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HIGH COURT OF JUSTICE
CHANCERY DIVSION
BUSINESS AND PROPERTY COURTS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1N
Date: 21 July 2022

B e f o r e :

THE HONOURABLE MRS JUSTICE SMITH DBE

B E T W E E N:

THE FINANCIAL CONDUCT AUTHORITY **Claimant**

and

1) KONSTANTINOS PAPADIMITRAKOPOULOS

Representation

Mr A George QC & Mr R Fakhoury , instructed by the FCA , appeared on behalf of the Claimant.
Mr R Power , instructed by BCL Solicitors, appeared on behalf of the Defendant.

HTML VERSION OF JUDGMENT

Mrs Justice Joanna Smith:

1. This is an application for disclosure of documents made by the First Defendant. It is made against the background of a pending strike out application due to be heard in September of this year.

2. The proceedings brought by the Claimant (" **the FCA** ") concern allegations that between 2011 and 2015 the First Defendant and the Second Defendant (who is not a party to the application), the CEO and CFO of Globo Plc respectively, engaged in market abuse and/or contravened AIM rules. The claim is brought pursuant to sections 382 and 383 of the Financial Services and Markets Act 2000 (" **FSMA** ").

3. The basis for the strike out application is set out in the first witness statement of Ms Hannah Raphael dated 15 November 2022. In short, the First Defendant complains that, in breach of section 9(2) of the Crime (International Cooperation) Act 2003 ("the 2003 Act") , the FCA has, without the consent of the relevant authority, used material it obtained from other countries by way of Mutual Legal Assistance (" **MLA** ") for the purpose of these civil proceedings. He says that this has come to light by reason of a first witness statement served by Mr Williams (of the FCA) on 13 October 2019 (" **Williams 1** ") supporting an application for permission to serve out of the jurisdiction. The alleged breach by the FCA is said by the First Defendant to be a serious abuse of process.

4. Mr Williams served a third witness statement on 24 May 2022 in response to the strike out application and in response to Ms Raphael's statement (" **Williams 3** ").

5. The disclosure application arises in circumstances where it is said that Williams 3 (which rejects the suggestion that the FCA has improperly used MLA material for the purposes of these proceedings) mentions documents which it is reasonable and proportionate for the FCA to disclose.

6. An issue which arises between the parties on the strike out application concerns the construction of the word "use" for the purposes of section 9(2) of 2003 Act which provides that MLA material "may not, without the consent of the appropriate overseas authority, be used for any purpose other than that specified in the request". In particular three competing constructions have been posited before the court as to this section, namely whether section 9(2) prohibits only the actual deployment of documents without the consent of the foreign authority, whether it prohibits reliance on documents as a springboard for the conduct of proceedings and, finally, whether the prohibition on use of documents requires the creation of information barriers where an investigating body is investigating two sets of proceedings but only has consent from the foreign authority in relation to one of those sets of proceedings.

7. The parties addressed me during the course of the hearing on various authorities concerning the scope of the concept of "use" in this statutory context, but I need not determine that question now. Suffice it to say that this dispute provides the backdrop to the application for disclosure and is of relevance to submissions made by the parties on reasonableness and proportionality. It is also relevant to some observations which I shall make at the end of this judgment.

The Disclosure Application

8. The application was made by the First Defendant on 24 June 2022 and seeks an order for disclosure of six categories of documents which it is said are all mentioned in Williams 3. I shall set out each of the individual requests when I come to consider them in turn, together with the relevant passages from Williams 3 on which the First Defendant relies.

The Law:

9. It is common ground that the test to be applied to the disclosure application is contained in paragraph 21 of CPR PD51U. That paragraph provides (so far as relevant):

> "21.1. A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in –
>
> (2) a witness statement;
>
> 21.2. Copies of documents mentioned in the statement of case, in witness evidence or in an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.
>
> 21.3. A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.
>
> 21.4. Subject to Rule 35.10(4), the court may make an order requiring a document to be produced if it is satisfied that such an order is reasonable and proportionate (as defined in paragraph 6.4)."

10. Pausing there, an application for disclosure under paragraph 21 therefore involves a two-stage test. First, it must be established that the document is 'mentioned', i.e. that it is "referred to, cited in whole or in part or there is a direct allusion to it". Second, assuming that gateway requirement is satisfied, then the party seeking disclosure must satisfy the court that the order sought is reasonable and proportionate (as defined in paragraph 6.4 of PD51U). This second requirement was not expressly stated in CPR 31.14 (its predecessor provision in the CPR).

11. Paragraph 6.4 of the Practice Direction provides that reasonableness and proportionality are to be assessed by reference to the overriding objective (which I need not set out here), including the following factors:

"(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure that the case is dealt with expeditiously, fairly and at proportionate cost."

12. Paragraph 21 of the Practice Direction was recently considered to contain:

> "a self-contained code by reference to which a party in receipt of a statement of case, witness statement, or affidavit is able to seek the disclosure of documents mentioned in such documents"

(per HHJ Pelling QC in Wilson v Emmott [2022] EWHC 720 (Comm) at [7]).

13. At [11], in the context of a disclosure application made prior to a strike out application, HHJ Pelling QC said this: "…in those circumstances, the approach, in particular to reasonableness and proportionality, may be a rather more focused and acute one than would otherwise be appropriate".

14. Whilst paragraph 21 of the Practice Directions constitutes a self-contained code, its reliance upon the concept of a document being 'mentioned' replicates existing authorities as to the meaning of that word pursuant to CPR Part 31.14 . Therefore, as HHJ Pelling QC rightly said at [15] (and as was common ground at this hearing) regard can safely be had to the general principles identified in the authorities as to the meaning of the word "mentioned."

15. It is common ground that the leading authority on the meaning of the word "mentioned" in CPR 31.14 is the Court of Appeal's decision in Expandable v Rubin [2008] EWCA Civ 59 . My attention was drawn specifically to [19], [23], [24] and [25] of the judgment of Rix LJ in that case, which refer to the decision in Dubai Bank Limited v Galadari (No.2) [1991] WLR 721 . Without setting those paragraphs out in full, I draw the following propositions from them:

- (a) the mention of a document requires a direct allusion or specific mention.
- (b) subject to the need for a direct allusion or specific mention, the expression "mentioned" is "as general as can be." It is not intended to be a difficult test. The document in question does not have to be relied upon or referred to in any particular way or for a particular purpose in order to be mentioned.
- (c) where a party mentions a document, then, subject to the question of privilege, the other party should be entitled to inspect. This is consistent with the "cards on the table" approach to litigation. As Rix LJ points out "[w]hat in such circumstances is the virtue of coyness?". (I note that of course this is now subject to the issue of reasonableness and proportionality).
- (d) a reference to a conveyance, guarantee, mandate or mortgage will involve the mention of a document, as will the words "he wrote to me" because the latter is a direct allusion to the act of making the document itself (i.e. 'he wrote a writing').
- (e) a reference to the effect of the transaction or document such as to, say, 'a property has been conveyed' or 'someone has guaranteed a loan', will not be sufficient to involve a mention.

- (f) it is insufficient that a witness statement refers to a transaction which, on the balance of probabilities, will have been effected by the document for which inspection is sought. A reference by inference is not enough.

16. The case of Rubin was recently followed by Warby J in Rudd v Bridle [2019] Costs Law Report 1067 at [41]:

> "The exercise of the power to order inspection under these rules and the meaning of "mentioned" in this context, have been considered in a number of authorities, among them Rubin v Expendable [2008] EWCA Civ 59, [2008] 1 WLR 1099 , relied on by both parties to this application. Lord Justice Rix, with whom Jacob LJ and Forbes J agreed, distinguished the case in which a document is "mentioned" from one where the wording of a statement merely allowed an inference that a document existed. He held at [23]-[25] that "mention" must mean specifically mentioned and approved a test of "direct allusion." He gave examples of forms of expression in which "the making of the document itself is the direct subject matter of the reference and amounts…to the document being 'mentioned'". He was referring here to statements such as "he wrote" or "I recorded and transcribed our telephone phone call." Statements such as these were contrasted with assertions such as "he conveyed" or "he guaranteed", which Rix LJ characterised as "references to transactions, from which it might be inferred that a document had come into existence."

17. On the specific facts of Rudd Warby J held that, first, a reference to 'taking out a short term loan' was not a direct allusion to a document containing a loan agreement but, rather, a reference to a transaction which may or may not be contained in or evidenced by a document; and, second, a reference to a communication whereby solicitors informed the first defendant that the sale could not be completed was also not a direct allusion to correspondence; at best, it was a statement from which the existence of correspondence might be inferred.

18. During submissions from the parties I was referred to two other authorities on the point.

19. The first, Scipharm v Moorfields Eye Hospital NHS Foundation Trust [2021] EWHC 2079 (Comm) , is another decision of HHJ Pelling QC. In that case HHJ Pelling found that the jurisdiction in CPR 31.14 was sufficiently engaged by the reference in a witness statement to a "work sharing arrangement" notwithstanding that the witness statement was silent as to whether this arrangement was written or oral. The Judge accepted a submission that, in the absence of evidence, a witness statement be provided to address that issue. The Judge also accepted the submission that in circumstances where it was unreal to suppose that information in a witness statement could have been derived from anything other than an attendance note or similar, it was appropriate to draw an inference that the information had been included by reference to an attendance note.

20. Scipharm was considered very recently in a careful judgment by Deputy Master McQuail in Hoegh v Taylor Wessing [2022] EWHC 856 (Ch) . The Deputy Master set out the law at [14]-[28] of his judgment, including a reference to Scipharm , noting at [28] that Scipharm had referred only to one authority, namely National Crime Agency v Abacha [2016] EWCA Civ 760 .

21. The application in Taylor Wessing sought production of a document or documents, namely a review that PWC had been instructed to undertake, which review had been mentioned in four places in the relevant witness statement.

22. The Deputy Master rejected the suggestion that the PWC review was a compendious reference to a class of documents generated by, and resulting from, the review process. Although the Deputy Master accepted that it was likely that the review had resulted in documents being generated, he held that the review was a process which was not itself a document, or a collection of documents, and it did not comprise documents. At [40] he said this:

> "The Court of Appeal cases of Dubai and Rubin are clear. A document is not 'mentioned' to engage what is now paragraph 21 of PD51U unless the reference is a direct allusion to it or to its contents. Reference by inference is not sufficient and reference to the effect of a

document rather than its contents is also not sufficient. Further, a mere opinion that on the balance of probabilities a transaction will have been effected by a document is not itself enough.'"

I, respectfully, agree.

23. At [41] the Deputy Master pointed out that the decision in Rudd was a reasonably straightforward application of the Court of Appeal authorities.

24. On the subject of the Scipharm case, which was urged upon the Deputy Master as supportive of the application for disclosure, the Deputy Master pointed out that Scipharm provided no explanation as to how references by inference to attendance notes in a statement could be caught by the terms of CPR 31.14 and he said at paragraph 43:

> "In the absence of an explanation which would enable me to justify a departure from them, I consider that I am bound on this application, under paragraph 21 PD51U, to follow Dubai and Rubin ."

25. I consider that I am in the same position as the Deputy Master in dealing with this application, in that I too am bound by those Court of Appeal authorities.

The Individual Requests:

26. I now turn to look at whether each of the individual requests satisfies the threshold requirement that a document is 'mentioned' in Williams 3. If, and insofar as they do, I shall go on to consider in each case whether disclosure would be reasonable and proportionate.

Request 1

27. Request 1 is as follows:

> "All requests for assistance are under MLA, IOSCO, MMoU and information requirements to domestic entities and organisations using the FCA's compelled powers under sections 171-173 and 175 FSMA (paragraphs 16, 30, 31 of Williams 3) including those requests that made reference to ESMA (paragraph 25) and the letter of request to the Swiss authorities (paragraph 41)."

28. Request 1 therefore arises in the context of paragraphs 16, 25, 30 and 31 of Williams 3. Insofar as there was originally a request for disclosure of the letter of request to the Swiss authorities referred to in paragraph 41 of Williams 3, it is accepted that such letter of request has been provided.

29. The relevant paragraphs of Williams 3 read as follows:

> "16. Information, material and evidence was primarily gathered by the FCA during this investigation via requests for assistance from international authorities under the International Organisational Securities Commissions (IOSCO) multi-lateral memorandum of understanding concerning consultation and cooperation and exchange of information (MMoU) and via information requirements to domestic entities and organisations using the FCA's compelled powers under sections 171-173 and 175 of FSMA.
>
> 25. Some of the FCA's requests under the IOSCO MMoU also made reference to the European Securities and Markets Authority (ESMA) multi-lateral memorandum of understanding on cooperation, arrangements and exchange of information. This is an MMoU for the purposes of enhancing the modalities of cooperation and the necessary exchange of information in relation to the Regulation of Financial Services and Markets in the European Union. Article 3 of ESMA deals with the scope and assistance under the MMoU and article 7 deals with confidentiality restrictions and permissible uses of information.

...

30. Where the FCA sought information in this matter pursuant to the procedures set out above it provided a reference to the relevant Treaty or MMoU itself, an explanation of the background to the investigation, details of the suspected misconduct, a detailed description of the assistance required from the international authority and an explanation of how that assistance will enable the FCA to process its own investigation. The proposed uses to which information received from the international authorities will be put, the timescale within which assistance is required, any confidentiality provision that applies to any non-public information and any additional requirements regarding notification and disclosure of the request, i.e. requirements to the international authority to consult with the FCA first before disclosing the fact that the FCA has made the request to the person from whom the information is being sought.

31. Where the FCA has sought information pursuant to the IOSCO MMoU and ESMA MMoU, it complied with the requirements set out therein. As such, the FCA considers that there is no restriction on the deploying of evidence, and information and material gathered via this mechanism in these proceedings."

30. Mr Power, on behalf of the First Defendant, contends that these paragraphs plainly involve the mention of documents, namely requests for assistance. He says that paragraphs 30 and 31 cite the content of such requests in whole or in part.

31. Mr George QC, on behalf of the FCA, rejects this contention, arguing that these paragraphs all refer to transactions under various procedures (i.e. the MLA procedure, the IOSCO MMoU procedure and the FCA's powers to require provision of information from authorised persons under FSMA). He says they are no more than high level narrative of the procedures pursuant to which the relevant information was obtained by the FCA. Whilst it might be inferred that documents came into existence (and indeed Mr George candidly accepts that there were 81 written letters of request), there is, he says, no specific mention of, or direct allusion to, such documents.

32. On balance and applying the case law to which I have referred at some length, I disagree with Mr George on this request. It appears to be common ground that a request for assistance in a case such as this will ordinarily be made via a letter of request. That this is so is clearly evidenced by the reference in paragraphs 40 and 41 of Williams 3 to the Swiss MLA "Letter of Request" which it is said "reflects the standard wording used by the FCA in Letters of Request".

33. Whilst I accept that the words "Letters of Request" are not used in paragraphs 16, 25, 30 or 31 of Williams 3 and I also accept that the words "request for assistance" are not in themselves a term of art, nonetheless I consider that, having regard to the nature of the requests and the procedures involved, the use of those words plainly involves a direct allusion to documents. That this is so is further borne out by the fact that paragraphs 25 and 30 of Williams 3 refer to the content of such requests in a manner which makes it plain beyond peradventure that the requests were made in writing (a proposition that I did not understand Mr George seriously to dispute).

34. In so far as may be necessary, I also find that paragraphs 25 and 30 cite the content of the request for assistance in whole or in part, albeit only in general terms because those paragraphs are seeking to deal with a very large number of different requests. I do not consider the general terms of the citation to undermine my finding that these paragraphs involve a citation from documents and/or a direct allusion to documents.

35. In my judgment, therefore, the gateway requirement for Request 1 is made out in that I accept that there is a mention of the relevant documents in Williams 3 for the reasons I have given.

36. I then turn to whether it would be reasonable and proportionate to grant disclosure of the documents in this request. In my judgment it would. Having regard to the guidance in paragraph 6.4 of PD51U, these proceedings are complex, substantial and important. The claim is potentially for many millions of pounds and a strike out application, if it is pursued in its current form - a point to which I shall return - raises issues of general public importance as to the FCA's standard approach to material received

through MLA. The FCA is a public body and has the resources to comply with this request. Furthermore, in relation to this category of documents, the disclosure exercise (involving, apparently, 81 documents) is not extensive and should not be difficult or onerous to carry out.

37. Whilst I am, of course, conscious that, in the context of a strike out application, there is a need for a more focused and acute assessment of reasonableness and proportionality than might otherwise be the case, on balance I accept Mr Power's submission that these documents may be probative in determining the strike out application. In particular, I accept that the documents may show, or at least shed light on, a number of issues including: when the requests for assistance were made, how the investigation developed over time, what was requested, how the investigation was described, how it was being conducted and whether the requests followed receipt of, or referred to, MLA material.

38. Mr George submitted, with characteristic aplomb, that these documents are unlikely to be of probative value given the issue of statutory construction with which the strike out application will be concerned. However, it is not his case that the determination of that issue will itself resolve the strike out application and it appears to be accepted that the issue of abuse will require consideration of the FCA's conduct in relation to these proceedings, including consideration of the evidence given in Williams 3. The documents sought are therefore potentially relevant.

39. Whilst I have reservations - to which I shall return later - over the dangers of the strike out application turning into a mini-trial, nonetheless, I cannot say at this stage, in light of my understanding of the issues, that the requests for assistance will not be relevant. Furthermore, Mr George accepts that, in and of themselves, the requests for assistance will provide a complete picture of the requests made.

40. In all the circumstances, and given that disclosure of these documents will not involve a substantial or costly exercise, in my judgment it is reasonable and proportionate to require it to be given.

Request 2

41. Request 2 is in the following terms:

> "All communications to and from lawyers from the FCA's Criminal Prosecutions Team relating to the review of Mr Williams' first witness statement and their advice that it did not include any material obtained via MLA (including any communications as to whether the FCA's reliance on MLA material necessitated the FCA issuing fresh proceedings). Given the FCA's reliance on the contents of that advice in paragraph 34 of Williams 3, privilege has been waived over those communications (see *Pcp Capital Partners Llp (2) Pcp International Finance Ltd v Barclays Bank* [2020] EWHC 1393 (Comm))".

42. Request 2 therefore arises in relation to the content of paragraph 34 of Williams 3 which reads as follows:

> "34. Without waiving privilege, I confirm that at the time it was prepared lawyers from the FCA's Criminal Prosecutions Team reviewed my first witness statement and were satisfied that it did not include any material obtained by MLA. None of the material exhibited to my first statement was obtained via MLA."

43. The request was originally a very broad one, but I understood it to be substantially narrowed during submissions from Mr Power, who realistically accepted that it should include only legal advice provided by the FCA's lawyers, together with their instructions. Mr Power submits that paragraph 34 involves a specific mention of "legal advice" and, furthermore, that in that paragraph the FCA relies on and expressly refers to the content of the legal advice. He submits that it is "almost inevitable" that the legal advice was communicated in writing and that there is no evidence that it was not, and, accordingly, that the reference in paragraph 34 is therefore a specific reference to a document, alternatively a direct allusion to a document. He submits that it would be a strange result if "having relied on the contents of a written communication in a witness statement the opposing party could not see it."

44. Mr George submits, on the other hand, that this is no more than a reference to a process or transaction, namely the conduct of a review of Williams 1 by the FCA's Criminal Prosecutions Team. He points out that there is no direct allusion to any document, or category of documents, and that it does not follow from the reference to a "review" that any documents came into existence to record its outcome. Still less, he says, is there a specific mention of a document. Indeed, it is impossible to identify what document is being referred to.

45. Having considered paragraph 34 with care, I agree with Mr George. The reference to a "review" is plainly not a specific mention of, or direct allusion to, a document. It may or may not have resulted in the generation of one or more documents. Just as in Hoegh v Taylor Wessing , where the PWC review was, simply as a matter of language, a process (a conclusion with which I agree), so the review here was also a process or transaction.

46. Does the fact that paragraph 34 refers to the lawyers being "satisfied" that Williams 1 did not include any material obtained via MLA affect the position? In my judgment it does not. I do not consider this reference to be a citation of the content of a document, whether in whole or in part. The lawyers' conclusions following the review could have been communicated in various different ways, including orally and over the telephone or at a meeting, and I disagree with Mr Power that it is inevitable that a formal document would have been created recording the outcome of the review.

47. Of course it is possible, even likely, that a document was created, and it may even be reasonable to infer that a document was created, but in my judgment it is clear from the authorities that such an inference is not enough to satisfy the requirement for a specific mention or direct allusion.

48. I agree with Mr George that this request does not get through the necessary gateway, in that it does not involve a mention of a document. In the circumstances, there is no need for me to consider the question of whether paragraph 34 of Williams 3 involves the waiver of privilege in any legal advice that may have been given and whether it would be reasonable and proportionate to permit disclosure.

Request 3

49. Request 3 is in the following terms:

> "All communications relating to the review undertaken by Mr Williams and Mr Adams referred to in paragraph 35 of Williams 3. Again, given the FCA's reliance on that review in support of the propositions at subparagraphs 35.1-35.14 of Williams 3, any privilege in those communications has been waived."

50. Paragraph 35 of Williams 3 reads as follows:

> "35. In response to the First Defendant's application to strike out the claim, a further careful and detailed review of the Particulars of Claim and my first witness statement in support of the Claimant's application to serve outside the jurisdiction has been undertaken by myself and Paul Adams, an Advanced Associate in the Enforcement and Market Oversight Division. In the light of that review, I address the specific assertions made in Ms Raphael's statement at paragraphs 30(a) to 30(k) below".

51. Sub-paragraphs 35.1 to 35.14 of Williams 3 then seek to address individual assertions in Ms Raphael's witness statement in light of that review, providing information about how the various different categories of documents she had identified were obtained.

52. Whilst Mr Power realistically (in my judgment) accepts that this request is "difficult" and that it is concerned with a "tricky legal issue", he nevertheless submits that Williams 3 relies on this "careful and detailed review" and that the propositions set out in the next eight pages of Wiliams 3, at paragraphs 35.1 to 35.14, are made solely on the basis of that review. He points to paragraph 39 of Williams 3 in which Mr Williams concludes that: "In the circumstances, it is clear from the review referred to above that the First Defendant is wrong to suggest that these proceedings have been founded wholly or substantially (or indeed at all) on MLA material." He says this is a reference to the content of the review and that Mr Williams is inviting the court to believe what is said about that

review because of the conclusions drawn from it. He submits that it is "inevitable" that a review of this sort was recorded in documents. Indeed, he suggests that the evidence calls to mind the idea that there is a document in existence which sets out the conclusions of the review. If that is correct, then he submits that the subparagraphs to 35 involve the recitation of the contents of that document. Mr Power sought to distinguish the decision in Taylor Wessing on the basis that the reference to "the review" in the witness statement in that case did not involve any reference to the contents of the review.

53. Mr George again resists this request on the grounds that it concerns a review which is no more than a process or transaction. He points out that no documents are mentioned at paragraph 35 of Williams 3 (beyond the Particulars of Claim and Williams 1) and that the reference to a review is far from a specific mention or direct allusion to any documents. He rejects the suggestion that sub-paragraphs 35.1 to 35.14 involve citation of the content of any document.

54. On balance, and having considered these paragraphs with care, again I agree with Mr George. In my judgment the reference here to "a review" is, as Mr George submits, a paradigm example of a transaction which does not get through the gateway, as the Deputy Master held in Taylor Wessing . There is no reference to any document and no reference to communications created in the context of the conduct of the review. It is not even possible to infer that any such communications were created given that Mr Williams himself conducted the review together with Mr Paul Adams. In any event, any such inference would not be enough. Further, I disagree with Mr Power that Taylor Wessing can be distinguished on the basis that there is no reference to the contents of the review in that case. On the contrary, it is clear from [30(iv)] of that decision that the relevant witness statement referred to the fact that some of the consequences of the original negligence "were only revealed by PWC's review." The fact that information is revealed or collected or identified in light of a review is, in my judgment, a reference to the effect of the review and not to individual documents or the content of individual documents.

55. Furthermore, there is nothing in the sub-paragraphs of 35 which could be said to be a citation from a document or part of a document. Mr Power's suggestion that paragraph 35 brings to mind a document from which all of the information set out in the statement has been taken is, in my judgment, no more than an invitation to the court to engage in speculation about what might have been created in the context of the review. He posited that any such document might say how the FCA was reacting to these proceedings; it might identify missed steps on the part of the FCA; it might provide commentary on how the documents had been used. It might, in other words, include a 'smoking gun' to establish that the FCA's case, as set out in Williams 3, is inaccurate.

56. Mr Power may or may not be right about all of this, and his desire to gain access to any such documents is perhaps understandable in the context of his strike out application. However, the possibility that there may be documents which contain a 'smoking gun' is not a legitimate basis for disclosure under the provisions relied upon. That is not the test that I must apply.

57. Again, I reject this request and therefore do not need to consider whether paragraph 35 of Williams 3 involves a waiver of privilege or whether it might have been reasonable and proportionate to grant disclosure.

Requests 4 and 5

58. I take these requests together; they read as follows:

Request 4: "The other examples of allegedly altered bank statements relating to 2013 and 2014 obtained by MLA, paragraph 35.2 of Williams 3".

Request 5: "The 2013 and 2014 audit files obtained from Grant Thornton, paragraph 35.10 of Williams 3".

59. There is no need to read from the relevant paragraphs of Williams 3. The requests accurately identify the relevant wording of those paragraphs.

60. As for Request 4, Mr George contends that this is not a mention of documents because "other examples" is a generic phrase and is not specific. I disagree. To my mind, this is a specific mention of bank statements relating to 2013 and 2014 or, at the very least, a direct allusion to them. Accordingly, Request 4 gets through the necessary gateway in my judgment.

61. Mr George concedes that Request 5, being a specific reference to "audit files," also gets through the gateway.

62. The documents sought in these requests are documents obtained through the MLA process. As Mr George points out, on the First Defendant's own case the FCA is not entitled to use these documents and, by necessary implication, it is not entitled to disclose these documents in the proceedings without the consent of the relevant foreign authorities.

63. Regardless of the question of reasonableness or proportionality, Mr George submits that this point in itself is a reason for the court to refuse disclosure. Mr Power does not appear to disagree with this, although he suggests that it ought to be possible for the parties to arrive at a mechanism to facilitate such disclosure. He points out that it is the FCA's case in any event that consent has been given. If that is correct, then there can be no issue with the court ordering disclosure.

64. Whilst it is true that the FCA does argue that consent has been given, it is Mr Power's case that the FCA is wrong about that and the issue of consent will have to be determined in due course by the court. In the circumstances, I do not consider that it would appropriate at this stage to order the disclosure of documents which might not be the subject of the necessary consent in foreign jurisdictions. To make such an order would be to risk breach of international treaties and arrangements pursuant to which such documents have been provided.

65. Mr Power invites me, nevertheless, to determine the question of reasonableness and proportionality so that when, and if, a mechanism can be found to facilitate disclosure, and/or an order of the court is made in the FCA's favour on the question of consent, there is no need to obtain any further order from the court.

66. In my judgment, for some of the same reasons that I have already given in relation to Request 1, it would be reasonable and proportionate, given the scale and complexity of this case and the nature of the strike out application, to order disclosure of these categories of documents. They are well-defined and should be capable of being easily identified and disclosed without substantial cost. The FCA expressly refers to these documents for the purposes of contending that they were not relied upon in the proceedings. Furthermore, Mr Power points to the statement in paragraph 35.9 of Williams 3 that the contents of letters provided to Grant Thornton in Greece is "inferred" from various evidence, saying that the letters are likely to be in the audit files and that if they are, it is not credible to suppose that the FCA does not rely on their own reading of the letters.

67. In circumstances where the question of the use of MLA material is plainly in issue in the strike out application, I consider it to be reasonable and proportionate (subject to the caveat I have already identified) for them to be disclosed.

Request 6

68. Request 6 reads as follows:

> "All of the bank account information referred to in sub- paragraphs 35.1 to 35.7 and 35.11, 35.13 and 35.14 of Williams 3 and the correspondence and other material referred to in paragraphs 35.8, 35.12 and 35.13."

69. These paragraphs are concerned with setting out the FCA's case as to how it obtained information and documents referred to in Williams 1. As I have said, it was the service of that statement which prompted this application, together with Ms Raphael's witness statement, querying the source of various documents. All of the documents said to be referred to in these sub-paragraphs are non-MLA documents and the FCA concedes that: (a) the balance confirmation letter referred to in sub-paragraph 35.8; (b) the loan agreement referred to in sub-paragraph 35.12; and (c) the correspondence referred to

in sub-paragraphs 35.13(iii) and (iv) are mentioned. However, it says that the balance of these sub-paragraphs refer only to transactions.

70. In my judgment Mr George is right in that submission, with a couple of exceptions. The references in sub-paragraphs 35.1, 35.3, 35.4, 35.5, 35.7, 35.11, 35.13(ii) and 35.13(v) to "bank account information" and "information relating to ownership, control and operation of sham companies" appear to me to be references to transactions, but not to specific documents. There is no reference to a specific document in the words "bank account information" and whilst I might infer that a bank account would usually be evidenced by documents, including bank statements, a reference to a "bank account" or "bank account information" is not a reference to a document. I note from Taylor Wessing that support for this is to be found in the Court of Appeal decision of Dubai Bank Limited v Galadari (No.2) [1991] WLR 731 (see [19] of Taylor Wessing) .

71. The exceptions to which I have referred are the references:

- (a) first, in sub-paragraph 35.2 to a "high level narrative description" of how the misconduct was effected, which is clearly a specific reference to a document in the context of that paragraph. It is said to have been based on comparing various materials which are then identified.

- (b) second, in the fourth line of sub-paragraph 35.2 to "allegedly altered bank statements" and later in the same sentence to "original bank statements". These are also clearly specific and direct references to documents.

- (c) third, in sub-paragraph 35.13(i) to "material relating to the loan agreement", which is plainly a compendious reference to documents (just as "correspondence" is a compendious reference to a number of letters, emails and the like).

72. I must then turn to the issue of reasonableness and proportionality. These documents are not documents obtained via MLA and so no issue arises as to whether it is appropriate for me to make an order on that score. The documents that I have found to have been mentioned should be easily retrieved by the FCA and ought not to be onerous to collect or expensive to produce.

73. Similar considerations apply to those I have already identified. I accept from Mr Power that there is potential for these documents to be relevant to, or to inform, the approach to the strike out application in circumstances where access to these documents will enable the First Defendant better to understand how the claim against him in these proceedings has been put together.

74. I bear in mind Mr George's submission that the value of this evidence will be limited where it will not represent a complete picture of the evidence. He referred me in this context to *Ansari v* Knowles [2014] CP Rep 9 per Moore-Bick LJ at [27]:

> "I would emphasise too that, on a strike out of a claim on the Jameel principle, where the question of abuse of process depends on whether the game is or is not 'worth the candle,' it is not appropriate for the court to undertake any kind of mini- trial, based upon incomplete evidence, either as to liability or quantum. Such a course is to be avoided on a strike out or a CPR Part 24 application for summary judgment, and is, in my judgment, equally undesirable where a Jameel application is made."

75. I shall return in a moment to the question of the strike out application, but for present purposes, whilst I accept that it would obviously be inappropriate for the court to determine the strike out application on the basis of incomplete evidence, that does not dissuade me from ordering disclosure in all the circumstances. These documents have been mentioned. They have been mentioned in the context of a witness statement which seeks to defend the strike out application and I am not yet in a position to determine precisely how they will or may be used on that application. On balance, and for all the reasons that I have given, it is, in the circumstances, reasonable and proportionate for them to be disclosed.

The Scope for a Preliminary Issue and the Pursuit of the Strike Out Application

76. As things stand, the strike out application is listed for the end of September. However, during the course of the hearing there has been discussion over the potential usefulness of dealing with various matters by way of preliminary issue, including the issue of statutory construction that I have already identified and the issue of consent from foreign authorities. I cannot possibly say at this juncture whether a preliminary issue is the correct approach and neither party has had the opportunity to make detailed submissions on the point.

77. However, in case it is helpful, I observe that it seems to me that the identification of preliminary issues of this kind might well be a useful and efficient way of progressing the issues in this case (always subject to consideration of the potential dangers that surround the determination of preliminary issues in a vacuum).

78. A key reason for the application for disclosure is the First Defendant's desire to invite the court to determine at the strike out application the extent to which the FCA may have made improper use of MLA material. Thus, for example, at paragraph 45 of his skeleton argument Mr Power said that: "Plainly in evaluating what use the FCA has made of MLA material and the credibility of its suggestions it did not deploy or rely on this material, the court will need to consider it and compare it with the material the FCA is said to have deployed and relied on."

79. Whilst I have permitted some disclosure which will go to this question on the basis that I consider it to be reasonable and proportionate in the context of this case (for reasons I have given), nevertheless I have concerns over the extent to which it will be appropriate for the First Defendant to invite the court to seek to engage in a comparison exercise on the hearing of the strike out application. Without knowing what is in the documents or what use the First Defendant will make of them, it is difficult to say that it will inevitably involve a mini trial, but there is quite clearly a danger that it will do so. Indeed, during the course of the hearing Mr Power suggested that, on one view, his abuse argument might ultimately need to be dealt with as a discrete trial on its own with full disclosure and witness evidence.

80. In the circumstances, if there is an alternative means of resolving some of the purely legal issues in this case, including issues which might make the strike out application otiose, then it seems to me that the parties, including for these purposes the Second Defendant, who is not a party to this application but was represented at the hearing by Ms Sagan, would be well-advised to consider them. One such issue might well be the question of consent, which, if resolved in the FCA's favour, would likely mean that the First Defendant's complaints of abusive behaviour in commencing these proceedings in reliance on material obtained by MLA would fall away.