the trust of the security are the Noteholders, in this case consisting only of the common depository as holder of the global note. It holds that interest on a sub-trust for the

> Clearing Systems, who hold on a sub-trust for the participants and so on down the chain to the UAH.

19. While the Trustee strictly speaking holds the benefit of the security for the common depositary (as the sole Noteholder) alone, the terms of the global note recognise this sub-trust structure by entitling the Trustee "to the extent it considers it appropriate to do so" to have regard to information provided by the Clearing Systems as to the identity of accountholders, and to "consider such interests on the basis that such accountholders were the permanent holder of this Permanent Global Note."

20. The arbitration proceedings were brought by the Trustee both in its own name and in the name of the Issuer (as permitted by clause 4.8.3 of the Trust Deed) by way of enforcement of the security.

21. As such, any sums received from PrivatBank represent "moneys received by [the Trustee] … in connection with the enforcement or realisation of the Security Interests" within the meaning of clause 8.1 of the Trust Deed. Accordingly, they must be applied pursuant to the terms of the payment waterfall set out in clause 8.1, as follows:

> "8.1.1 first, in payment or satisfaction of the costs, charges, expenses and liabilities incurred by the Trustee in or about the preparation, execution and performance of the trusts of this Trust Deed (including remuneration of the Trustee and of any Appointee appointed hereunder) and incurred by the Trustee or a Receiver (and any Appointee) in the realisation or enforcement of the Security Interests;
>
> 8.1.2 secondly, in or towards payment pari passu and rateably of all arrears of amounts corresponding to principal and interest remaining unpaid in respect of the Notes; and
>
> 8.1.3 thirdly, the balance (if any) in payment to the Issuer …"

The issues raised by this application

22. The principal form of relief sought in the Claim Form by the Trustee is an order that:

> "The Trustee is at liberty to make payments to or at the direction of the Noteholders (as that term is used in the Trust Deeds) or Ultimate Account Holders (as that term is used in the Awards) in accordance with the payment scheme set out at operative paragraphs 5 to 9 of the Awards."

23. Alternatively, it seeks an order that:

> "The Trustee shall not be liable to any Noteholder, Ultimate Account Holder or other direct or indirect beneficiary under the

> Trust Deeds by reason of the making or withholding of payments in accordance with the payment scheme [set out at paragraphs 5 to 9 of the Awards]"

24. I will refer to the UAHs to whom paragraphs 5.2(3) and 6.3(3) of the Awards require payment to be made as the "Entitled UAHs". I will refer to those UAHs to whom the Awards preclude any payment being made as the "Related UAHs".

25. By order of Mann J dated 20 November 2019, the first defendant, Shakoor Capital Limited ("Shakoor") was appointed to represent the Instructing Group and all other Entitled UAHs. The Trustee has sent notice of this application to the Clearing Systems, for onward transmission to UAHs, requesting UAHs to state whether they wished to participate in the application or otherwise set out their views. Aside from one UAH which initially indicated an intention to appear but, having sold its interest in the Notes, no longer wishes to do so, no UAH has indicated an intention to participate in the application, made written representations, or appeared on the hearing of the application.

26. The Trustee was represented before me by Sonia Tolaney QC and Nicholas Sloboda. Shakoor was represented by Adrian Beltrami QC and Louise Hutton. PrivatBank was represented by David Wolfson QC, Simon Atrill and Nick Daly. The principal submissions in favour of the directions were made by Mr Beltrami. These were adopted by Mr Wolfson, who made further points in support. Ms Tolaney took an initially neutral stance, but in reply made such arguments as she considered could be made against the directions, for the purposes of ensuring the Court was presented with at least some of the arguments that might be made on behalf of UAHs who might be prejudiced by the directions.

27. The principal submission of Shakoor and PrivatBank is that on the true construction of the Trust Deed the Trustee is required to make the payments to the Entitled UAHs, either pursuant to clause 8.1.1 or clause 8.1.2 of the Trust Deed. If that argument succeeds, no question of breach of trust arises.

28. In the alternative, I am asked to relieve the Trustee of any liability it may incur to any of the UAHs by reason of making payment in accordance with the terms of the Awards, whether pursuant to the inherent jurisdiction of the Court to supervise trustees (or its variant named after *Re Benjamin* [1902] 1 Ch 723) or pursuant to s.57 or s.61 of the Trustee Act 1925.

Clause 8.1.1

29. Mr Beltrami contends that the payments required to be made pursuant to paragraphs 5.2(3) and 6.3(3) of the operative part of the Awards constitute "liabilities" incurred by the Trustee in or about the performance of the Trust and incurred by the Trustee in the realisation or enforcement of the Security Interests, within the meaning of clause 8.1.1 of the Trust Deed.

30. The first step in the argument is that the word "liabilities" is a word of broad meaning, which extends to all legal obligations without limitation, save for

that found in the clause itself, namely that they were incurred in or about the performance of the Trust and in the realisation or enforcement of the security. The clause is to be construed as at the time it was entered into and not against the background of the circumstances in which it is now sought to be applied. It is irrelevant, therefore that the drafter of clause 8.1.1 would not have envisaged circumstances such as those which the Trustee currently faces.

31. Mr Beltrami submitted that there is no reason to limit its scope, for example, by reference to the identity of the person to whom the liability is owed. Nor is there any necessary link between clause 8.1.1 and clause 8.1.2: there is accordingly no reason to exclude from clause 8.1.1 liabilities on the basis that they are owed to persons for the benefit of whom payments in respect of the Notes are to be made under clause 8.1.2.

32. I accept these submissions. The strongest argument to the contrary is that, given that payments to Noteholders in discharge of arrears due under the Notes are governed by clause 8.1.2, such payments cannot have been the intended subject-matter of clause 8.1.1. Even though the recipients of the payments, the UAHs, are not those entitled to any payment made pursuant to paragraph 8.l.2, payments made under that provision are for their benefit and, by clause 7.4 of the Trust Deed, the realisation of the security and application of the proceeds in accordance with clause 8 will have the consequence of satisfying the Issuer's payment obligations under the Notes. In other words, however broad is the meaning of "liabilities" under clause 8.1.1, it cannot extend to a liability to Noteholders of amounts due under the Notes.

33. Although at first sight this argument is compelling, I do not think it is right. The circumstances in which the Trustee might come under a liability within the meaning of clause 8.1.1 to pay either the Noteholders or UAHs any amount in respect of sums due under the Notes are extremely rare. Indeed, it is difficult to think of any circumstances in which that would be possible other than in a case materially similar to this one. That is because a liability to pay an amount due under the Notes could rarely be characterised as having been "incurred by the Trustee in the realisation or enforcement of the Security Interests".

34. It is capable of being so characterised in this case only because of the conditionality attaching to the payment to be made by PrivatBank *to* the Trustee under the Awards. The Awards have resulted from steps taken by the Trustee to enforce the security. As a result of the form of Awards fashioned by the Tribunal the Trustee can receive payment under the Awards only if it accepts the liability to pay the UAHs imposed upon it by paragraphs 5.2(3) and 6.3(3) of the operative parts of the Awards. Accordingly, that liability is properly characterised as having been incurred in or about the "performance of the trusts of this Trust Deed" and "the realisation and enforcement" of the security.

35. For these reasons I accept that while it is counter-intuitive to consider that a liability to make payment for the benefit of the holders of the beneficial interests in the Notes could fall within clause 8.1.1, on the peculiar facts of this case, it would do so.

36. The next question is whether the Trustee is in fact under such a liability as a consequence of the Awards. If looked at in isolation, paragraphs 5.2(3) and 6.3(3) of the operative parts of the Awards clearly impose obligations to make payment and would thus constitute a liability. They must, however, be read together with paragraphs 10 and 13. Paragraph 10 provides that:

> "Nothing in this Partial Award shall require the Claimants [which includes the Trustee] to make any payment pursuant to paragraph 5 or 6.3(3) until the Trustee has had an opportunity to make an application seeking directions to make those payments from a Judge of the High Court in England and Wales, in order to confirm that it will have no further liability under the Trust Deed or otherwise as a result of making the payments envisaged by this Partial Award. For the avoidance of doubt, such application shall not be a challenge to the terms of this Partial Award or to the Trustee's entitlement or obligation to make the payments anticipated hereunder."

37. Paragraph 13 provides that:

> "If, on the final determination of such an Application, the Court declines to direct the Trustees to make the payments specified in this Partial Award, paragraphs 1 to 9 hereof shall cease to have effect in their entirety."

38. Mr Beltrami and Mr Wolfson both submitted that upon a proper analysis of the provisions of the Awards, the Trustee is under an existing liability to make the payments envisaged by paragraphs 5.2(3) and 6.3(3). They accept that the liability is contingent, on the outcome of the bail-in issue which has yet to be resolved by the Tribunal, and defeasible, because if this Court declines to direct the Trustee to make the payments specified in the Awards, then the Awards (and all payment obligations in them) simply fall away. Nevertheless, they submit, until such time as the event referred to in paragraph 13 arises, the Trustee <u>is</u> subject to the liabilities in paragraphs 5.2(3) and 6.3(3).

39. I would accept that if the Trustee receives payment under the Awards then it will at that point be subject to a liability within the meaning of clause 8.1.1. I do not accept, however, that it is currently subject to such a liability. That is because the liability is also subject to the further contingency that the Trustee receives payment. Unless the Trustee receives payment from PrivatBank the obligations under paragraphs 5.2(3) and 6.3(3) of the operative parts of the Awards do not arise and there would in any event be no proceeds of enforcement to which clause 8.1 of the Trust Deed could apply.

40. In this case, the enforcement process has been paused pursuant to that part of the Awards which permits the Trustee to seek directions from this Court. Even without the pause button being pressed in that way, I consider that the Trustee would in any event not be *bound* to receive payment from PrivatBank under the Awards. As with a judgment of a court, the fact that the Trustee has the benefit of it does not mean that (as between it and the judgment debtor) it is bound to receive payment. Such an issue would rarely arise and does so in

this case only because of the condition attached to receiving payment which the Tribunal has imposed.

41. Accordingly, although not quite framed in this way by the Awards or the Claim Form, I consider that the essential question for the Trustee is whether it is consistent with its duties under the Trust Deed to continue the enforcement action it has started, by accepting payment under the Awards and thus incurring the liability to apply all of the proceeds of that enforcement in favour only of the Entitled UAHs.

42. That question is not answered by the conclusion (which, as I have noted, I accept) that once the proceeds of enforcement against PrivatBank are in its hands the Trustee will be subject to a liability, falling within clause 8.1.1 of the Trust Deed, to apply them in that way.

43. I will return to this question after considering the alternative construction arguments advanced by the parties.

Clause 8.1.2

44. As noted above, clause 8.1.2 provides for the application of funds received by the Trustee upon enforcement of the security to be applied in or towards payment "pari passu and rateably" of all "arrears" corresponding to the sums remaining unpaid in respect of the Notes.

45. Mr Beltrami submitted that if the obligation to make payment does not fall under clause 8.1.1 then it falls under clause 8.1.2, on the basis that the only "arrears" to which that clause now applies are those in favour of the Entitled UAHs.

46. The argument runs (in summary) as follows. "Arrears" means amounts that are both due *and payable*. That clearly encompasses amounts due and payable by the Issuer, but it is also capable of encompassing amounts due and payable by the Trustee. There are no amounts due and payable by the Issuer in respect of the Notes, because (i) (as a consequence of the limited recourse nature of the rights of Noteholders) the Issuer's obligation to pay is conditional on it receiving funds from PrivatBank and, (ii) since the Awards require payment to be made only to the Trustee, the Issuer will not receive any funds from PrivatBank. The Awards do create an obligation on the Trustee, but that is limited to the obligation to pay the Entitled UAHs. Accordingly the only "arrears" that exist within clause 8.1.2 so far as the Trustee is concerned, are the sums due and payable by it to the Entitled UAHs.

47. I do not accept this argument, which requires a strained and unnatural reading of clause 8.1. In my judgment, "arrears" in the context of clause 8.1.2 is not intended to be limited by reference to the extent to which amounts are actually *payable* by the entity required to make payment (whether it be the Issuer or the Trustee). Rather, it is intended merely to identify the amounts of principal and interest which are outstanding from the perspective of the Noteholders, i.e. which have not been repaid to the Noteholders. That is clear from the words

of the clause itself, which links "arrears" to the amounts "remaining unpaid" in respect of the Notes.

48. That view is reinforced by the fact that paragraph 8.1 is intended to apply wherever the Trustee has enforced its security over the debt due from PrivatBank. Whenever it does so, it will be the Trustee, and not the Issuer, that receives funds from PrivatBank. Thus, if Shakoor's argument were correct, clause 8.1.2 could never be engaged where the Trustee takes such enforcement: there would be no "arrears" owed by the Issuer (as it had never received any funds so as to render amounts due under the Notes payable by it) and there would be no "arrears" owed by the Trustee (as nothing imposes any liability on the Trustee to make payment to the Noteholders from the proceeds of security other than clause 8.1.2 itself). The fact that Shakoor's argument would prevent 8.1.2 operating at all in circumstances (recovery of proceeds of enforcement of security by the Trustee) that clause 8.1 as a whole was clearly intended to cover is a compelling indication that the argument is wrong.

49. That conclusion is reinforced when it is appreciated that payment by PrivatBank under the Loan Agreements to or to the order of the Trustee "…shall pro tanto satisfy the obligations of the Issuer in respect of the Notes…" (see clause 13 of the Trust Deed). As a result of this provision, any payment by PrivatBank to the Trustee (whether pursuant to enforcement of the security or otherwise) would automatically discharge the Issuer, and thus prevent there being "arrears" due from it to the Noteholders.

50. Mr Beltrami suggested that Noteholders would ultimately recover because if the proceeds were not paid under clause 8.1.2 then they would be paid to the Issuer under clause 8.1.3, at which point the Issuer *would* have received proceeds such as to give rise to *its* obligation to make payment under the Notes. I do not think the drafter intended funds to be sent round the waterfall twice in this way. Rather, the drafter intended that any sums payable to the Issuer under clause 8.1.3 would be for the Issuer's own account. Indeed, it is not immediately obvious how sums paid to the Issuer under clause 8.1.3 would remain subject to the security created by the Trust Deed at all, since the subject matter of the charge in clause 4 is limited to the rights under the Loan Agreements, the sums in the Lender Account and the interest in Permitted Investments. This further supports the conclusion that "arrears" in clause 8.1.2 refers to the amounts unpaid from the perspective of the Noteholders: it is only when the Noteholders have no further right to any principal or interest that the Issuer should receive anything under clause 8.1.3.

51. In the further alternative, it was submitted that there was no obligation to distribute proceeds of enforcement under clause 8.1.2 *pari passu*, because the entitlement of Noteholders was to receive payment upon actual receipt by the Issuer from PrivatBank and then only "subject to the conditions attaching to" any such receipt. I do not accept this argument. The phrase relied on appears in clause 2.2 of the terms and conditions of the Notes, under the heading "Limited Recourse", and follows on from the statement that sums actually received by the Issuer will be paid *pari passu* to all Noteholders. It cannot have been intended, in my judgment, to remove the right to *pari passu* distribution that had been given by the immediately preceding words in that

clause. In any event, (i) it deals with payments to Noteholders, whereas the payments under the Awards are to be made to UAHs and (ii) it deals with payments by the Issuer, whereas the sums to be paid – both under the Awards and under clause 8.1 of the Trust Deed – are payable by the Trustee.

Trustee's powers and duties in connection with enforcement of the Security

52. I return to the question I posed in paragraph 41 above, namely whether the Trustee may, consistent with its duties under the Trust Deed, continue enforcement action which will result in it assuming an obligation to apply all of the proceeds of enforcement in payments to the Entitled UAHs alone.

53. The Trustee has an unfettered discretion as to the manner in which it enforces the security: see in particular clause 7.1 of the Trust Deed (which permits the Trustee after an Event of Default under the Loan Agreements "…at its discretion … to institute such steps, actions or proceedings as it may think fit to enforce the rights of the Noteholders…") and clause 4.8 and Schedule 10 (which provide for a similarly wide discretion in relation to calling in, collecting, selling or otherwise dealing with the Loan after a Relevant Event has occurred).

54. It must, however, exercise that discretion subject to its overarching obligation to act in the interests of all the Noteholders: see clause 4.1 of the Trust Deed (which provides that the rights under the Loan Agreements are charged and assigned to the Trustee "for the benefit of itself and the Noteholders"); clause 17.1.6 (which requires the Trustee, whenever it is to have regard to the interests of the Noteholders, to "have regard to the interests of the Noteholders as a class"); and clause 8.1.2 (which, as noted above, requires the funds received by the Trustee to be applied, after costs, charges, expenses and liabilities of the Trustee, *pari passu* to the Noteholders).

55. The trust on which the Trustee holds the security is (in the first instance) a bare trust under which the interests of the Noteholders, as beneficiaries, are fixed by reference to the face value of their Notes. In this case the picture is then complicated by the beneficial interest in the Notes being divided up via the sub-trust structure referred to above. Each of those sub-trusts is also a bare trust, the interest of each UAH being fixed by the amount of their interest in the Notes. There is no question of any discretion vesting in the Trustee in this respect.

56. Conceptually, therefore, the Trustee may be said to hold its rights under the Loan Agreements for the ultimate benefit of each and every one of the UAHs, owing each of them an obligation to recover the amount of the Loan required to repay that UAH. The duty to each UAH is qualified, however, by the duty owed to all other UAHs. In practice, that means that the Trustee cannot take action to the benefit of one UAH which would prejudice others. It could not, for example, under normal circumstances take all the available proceeds of security and apply them in payment of some only of the UAHs. Nor could it take such proceeds as were currently available on a partial enforcement of the security and pay them to some only of the UAHs, if there was any doubt over being able to enforce the remainder of the security. In each case, that would

amount to preferring the interests of some beneficiaries over the interests of others.

57. In considering whether accepting the payments, and the attached obligations, under the Awards would fall foul of its duties, it is first necessary to identify what real alternatives the Trustee has to doing so.

58. If the Court refuses to grant the relief sought on this application then the matter is automatically referred back to the Tribunal. At that stage, in light of its clear conclusion that no recovery can be made by or for the benefit of any of the Related UAHs, there are only two realistic options. Either the Tribunal concludes that the Trustee's action against PrivatBank fails altogether by reason of illegality or it provides for an alternative solution to ensure that the Related UAHs recover nothing which – as it acknowledged at paragraph 128 of the Awards – would involve considerably more delay and expense given the locations, resources and conduct of those who might be targeted for relief. Importantly, in neither case would any recovery be made by or for the benefit of the Related UAHs.

59. It is also instructive to consider the rights of the Noteholders where the Trustee simply refrains from taking action. The final sentence of clause 7.1 of the Trust Deed provides that while Noteholders may not generally enforce the provisions of the Trust Deed, they may do so if "the Trustee, having become bound to proceed in accordance with this Trust Deed, has failed to do so within a reasonable time and such failure is continuing." Enforcement of the provisions of the Trust Deed includes taking action pursuant to the security over the Loan Agreements to enforce payment by PrivatBank.

60. The Trustee becomes bound to take action if instructed by Noteholders holding at least one-quarter in principal amount of the Notes outstanding, provided it is indemnified to its satisfaction. This has already been satisfied in this case, where the Trustee took enforcement action upon the instruction of the Instructing Group. While clause 17.2.3 permits the Trustee to refrain from doing anything that would or might in its opinion be contrary to any law or which it may not have power to do, I do not think that would be engaged, since the issue is not whether the Trustee lacks the power to enforce the security, but whether it would be a proper exercise of its discretion where the result would be to benefit some only of the UAHs.

61. There would be practical hurdles to overcome, caused by the fact that there is only one Noteholder (the common depository). There are, however, circumstances in which the global note may be converted into multiple definitive notes to be held by the participants or, with the co-operation of the participants and the relevant UAHs, the UAHs themselves. The terms of the global note entitle the holder of the Note to request the exchange of the global note for definitive notes in defined circumstances. In the case of the 2013 Notes, those circumstances already exist (one of the circumstances being the occurrence of a "Relevant Event", which includes the non-payment by the Issuer of principal or interest when the same becomes due). In the case of the 2010 Notes those circumstances do not exist, but in any event those provisions define only the circumstances in which the Noteholder can *require* exchange,

and there does not appear to be anything in the terms of the global note which precludes the Issuer from *offering* to replace the global note with definitive notes, assuming the persons to whom the definitive notes are to be issued can be ascertained.

62. If the Trustee was in fact bypassed in this way, then it would create privity directly between the individual holders of the Notes (whether each UAH or an account holder acting on their behalf) and PrivatBank. In that case, as Mr Beltrami submitted, the conclusion of the Tribunal in the existing Awards would, to the extent that any Related UAH itself sought to pursue action against PrivatBank, prevent them from doing so by virtue of issue estoppel.

63. Where legal action is brought by a trustee, for example to recover trust property from a third party, then a decision adverse to the trustee is binding on the trustee and all of the beneficiaries of the trust, so as to prevent a beneficiary of the trust bringing its own subsequent claim against the third party. That is because there is a sufficient degree of identification between the interests of the beneficiaries and the interests of the trustee: see *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510, per Megarry VC at p.515, cited with approval in *Lemas v Williams* [2013] EWCA Civ 1443, per Arden LJ at [40].

64. I was initially concerned that, in this case, the effect of the solution which the Tribunal has imposed creates a conflict between the Entitled UAHs on the one hand, and all other UAHs on the other. As such, it might be said that there is insufficient degree of identification (for the purposes of creating an issue estoppel) between any one UAH and the Trustee.

65. I am persuaded, however, that that is not the correct approach. Rather, it is necessary to focus on the precise issues determined by the Tribunal and the extent to which there is sufficient degree of identification between the Trustee and each UAH in relation to them. The Trustee sought payment under the Loan Agreements for the benefit of all UAHs. The Tribunal's findings, as to (i) the existence and nature of the illegality and (ii) public policy requiring it to act so as to prevent recovery where to allow the claim would enforce the fraud and assist in the achievement of the fraudulent purpose, are ones in which the Trustee and all UAHs had a sufficient degree of identification. That is sufficient to preclude any of the Related UAHs from being able to recover anything (directly) from PrivatBank. On the other hand, there would be no bar to the Entitled UAHs from recovering in full.

66. In short, the position the Trustee is faced with is that in no circumstances can it recover anything for or on behalf of the Related UAHs and it can only make any recovery at all if it is prepared to accept that whatever it receives can be paid only to the Entitled UAHs. All parties urged on me the commercial and practical sense in making the order sought in the Claim Form. It would be a "significant step" if the court were to reach a conclusion which led to innocent UAHs who invested in good faith in an English law note instrument being unable to recover on their investments, solely because of the fraud of other non-related noteholders.

67. I do not think I am driven to that conclusion. Specifically, in the special circumstances of this case I do not think that the Trustee's duty to act in the interests of all UAHs precludes it from accepting the payments under the Awards. Importantly, although its actions would in fact result in benefit to some only of the UAHs, that would not be *at the expense* of the other UAHs, because the Trustee is simply incapable of doing anything to benefit them as a result of a legal impediment. The Related UAHs' inability to recover (and the Trustee's inability to recover on their behalf) is not due to any action (or inaction) of the Trustee, but is due to the decision of the Tribunal. In other words, the fact that the Trustee cannot recover on behalf of the Related UAHs should not prevent it from recovering on behalf of the Entitled UAHs, where doing so does not itself prejudice the Related UAHs.

The late-responding UAHs

68. So far, I have focused on the position of the Related UAHs. The solution imposed by the Tribunal also arguably prevents those UAHs who failed to respond by the deadline imposed by the Tribunal from recovering under the Awards. The position is not certain, and at least one former UAH (which had intended to appear on this application, but then sold its interest in the Notes) indicated an intention to argue before the Tribunal that no absolute bar had been imposed.

69. There is therefore the possibility that some UAHs who are not in fact Related UAHs will still be prevented from recovering. These fall into two categories: those who have yet to come forward at all and those that have come forward but only after the deadline set by the Tribunal.

70. Nevertheless, I do not think this alters the conclusion that the Trustee would be acting consistently with its duties under the Trust Deed by accepting payment, and the attached obligation, under the Awards. The Trustee's actions would be no more taken at the expense of the late-responding UAHs than its actions would be at the expense of the Related Noteholders. In neither case does the Trustee use any proceeds of enforcement that were referable to the relevant UAHs' interest under the Notes, nor is it a consequence of its own action or inaction that precludes the relevant UAHs from recovering. On the assumption that the terms of the Awards do prevent a late-responding UAH from recovering at all, then it is the Awards, and not any action of the Trustee, that has that consequence. The decision of the Tribunal as to what constitutes an "Entitled UAH" is binding on the Trustee and all UAHs (including where that is by reference to a time-bar on claims imposed by the Tribunal), in the same way as its findings as to illegality and its consequences.

71. There is one potential difference, however. If, as was suggested before me, there remains some uncertainty as to the impact of the deadline imposed by the Tribunal, then there remains the possibility that the late-responding UAHs could persuade the Tribunal that they are to be regarded as Entitled UAHs for the purposes of benefitting from the Awards. If so, then the Trustee's duty to act in the interests of each UAH, to the extent it is practically able to do so, would require the Trustee to advance such arguments as can be made before the Tribunal on behalf of late-responding UAHs.

Conclusion

72. For the above reasons, I conclude that the Trustee would not be acting in breach of trust if it accepts the payments from PrivatBank under the Awards and makes the payments to Entitled UAHs in accordance with the payment mechanism set out in the Awards. On that basis, I am prepared to make the order sought in paragraph 1 of the draft Order.

73. In those circumstances, I need not address the alternative arguments based on the Court's inherent jurisdiction to relieve the Trustee from liability for breach of trust.