

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: Friday, 15th July 2022

Before:

MR. JUSTICE WAKSMAN
Remotely via MS Teams

Between:

QATAR AIRWAYS GROUP QCSC

Claimant

- and -

AIRBUS SAS

Defendant

MR. PHILIP SHEPHERD QC, MR. BAJUL SHAH and MS. KATHLEEN DONNELLY
(instructed by **Crowell & Moring LLP**) for the **Claimant**
MR. RUPERT ALLEN (instructed by **Clifford Chance LLP**) for the **Defendant**

APPROVED JUDGMENT
ON APPLICATION

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE WAKSMAN:

Introduction

1. I have come to a clear view on this application so I am going to give judgment now. This case concerns a well-publicised dispute between Qatar Airways Group QCSC ("Qatar") and Airbus SAS ("Airbus") which had its genesis in problems or features affecting the surface of the airframes of at least 23 of Qatar's A30 aircraft, which are presently grounded in Qatar. It is not necessary to go into further detail save to say that this is a very substantial and complex piece of litigation which I decided, on 17th June, should be tried on the basis of an expedited trial for reasons which I articulated then.
2. To that end, I ordered a series of directions leading up to a trial which will take place in a window of May to July of next year, 2023. Without going into the finer points of the arguments over trial estimates, on any view I think it is likely to take some eight weeks. To that end, I directed a timetable which is tight, though properly and fairly manageable by the parties provided all the dates are kept to.
3. So far as that is concerned, I should just outline some of those directions because they are highly pertinent to the present application. There are some amendments to be made, but then there is to be a process of agreeing the disclosure review documents and the list of issues all to be done by the Long Vacation; then the substantive extended disclosure by list together with the production of the documents is to take place by 4 pm on 16th September. In addition to that, and by an order which I made at a later hearing on 7th July, there was to be early disclosure which is to take place on 5th August.

4. In addition to that, the order of 7th July had the process of witness statements and expert evidence all starting this year hard on the heels (if I can put it like that) of disclosure, which is critical to the further steps. That is not least because in relation to the fundamental issues at play, though not all of them, the relevant documents are in the possession of Airbus and will not have been seen before. It was also made clear by 7th July that in relation to the technical matters which lie at the heart of the A350 litigation, they are all held on discrete Google drives. It is not clear to me whether they are located on servers in France -- there is a suggestion they are not -- or indeed whether they are entirely Cloud based; but they are going to be the main and important repository for the disclosure to be given by Airbus and, as I say, it is a critical step not only in its own terms but for the case going forwards. What all of that means is that the first tranche of disclosure, which has been organised now for 6th August is some three weeks away.

This application

5. Airbus, of course, is a French company. Although this case commenced in December 2021, Airbus's solicitors raised for the first time the issue which is the subject of today's application in a witness statement from Mr. Acratopulo dated 25th May 2022 and paragraphs 36 and 47 of that witness statement made a brief reference to the effect of what I shall call the "French Blocking Statute" because that is what most people call it; that was in relation to disclosure but in the context of the timing for trial with the suggestion that it may have an adverse impact on the completion of directions to trial. That is the way in which it was first referred to.
6. Airbus have taken a different view by now, as I shall explain later, since they say that the way to deal with the French Blocking Statute will not have any impact on the trial

timetable whatsoever. However, that point then having been raised and Qatar then prompting Airbus to deal with how the question of the French Blocking Statute might play out, the next thing that happened was that on 22nd June Airbus said that it was a problem and that it was proposing a way to deal with it; this involved issuing a letter of request from this jurisdiction to the Ministry of Justice in France. Qatar immediately objected to that course and it is noteworthy that when I had the hearing on 7th July, Airbus was still not in a position to ask me to immediately take that forward or to list it as an agenda item on that day. Indeed, it was I who was concerned, after speaking to counsel, and realising that there was a dispute bubbling under, that this had to be got to grips with, not least because of the impending disclosure dates. I therefore said that this was a matter which had to be resolved as soon as possible with whichever counsel were available to be dealt with today, which is 15th July; I organised a tight timetable for the exchange of evidence and skeleton arguments which has been complied with.

7. So that is the genesis for what then happened, which was that on Monday this week, 11th July, Airbus issued its application for a letter of request which it said was the way to deal with, and the only way to deal with, what was said to be the problem arising by virtue of the French Blocking Statute. That approach is strongly resisted by Qatar, which contends that, as has always been the case, and as held by a number of courts here, there is no real risk of any prosecution brought against Airbus as a French entity by French authorities under the French Blocking Statute. Furthermore, it contends that the letter of request route will not be speedy and efficient but will be cumbersome, time-consuming and may have some uncertainties about its operation. That is the background to this judgment and this hearing.

8. For the purpose of this application, I have before me, adduced by Airbus, a second witness statement of Mr. Hennessee, the Vice-President and Head of Litigation for Airbus, and a first witness statement of Mr. Baudesson, both dated 11th July. Mr. Baudesson is a partner in the Paris office of Clifford Chance, who act for Airbus in this litigation.
9. Opposing that evidence from Qatar is a witness statement from Mr. de la Plaigne dated 13th July. He is a partner in the Paris office of Clyde & Co who are not acting for Qatar. I should add that Mr. Allen has informed me that Mr. Baudesson, although a partner in Clifford Chance and having acted for Airbus in other cases, is not presently engaged in acting for it in this case.

The French Blocking Statute

10. The French Blocking Statute, which I shall now refer to as the "FBS" was passed in 1968. One of the drivers behind it, perhaps the main one, was to exert control over French persons who were otherwise the subject of what were regarded as wide-ranging and oppressive discovery orders and interrogatory orders made against them or in relation to them by the courts in the United States. In its 54-year history there has only been one prosecution under the FBS. That was in 2007 in the case of Christopher X to which I shall return later.
11. The text of the FBS in translation which I take from Mr. de la Plaigne's witness statement is this:

"Article 1

Subject to international treaties or agreements, it is prohibited for any natural person of French nationality or habitually residing on French territory and for any officer, representative, agent or servant of a legal person having its head office or an establishment in France from

communicating in writing, orally or in any other form, in any place, to foreign public authorities, documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which is such as to undermine the sovereignty, security, essential economic interests of France or public order, specified by the administrative authority as necessary.

Article 1 bis.

Subject to international treaties or agreements and applicable laws and regulations, any individual is prohibited from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, with a view to establishing evidence in foreign judicial or administrative proceedings or in relation thereto."

12. Article 1 is almost certainly irrelevant here. Mr. Baudesson says that is because the expression "foreign public authorities" would not encompass an English court who has made the underlying disclosure order. Mr. de la Plaigne disagrees and so do I. Absent any further definition, it seems to me that it could well encompass a foreign court which has made the underlying order. All of that said, the debate probably does not matter because I cannot see that the disclosure ordered here, or at least the vast majority of it, would be such as to undermine the sovereignty, security, essential economic interest of France.
13. Accordingly, like the parties, I will concentrate on Article 1 bis. There is no dispute that, on its face, it would apply to the disclosure to be provided by Airbus, as a French entity, in terms of the nature of that disclosure. There is a separate question, however, as to whether that disclosure is actually to come from France albeit that the disclosing party is a French company. That is a point raised by Qatar which I will deal with hereafter.
14. The penalty for breach of either article is in the case of individuals €18,000 as a fine and/or six months in prison and for companies it is €90,000.

The Law

15. It is trite law and, in any event, it is common ground that in relation to procedural matters like disclosure, the governing law is the *lex fori*, i.e. English law. This court is not bound by the laws of other jurisdictions in relation to its own procedural matters. Thus, by way of example, the fact that in order to perform an obligation to make disclosure here may involve a breach of some rule of law in another jurisdiction does not affect the ability or the jurisdiction of this court to make that order and it does not displace it. There are numerous statements to this effect and I will just refer to two of them.

16. First of all, in *Brannigan* Lord Nicholls said that:

“Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.

"This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings.”

17. And then as Hoffmann J (as he then was) put it in *McKinnon*:

“... I am not concerned with the discovery ... from ordinary parties to English litigation who happen to be foreigners. If you join the game you must play according to the local rules. This applies not only to plaintiffs but also to defendants who give notice of intention to defend. ... adherence to local rules requires also forbearance from taking advantage of more advantageous rules available elsewhere. Of course, a party may be excused from having to produce a document on the grounds that this would violate the law of the place where the

document is kept ... But, in principle, there is no reason why he should not have to produce all discoverable documents wherever they are.”

18. Next, and again this is common ground, the court nonetheless has a discretion not to make the contemplated order because of the risk of prosecution elsewhere. That has just been adverted to in the passage I have just read out from *McKinnon* but in *Servier* the Court of Appeal upheld the exercise of such a discretion or the non-exercise of it by Roth J in the *National Grid* case and Henderson J in the *Servier* case at first instance. In both of those cases, they declined to inhibit the usual disclosure and production process on the basis of a risk of prosecution under the FBS.

19. As Rimer LJ put it at paragraph 99:

“The orders in question were, respectively, for the provision of further information and disclosure. They were orders of a procedural nature in the pending claims and their making was, therefore, governed by the *lex fori*, namely the law of England and Wales. The domestic authorities to which we were referred show that the fact that such orders might, if complied with, expose the parties subject to them to the risk of prosecution under a foreign law provides no defence to their making. The English court still retains a jurisdiction under the *lex fori* to make them, although it has a discretion as to whether to do so in the particular circumstances. In the present cases, both Henderson and Roth JJ correctly recognised that, and they exercised their discretion to make the orders now under challenge.”

20. In *Servier* itself it was recorded in the Court of Appeal that although the respondents had said that giving the disclosure would expose the French *Servier* companies to a real and significant risk of a criminal sanction, that was rejected both below and by the Court of Appeal. The exercise or the non-exercise of discretion by Roth J and Henderson J was emphatically upheld. At this stage, I am simply dealing with the question of law as to the existence of the discretion.

21. But it is also worth noting the observations made by Neuberger J (as he then was) in the *Morris* case where he says this:

“Although not necessary to my decision, I agree with Mr. Sheldon’s submission that the Court should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved.”

That said, of course, each case turns on its own facts and I have to exercise my discretion on the basis of the materials and the submissions before me.

22. I should then make a reference to a case which was not dealing with the FBS but which, nonetheless, dealt with the question of taking into account possible penalties under foreign law and that is the *Bank Mellat* case. At paragraph 63 Gross LJ in the Court of Appeal pulled the threads together of what he said were the relevant principles. This was a case about the respondent bank giving out information about its customers would be a breach of local Iranian law and expose them to penalties and the question was how to deal with the information and a way was found there involving a confidentiality ring. However, the important point is what Gross LJ said at paragraph 63 was this:

“(i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the 'home' country of the party the subject of the order.

"(ii) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here English law. Local rules apply; foreign law cannot be permitted to override this Court’s ability to conduct proceedings here in accordance with English procedures and law.

"(iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind ... This Court is not, however, in any sense precluded from doing so.

"(iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand

weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

"(v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

"(vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."

23. There is nothing in the decision of *Bank Mellat* or the analysis of Gross LJ to suggest that the approach of the court is any different to the way in which it had been described in previous cases such as *McKinnon*, *Brannigan*, *Morris* and *Servier*, all of which were cited with approval in the paragraphs leading up to paragraph 63.
24. I will have to say a little more about the case-law below because it does, at the least, provide some useful examples of the sorts of matters that are relevant to the exercise of my discretion in cases of this kind concerning the FBS. There does not appear to be, as far as I am aware, any case where disclosure was not ordered or some other procedure was adopted instead of it on the basis of a risk of prosecution under the FBS.

The Evidence about the FBS

25. Let me say something just in general terms about the evidence of the two French lawyers. Both of them have provided witness statements rather than expert reports under CPR 35 and in an interlocutory matter of this kind dealing with foreign law and also some simple factual and practical matters there can be no objection to that. I

should say that in general I found Mr. de la Plaigne's witness statement more persuasive and comprehensive than Mr. Baudesson. Indeed, in one area, that is the obligation to disclose to the SISSE, he appears to have overlooked a relevant provision.

26. Secondly, Mr. Baudesson cannot be said to be independent because he is working for Clifford Chance who are Airbus's solicitors. That does not mean that he is setting out to tell untruths or he has told untruths, but there is always the risk of advocating for one's own client. That is a factor, although I am less impressed by his evidence on the substantive matters in any event.
27. Against that background, let me turn to the first matter, which is the risk of prosecution. The primary consideration of the courts historically when dealing with the FBS issue has unsurprisingly been the reality or otherwise of the risk of prosecution under the FBS of the individual or company concerned. As already noted, there has only been one successful prosecution. That involved *Christopher X*, a French lawyer who used deception unilaterally and without any mandate to obtain information from a French company in order to support a US disclosure order. He was prosecuted and fined €10,000. In *Servier*, at first instance, Henderson J described the case of Christopher X as "exceptional" because of the factors I have just mentioned and that was a view endorsed by the Court of Appeal in the same case.
28. There is, of course, no rule of law as to the size of any risk before it can or even should be determinative or treated as a serious factor in the exercise of the court's discretion. But in *Servier*, the Court of Appeal at one point dealt with the argument that there was a real and significant risk – that is how the parties seeking to resist the

normal disclosure put it – and otherwise the judges, as I have shown, have made a distinction between what is real in the sense of actual, and what is not.

29. In his witness statement, Mr. Baudesson says that the risk now was real and not theoretical. It is plain from his evidence that his reasoning for saying this depends on what he says have been important developments since 2016. It is clear from his witness statement, absent those developments, he would be forced to accept that the risk was purely theoretical and not real. Accordingly, I need to consider those developments.

30. First, there was the establishment in 2016 of a new French anticorruption agency. Under the relevant statute, it is empowered to ensure compliance with the FBS in the context of monitorships of French companies. These arise, for example, where there has been a settlement of corruption, investigations or charges, as happened with Airbus, which was the subject of investigation by the French, UK and US anticorruption authorities. Deferred prosecution agreements were entered into with it and Airbus has been the subject of a monitorship since 2020. The joint investigation team, which included the French PNF and the UK's SFO shared information between them and declared that Airbus had sent the information only to PNF, which was then sent by PNF to the SFO so as to comply with the FBS. That is a point that is made by Mr. Baudesson. However, Mr. de la Plaigne points out that all of this was in the context of anticorruption and especially extra territorial investigations focusing on corruption. They are not dealing with standard forms of disclosure in civil proceedings such as this. I agree with him that the declarations made here do not mean that a theoretical risk of prosecution under the FBS has now become real in the context of this litigation.

31. Mr. Allen, to whom I am indebted for his submissions, sought to persuade me that the AFA development was none the less a real one because there was a reference to the FBS. I see that but, as I have already indicated, it seems to me that this was linked very clearly to the whole question of anticorruption.
32. Next Mr. Baudesson refers to the creation of the Ministry of Economies Information and Economic Security Service, SISSE, in 2016. Part of its remit was to act as an information resource to French companies facing disclosure requests which would be in breach of the FBS. By Article 3 of a decree made in February 2022, the approval of SISSE was required before giving disclosure which would be covered by Article 1 of the FBS. Mr. Baudesson also said that the French companies had to inform the SISSE without delay upon the receipt of a request from a foreign public authority. A further order of decree of 7th March 2022 provided that the information had to be given to the SISSE when a French company received such a request. On Mr. Baudesson's analysis, Article 1 was not relevant here. I have already referred to that. But, he says, all of this still shows the increased importance of the FBS.
33. However, what he omitted to say is that this reporting requirement appears to me, as it did to Mr. de la Plaigne, in fact to apply to the putative provision of information, whether under Article 1 or under Article 1 bis (see the relevant provisions which are cited by Mr. de la Plaigne at paragraph 27 of his witness statement).
34. In so far as that was concerned, Mr. Allen came back on the point -- I should say this, that the essential reason why Mr. de la Plaigne took the view that the SISSE reporting requirement would be triggered by anything that fell under Article 1 bis was because if one looks at the wording of the relevant provisions which he has set out in detail,

there is reference there to the reporting both in relation to Article 1 and in relation to Article 1 bis.

35. It is perfectly true, as Mr. Allen points out, that there is then a reference, for example, in Article 2 of the February 2022 decree, which refers to both Articles 1 and 1 bis to say that persons subject to the prohibition under 1 and 1 bis shall refer any request for such communication issued by a foreign public authority or by any person acting on its behalf or in order to respond to its request. There is no rubric there that goes on to refer to undermining sovereignty, so it is clearly not limited to Article 1 in that sense.
36. Secondly, it gets back to the point I referred to earlier on. It is very difficult in that context to see that a foreign public authority does not include a court when it is remembered that although this is a consequence of the obligations between the parties to give disclosure, the fact is that the orders for disclosure are made by the court and, more importantly, here the putative letter of request which would trigger the need to report to SISSE is a letter of request which in terms comes from the Queen's Bench Division of the High Court of Justice and is approved and executed by The Senior Master. Indeed, the requesting judicial authority is said to be The Senior Master. I do not have to make a final decision on it but it seems highly likely to me that that would be contained within the phrase "foreign public authority" for those purposes.
37. Yet it is the position of Airbus that it has not and does not intend, whatever else it may do, to seek the approval or the guidance of the SISSE. I can understand that if it was thought that that approval would have to be sought then that would be a yet further step in the ultimate process of acquiring the documents which have to be disclosed. That would be another layer of administration, one which would inevitably

take time, not least because the SISSE says that it aims to get a response within a month.

38. Then I refer to some other matters which Mr. Baudesson has set out in his witness statement. He says, having referred to the AFA at paragraph 25: “The renewed impetus to place the French Evidence Law” as he calls it “at the heart of cross-border criminal proceedings is illustrated by the language of the” deferred prosecution authority, and I have given the extract from that but it is rather difficult to see how first of all the French Blocking Statute is at the heart of cross-border criminal proceedings as opposed to anything else, even though, obviously, it is now referred to as part of the scheme. But in any event, we are not concerned here with cross-border criminal proceedings. So that point is overstated in my judgment.
39. Paragraph 26 was dealing with the SISSE's creation and all he derives from that is that it is illustrative of the fact that the French authorities have shown a renewed interest in compliance with it but in and of itself I do not consider that that means there is an increased risk of prosecution of Airbus in the context of these proceedings and I think it is worth making some general points about that at this stage. Airbus, as I understand it, has some 12,000 employees, I think in France, or perhaps it is here, but it has a very significant presence here, the wings or parts of the wings for many of the aircraft are made here, as they are in other parts of Europe and of course it is a very significant and substantial presence and employer in France. The type of disclosure which is going to be given, which although it is technical and although there is a great deal of it, is otherwise utterly common place for a civil dispute of this kind. It is very hard to see why a French prosecutor should take a particular interest in prosecuting Airbus in these circumstances.

40. The next point that is made by Mr. Baudesson is to refer to the Gauvain report. This is a bulky document which was prepared in 2019 with the heading “Restoring the Sovereignty of France and Europe and protect our companies from extraterritorial laws and measures”. It made reference to the French Blocking Statute. It is suggested that criminal sanctions and violations should be increased, but that never happened, and that there should be new guidelines imposed for monitorships, and I am not sure that that happened either, as it were as a gloss on the existing monitorship regime. But again it is important to understand the context of that report. It begins:

“The United States of America has dragged the world into the era of judicial protectionism. While the rule of law has always served as an instrument of regulation, it has now become a weapon of destruction in the economic war waged by the United States against the rest of the world, including its traditional allies in Europe.

The six months of investigations and hearings carried out by the mission made it possible to draw up an observation widely shared by the interlocutors met: French companies do not currently have the effective legal tools to defend themselves against extraterritorial legal actions brought against them, whether by competitors or by foreign authorities. They are in a situation of great vulnerability, the French authorities giving for many years the feeling of passivity and the impression of having given up.

41. It also goes on to say:

“... the prosecutions appear to be economically motivated and the targets chosen on purpose. Large American companies are, for the most part, spared from prosecution and only large European and Asian companies, in direct competition with American companies, are targeted. French companies are held hostage by these American procedures, stuck between a rock and a hard place in a process of façade 'negotiation', aggravated by blackmail for access to the American market: in the end, they have no choice but to incriminate themselves by paying astronomical sums to the US Treasury.”

42. Then referring to the blocking statute it says:

“... in reality a law of referral and referral of foreign requests to the normal channels of international cooperation, has never been seriously and systematically implemented. It is now proving to be dated and

insufficient to force foreign authorities to comply with mutual aid treaties and international cooperation agreements in order to obtain documents and/or information about our companies.”

43. He goes on to say that it is preventing French companies from trading freely.
44. Mr. Allen referred me to what is said at paragraph 1.3.3 of the report, which I think is worth reading:

“The intention of the legislator” – back in 1968 – “was indeed to protect French companies called upon to respond to the endless questionnaires of foreign lawyers seeking to accumulate evidence against said companies, often competing with those that these lawyers represent, through the so-called 'discovery' procedure.”

45. So, yes, of course this is dealing with civil proceedings, but the whole thrust of this is what was regarded at the time of the passing of the French Blocking Statute and it would seem in certain quarters now to be the highly oppressive and intrusive forms of what is still called discovery in the United States against effectively unwilling French participants. That, in my judgment, is a million miles away from what this case is all about.
46. There is an additional point to make here. Far from being an unwilling participant dragged into the English court, the reality is that in relation to all material contracts with Qatar, there is a specific choice of law and jurisdiction clause, namely English law and England. That would have been a considered decision for Airbus to make at the time.
47. If it considered that it was going to encounter intractable problems in relation to the French Blocking Statute, then it might well have considered whether to choose a different governing law and/or jurisdiction. It would have been open to it do so. It has not done so and I make the point that the last of the relevant contractual documents, the Supplemental Commitment Letter, which I think was executed at the

end of 2019, in other words after these developments which have been referred to, again chooses English law and England. Moreover, Airbus has made a very substantial counterclaim to the claim brought against it. So this is hardly the example of an unwilling, vulnerable French company that has now found itself having to cope with a highly intrusive and oppressive form of discovery which it did not want. That is an important point in my judgment.

48. Going back to Gauvain, although Gauvain was clearly seeking reform in relation to the problem that it saw, I do not see that as evidence to support the proposition that the risk of prosecution of a company like Airbus in this context has been increased.

49. There is another document to which I also need to refer. This one was cited by Qatar. It is the head of SISSE in an article which says: "Bercy ... is not in a punitive approach: we are here to help companies." It makes reference to the SBS and says that they should now come to the organisation when they have a doubt about the sensitivity of the data:

“... we preferred to rule out the idea of strengthening penalties. The aim is to interest companies in the success of the reform, to encourage them to come see us. It is an accompanying approach, intended to facilitate the invocation of the law and protection it offers. This approach obviously falls within the framework of the criminal law and the obligations it provides in the event of an offence. Cases are often complex. There is diplomacy, legal, judicial ...”.

50. Then it makes reference to the one-month deadline which it imposes upon itself.

51. Overall, in my judgment, I think that this is a neutral document. On the one hand it clearly highlights the relevance of the French Blocking Statute but at the same time says that the approach is not to be punitive. It is also worth noting that reference here to sensitivity is mirrored in another document which is referred to by Mr. Baudesson. This is a statement from a consortium of some French companies, published on the

SISSE website. [It shows that French companies are cognisant with the need to comply with the FBS and are less inclined to disregard it in the past. That is what is said there.

52. The statement itself makes a particular point of encouraging the seeking of guidance of SISSE in relation to what is called sensitive data or sovereign-sensitive data, if that is identified. I see that but it is not at all clear to me that the data with which we are concerned in the disclosure exercise is sensitive.
53. Mr. de la Plaigne's analysis of the Gauvain Report overall is that the recommendations were not introduced and Mr. de la Plaigne's view, which I agree with, is that the fact that those changes were not made was consistent with there being no real change to the risk of prosecution. Mr. Baudesson, I think at one point, says, that this is the position at this stage, in other words it could all change. Well, of course, anything could change, but I think I have to deal with the position as I see it today.
54. At paragraph 29, Mr. Baudesson goes on to say that the consortium statement published by the French company was "... as a direct result of the change in the attitude of the authorities and the fact that the risk of prosecution for noncompliance is no longer merely theoretical." It is not clear what the real basis for saying that is, especially when one looks to the terms of the guidance which, as I have said, refers particularly to sensitivity.
55. Overall, Mr. Baudesson's opinion is that this practical risk of prosecution is -- and I quote from his paragraph 30:

"... far greater practical risk of criminal prosecution than was previously the case ...". Then he goes on to say: "In light of the

renewed focus ... and the recency of the developments, I cannot rule out the possibility that the French authorities may prosecute an individual ... for breach of the French blocking statute even where it is done pursuant to an order of a foreign court ...”.

56. I have to say I find a certain tension between those two statements. If this is a far greater risk of criminal prosecution than before, that suggests something rather more than what he goes on to say, which is that he cannot rule out the possibility that the French authorities may prosecute an individual, which is a pretty low-level statement, in my judgment. Either way, he then concludes there is a real risk and not merely a theoretical risk.
57. Although perhaps to an extent a forensic point, it is material, in my judgment, that Airbus have given a not inconsiderable amount of documentation by way of initial disclosure, pursuant to 51U along with much information that has been provided in relation to the two heavy injunction applications which I have decided at that stage, it does not seem to have been troubled by the FBS. Mr. Allen says, that is effectively because everything that was done previously was voluntary. I am not much impressed by that. The initial disclosure requirement is set out in 51U and in any event, it is not clear to me in relation to 1 bis that voluntary actions are necessarily excluded from its ambit. But it is surprising if Airbus, as it says it has, has taken the view that all of this is really problematic and indeed has referred to some other pieces of litigation where the matter has come up. But it seems to have proceeded without any consideration of this matter until it arose in May 2022.
58. Doing the best that I can on the material before me and having considered all of it, I am of the firm view that there remains no real risk of a prosecution of Airbus in the context of this case and this disclosure. If it makes any difference, the way that Mr. de la Plaigne, I think, put it is that the risk was and remains very low, and I do not

think there is any difference in the way that those expressions are used. In one sense, that is almost dispositive of the exercise of my discretion because if there is no real risk, then on the face of it, there is no reason why the court should make any changes to the usual disclosure regime.

The Letter of Request

59. Mr. Allen is quite right to point out that Airbus is not seeking to displace the disclosure orders themselves. They are in place. They will have to be complied with. But that rather overlooks the fact that what is to be changed, according to Airbus, is the route or the route to the giving of that disclosure because Airbus's case is that the route to the giving of that disclosure must exclusively be through the process of the letter of request. I am going to deal with that in any event.
60. In short, Airbus says that there is a speedy and straightforward way to enable disclosure to take place which avoids the risk of prosecution under the FBS if there was one and that as it will make no adverse difference to the timetable or anything else, there is no harm, as it were, in doing it. That may be right in terms of there being no harm. On its case it says there would be no harm. Even if there is no harm it does not mean that the court here should seek to displace the normal route to disclosure just because this process might be available. Airbus says that it will seek the appointment of a Commissioner, Mr. Brooke (who has been used in at least one of the two helicopter cases I have been referred to where letters of request by consent have been issued) to take evidence for the purpose of giving disclosure here pursuant to Article 17 of the Hague Convention. There is something of a dispute as to whether Article 17 is appropriate anyway because Mr. Shepherd says that Article 17 is all about the taking of evidence abroad, that is a concept we are all familiar with, not

really dealing with documents. I am not going to enter into that debit, not least because there appear to have been at least two letters of request along the same lines issued in relation to the helicopter litigation which do not appear to have been rejected on the basis they fall outside Article 17.

61. However, the process is that Mr. Brooke would be required to receive the documents from Airbus in France on the basis of an agreed search and in relation to the disclosure for early disclosure order they would all be listed out. In relation to the main disclosure they would be listed by reference to broader categories rather than each individual document being itemised. Airbus contends all of that is completely doable within the relevant timeframes and would be wholly acceptable to the French authorities.

62. It is right to say, although this is, of course, a statement that was made in a different case at a different time that the Court of Appeal in *Servier* said this:

“It is obvious that as between obtaining disclosure (i) by a direct order against the parties, and (ii) by a court to court request under the Regulation, the former is plainly the more appropriate course. The latter is likely to be a slow, cumbersome and inadequate alternative, which may well, as Roth J noted, spawn follow-up applications under the Regulation if, as is likely to happen in practice, National Grid considers that yet further disclosure needs to be given. It is obvious that the just and efficient disposal of National Grid's disclosure application required a conventional order directly against the French defendants, and no judge would have contemplated the use of the Regulation unless compelled to do so. Roth J, having decided that it would be appropriate to make a disclosure order, concluded that the existence of the Regulation did not require any different course. He was not only entitled to come to that view, it was, I consider, one that was manifestly correct.”

63. It is obvious in a sense that any process which is going to involve court-to-court or authority-to-authority dealings and processes, quite apart from the selection of the documents concerned, is inherently, in my judgment, likely to be more time-

consuming than the straightforward process of giving disclosure. That is no criticism of the alternative processes.

64. Mr. de la Plaigne says that in this particular case the process, through the letter of request, would not be as straightforward or as speedy as Mr. Baudesson has said. The first possible wrinkle is the fact that in 1974 the French authorities decided they would not execute letters of request for foreign pre-trial disclosure. That was modified at 1987 where they would do so if the documents were enumerated limitatively in the letter of request and had a direct and precise link with the object of the letter of request, in other words, here, the litigation. The idea would be to append, as I have said, a discrete list of individual documents for a first letter of request, that is this one, but then there would have to be a more broadly categorised list in relation to the second one.
65. Mr. Allen says that there is no real difficulty here. First of all, in the difference helicopter cases, there were lists which went through and were dealt with timeously. Secondly, on the basis that this is agreed disclosure between the parties, it is unlikely that the appointed Commissioner would or could, as it were, second-guess that in terms of that being a direct link with the litigation. I am not entirely convinced by that and there is no precise evidence as to what the French authorities might do, because that has not been actually investigated for the purpose of this application.
66. But I think it is helpful to start at the very beginning, which is what Mr. Shepherd does and, as I said before, the letter of request has to be approved and executed by the Senior Master and issued by the Foreign Process Section of the High Court. It appears that Airbus have not made any enquiries about how long that would take. How long it may have taken in other cases, for example, in early 2021, does not really

assist here and particularly in the context of the backlog of work which I know exists as a result of Covid. However, Qatar have made some limited enquiries and the Foreign Process Section has said they are not able to give even a time estimate for when a letter of request could be processed because of the backlog. But all I can say is that is not implausible to me as a judge because we get requests for extensions of time precisely because the Foreign Process Section is subject to delay. That is no criticism of it, but Airbus is not really in a position to gainsay it since it did not make any enquiries in the first place.

67. Once that stage has been gone through, then there is the question of transmission to the Ministry of Justice. It is now the middle of July. The French holidays are July and August. The Ministry of Justice, I am told, is not closed over that period, but it does not mean that staff cannot be taking their usual vacation at that time, which could have an adverse impact on when the letter of request could be processed at that stage. It is perfectly true that the article by Mr. Blumrosen (who has accepted the office of a Commissioner and is clearly seeking to increase that business) has given very optimistic timescales for when letters of request appointing Commissioners are to be done. That is an article that he has written, but I do not think it can be a necessarily safe guide to dealing with the acute timing points that I have to bear in mind in this case.
68. There is also the question of whether there will be any assessment by the Commissioner in relation to the question of direct link. It appears not to have been done before, and indeed the putative mandate for this Commissioner is said to be one whereby he really is doing no more than a postbox exercise. In a case as high profile as this, if a letter of request was issued to the Ministry of Justice, I cannot be sure that

the Ministry of Justice might not want a more proactive exercise by the Commissioner or that the Commissioner might consider that something more is required on his part, and any review of documents is going to be very time-consuming indeed.

69. There is a further timing point here. In one of the helicopter cases, LNP Aviation, the order actually contained the necessity for there to be prior approval from the SISSE in relation to any documents which might prejudice the sovereignty, security or essential economic interest of France or public order. That is an Article 1 point, but, as I have indicated, it seems to me that documents that fall under Article 1 bis would also have to be the subject of an inquiry.
70. There is no similar provision in the suggested order in this case at all. There is no explanation for why it is not there. The helicopter case, on the face of it a much smaller case, but again it is conventional civil proceedings, and that again emphasises the fact that there may be further timing implications, if, for example, Airbus was to change its mind and say that after all it should go to the SISSE.
71. There are further points concerning whether the evidence has to be taken in a public room which is all concerned with, I suppose, what might be regarded as at least the core case under Article 17 which is the taking of evidence of witnesses. Perhaps all of that could be overcome, but I have little doubt that the whole exercise here is one which is far greater and far more involved than the ones which have affected the two helicopter cases. So I can only take limited comfort from those two.
72. Just dealing with the position then as we are and on the information which I have got and on the information which I have not got, I am far from sure that the process which has been contemplated will run as smoothly and timeously as Airbus have suggested.

I very much take the view that it will take a lot longer and there may be complexities or uncertainties along the way.

73. In a case which had the luxury of time, if any case does have the luxury of time, all of that might not be a problem if it was necessary to go down that route. But this case does not have the luxury of time and even a short delay to the timetable is going to have a serious knock-on effect for the delivery of expert evidence and witness statements in good time for the preparation of the trial by March or April of next year. Days could count, but certainly, on any view, weeks undoubtedly would.
74. So to the extent that it is even necessary to contemplate the letter of request route, I am not prepared to accept that it would have no adverse impact on the trial timetable. In my view, it would, and for that reason alone would be unacceptable, leaving aside the question of whether there was a risk of prosecution which, in my view, there is no real risk.
75. I make a third point, which is another factor in the exercise of my discretion, which is that to a serious extent, the sort of uncertainties we have been dealing with today could all have been avoided if Airbus started investigating this alternative route a lot earlier, even from the beginning of this case. Airbus, like any major corporation, is involved in litigation, probably all of the time. On its case, if it really took the view that there was a serious or real risk of prosecution, it is very difficult to understand why it was not taking active steps to look into all of this, to the timing of all of this, testing out whether the form of the letter of request would work ages ago. Mr. Allen says, "Well, that does not really matter because you would not be able to issue a compliant letter of request until you have a list of the documents which you wish to disclose and all that is being done now because the court has only just made the

disclosure orders." I am afraid I do not accept that. It is not about how long it will take you to draw up the list. It is about having the debate in principle, which we have been having today, and which could have been brought on by an application months ago. So if, to any extent, I have had to make a judgment on the basis of not very much evidence as to what might happen with the letter of request, I am afraid if there is a lack of information, that is down to Airbus. It is not down to Qatar. So to that extent, that is a matter for which Airbus is responsible.

76. I take the view that the letter of request route for this case has simply not been thought out properly, but in any event, there is no prospect of it being a quick fix to the problem if there was one.
77. I have dealt with the giving of disclosure without suggesting there was a problem which was another factor which, on any view, does not help Airbus. I have also made reference to the fact that Airbus is not some unwilling participant to the proceedings here brought in by way of some gateway under the service-out provisions. It is the form it knew it would always litigate if there was a problem because it had expressly agreed to it in the first place. To that extent it has positively joined to play the game, to use the expression from earlier on.
78. From for all the above reasons, therefore, it is plain that I should refuse to take the route suggested by Airbus and issue the letter of request as to the precise channel of disclosure. The disclosure order will therefore remain in place in the usual way. And I apologise for taking so long to set out those reasons.

(For continuation of proceedings: please see separate transcript)

79. No, I am going to award the costs to Qatar on this. This was an issue which had been flagged and then I had to have it dealt with and this was, as it were, a full-on application seeking a particular form of order.
80. Had the matter been flagged at a very early stage as a point to be dealt with or noted by the court, that might have been a different matter, but it is not how it happened. Because it had not been dealt with at an earlier stage and given when the disclosure order was, if Airbus wanted to maintain its position it really had to make the application and it has lost on every part of it. So I am afraid I am going to order that Airbus will pay the costs.

(For continuation of proceedings: please see separate transcript)

81. At first flush sadly, like many costs schedules I have seen in this case, the figures appear to be eye wateringly large. There is something like £70,000 on counsels' fees in relation to a hearing which took just under two and a half hours, exclusive of the judgment, where there were two witness statements from the applicant and one witness statement from the respondent and in reality the material I had to traverse was relatively limited and might have been the same in a conventional application, for example, to strike out or summary judgment or matters of that kind.
82. Mr. Shah's main answer to that is that this does not take account of the fact that a team had to be assembled at high speed because of the truncated timetable I set, which was in turn because Airbus had taken no steps properly to advance what it said was an important matter. I see that to the extent that there were certain underlying matters which Qatar obviously knew about because Mr. Shepherd made those points at the hearing the other week, but they needed to be ready to go once Mr. Baudesson's

witness statement had been served on 11th July and it was no doubt a very hectic 48 hours.

83. All of that said, if one looks at counsel's fees, for example, it is absurd to have three counsel acting on this case. I can see that Mr. Shepherd might have needed one junior to do some of the background work, and I do not think it is inappropriate to have a silk on this application given its importance. The notion that there should be £22,000 for his advice, another counsel for £6,000 on prehearing advice and another £10,000 for counsel before this hearing is frankly pie in the sky.
84. I cannot say much about the documentation preparation for £35,000 because I do not have the schedule but that means I have just got to be very cautious about it. I appreciate there may have been documents in French that had to be translated, I can well understand that the French law experts may have needed to have been on hand over and above actually producing the witness statement and I notice that Mr. Laville de la Plaigne had some others assisting him in preparing it.
85. All of that said, on an assessment, a figure of nearly £180,000 would be regarded as completely over the top. I am not going to adopt the normal 60% figure which would bring us out at something like 100, I think. Rather I am going to go to the 40% figure. I do not consider that, looking at an irreducible minimum I have to go below the 40%, but I am going to go to the 40% and rounding it the figure that I come to is £70,000. That will be payable in 14 days.

(For continuation of proceedings: please see separate transcript)

