Neutral Citation Number: [2020] EWHC 853 (Ch)

Case No: HC-2017-001598

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

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

Date: 08/04/2020

Before :

THE HON. MR JUSTICE FANCOURT

- -

Between :

(1) MARK BYERS **(2) HUGH DICKSON** **(as Joint Official Liquidators of Saad Investments Company Limited)** **(3) SAAD INVESTMENTS COMPANY LIMITED** **(in liquidation)**	**Claimants**
- and –	
SAMBA FINANCIAL GROUP	**Defendant**

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Mr Stephen Smith QC, Mr Adam Cloherty and Mr Timothy Sherwin (instructed by **Morrison & Foerster (UK) LLP**) for the **Claimants**
Mr Andrew Onslow QC, Mr Alan Roxburgh, Mr Edward Harrison and Ms Sarah Tulip (instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing dates: 25, 26, 27 February 2020

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Approved Judgment

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

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

This Judgment comprises the following sections:

I. Introduction to the applications

1. On 20 November 2018, at the first case management conference in this claim ("CMC 1"), His Honour Judge Klein made an order that the Defendant ("the Bank") give standard disclosure of documents. The Claimants were also ordered to give standard disclosure. (These orders were made before the Disclosure Protocol in the Business and Property Courts (CPR 51UPD) came into force, though that Protocol has applied to the claim from 1 January 2019.)

2. The order was for the parties to give disclosure in two tranches: the first by 17 May 2019 and the second by 27 September 2019. This was because the Bank drew to the Judge's attention that it considered that its ability to give disclosure of some at least of its documents depended on the agreement of the Saudi Arabian Monetary Authority ("SAMA"), the financial and banking regulator in the Kingdom of Saudi Arabia ("KSA"). The Bank therefore asked for a generous time in which to complete the disclosure exercise, to allow time for the necessary approval to be obtained. The Claimants also had to seek the permission of the Court to disclose certain documents that had been obtained through other court process. The first tranche of disclosure was

therefore to be of documents "where disclosure does not require third party consent or the permission of any court".

3. The first tranche of disclosure and a disclosure statement was provided by the Bank, but the categories of documents were limited and the number (in the context of this claim) quite small. The substantial majority of the Bank's disclosure would arrive in the second tranche, as the Bank contended that SAMA approval to all further disclosure was required. However, no second tranche of disclosure has been given by the Bank – neither a list of documents nor a further disclosure statement – and no copies of any further documents have been provided save for two letters from SAMA.

4. On the very day on which the second tranche of disclosure was due, 27 September 2019, the Bank applied for an extension of time, so that it could complete the exercise of searching for and reviewing hundreds of thousands of documents in order to show them to SAMA and obtain SAMA's consent. It considered that it would need until 6 January 2020 to do so. On 22 October 2019, despite misgivings about the Bank's conduct, I granted an extension of time until 13 December 2019. The Bank stated that its ability to give further disclosure, once it had completed the review exercise, depended on SAMA giving consent. At that time, the Bank expressed guarded optimism that consent would be granted in due course, but it indicated that there was a possibility that a further application in that regard would have to be made, possibly one for an order to revoke or vary its disclosure obligation.

5. The Claimants complied with the original order for disclosure and served their list of documents and disclosure statement on the Bank on time. They raised with the Bank's lawyers whether inspection should be delayed until the Bank too had given disclosure, but the Bank insisted that the Claimants allow inspection of their documents, in accordance with the court's order, and the Claimants did so. The Bank has therefore had access to copies of all the Claimants' documents since early October 2019.

6. When extending the date for the Defendant's disclosure, I ordered that if any further application was made for an extension of time or to vary the Bank's disclosure obligations on grounds that were connected with its regulation by SAMA, the Bank must at that stage disclose its relevant correspondence and notes of meetings with SAMA from 6 December 2017 up to the date of the application (save for any privileged documents) and file a disclosure list supported by a statement of truth ("the SAMA disclosure"). There has been no appeal against that order.

7. Late on 13 December 2019, the Bank applied for a further extension of time and/or a variation of the order for standard disclosure and the order for SAMA disclosure. No further disclosure had by then been given by the Bank, save that it had provided a copy of one letter from SAMA dated 5 November 2019 and a translation of it. The Bank said that the reason why it had not given disclosure was that SAMA had refused on 11 December 2019 to give its permission for disclosure to take place, and had suggested to the Bank that the proper course was for the Court to approach the Ministry of Foreign Affairs in KSA to seek its assistance in connection with the Court's "request" for disclosure of the Bank's documents. The Bank was in any event behind schedule with its review of certain categories of documents and so sought a further extension of time to complete that exercise and to engage with SAMA at a high level to try to obtain its consent to disclosure. In the alternative, it sought a

variation of the order for disclosure to remove the requirement to disclose those documents for which third party consent was needed but could not be obtained.

8. On 16 December 2019, the Claimants issued an application for the Bank to be debarred from defending the claim and for the Defence to be struck out; alternatively for an order that unless disclosure were given by 3 January 2020 the Bank be debarred and the Defence struck out.

9. I heard the Bank's application for a further extension of time urgently on 19 December 2019. I was unable to consider the communications between SAMA and the Bank because, in breach of the Order of 22 October 2019, the Bank did not give the SAMA disclosure or provide a verified list of those documents. The Bank asserted that SAMA had forbidden disclosure of correspondence between it and the Bank on grounds of confidentiality. It produced the letter from SAMA dated 5 November 2019 to that effect. It referred to but did not produce the letter sent by SAMA on 11 December 2019, in which SAMA is said to have expressed its requirement for the Court to petition the Ministry of Foreign Affairs in KSA.

10. On 20 December 2019, I rejected the Bank's application for a further extension of time, on the grounds that: the evidence of the Bank in support of its application was inadequate and opaque; the Bank was not putting the full picture before the Court; and there was no credible basis in the evidence for believing that a further extension of time would be productive. I did not decide then whether the application should be dismissed because the Bank had failed to comply with the SAMA disclosure order. The Bank's application to vary the orders for disclosure and the Claimants' application to strike out the Defence were adjourned to be heard at a later date. I indicated that if by then the Bank had been able to give disclosure, the Court would have to consider, in the context of the Claimants' application to strike out and debar, whether a fair trial of the claim remained possible notwithstanding the serious delay.

11. No further disclosure has been given by the Bank to date, save for a further single letter from SAMA dated 1 January 2020, explaining that criminal proceedings would be initiated against the Bank if it disobeyed SAMA's directions. That letter was written in response, the Bank says, to a letter from it to SAMA (undisclosed) in which the Bank asked SAMA to spell out the consequences of providing disclosure without SAMA's consent. The Bank then asked SAMA for permission to rely on that one letter in these proceedings and SAMA gave permission, on terms as to confidentiality.

12. On 10 January 2020, the Bank issued a further application. This was for the trial of preliminary issues, which the Bank said could fairly be tried before the Bank needed to give further disclosure. This application was made in the alternative to the Bank's existing application to be discharged from its disclosure obligations. There was also an application for a direction that a letter of request be sent by the Court to the Ministry of Foreign Affairs of KSA, and for relief against sanctions "to the extent necessary".

13. All these outstanding applications were heard over 3 days from 25 February 2020 on the basis of written evidence, including evidence of four expert witnesses on Saudi Arabian law, banking practice and regulation. I was assisted by written and oral submissions of the highest quality from both sides. The applications raise a number of difficult case management problems. At bottom is the question of whether the Bank

has forfeited its right to a trial on the merits in October 2020, on account of serious and deliberate breaches of the Court's orders, or whether it should – without giving disclosure – be allowed to defend the claim, or at least defend certain issues.

14. Mr Stephen Smith QC, who appeared with Mr Adam Cloherty and Mr Timothy Sherwin on behalf of the Claimants, said that the Bank's conduct was disgraceful and that it had brought the problems with SAMA on its own head, and had not been straight with the Court, such that the usual order in cases of serious and deliberate non-compliance with the Court's orders (which he said was to strike out the whole of a party's claim or defence) should be visited on the Bank. He submitted that there was no justification for having a trial of preliminary issues of law and that the Bank should not be allowed to defend issues in the claim even if there were issues that were not fact- and disclosure- sensitive. That was because, first, the Bank's breaches of the Court's orders were serious and inexcusable, and second, because on a proper analysis none of the issues could fairly be tried without disclosure, or at least none that would serve any purpose in terms of progressing the resolution of the claim.

15. Mr Andrew Onslow QC, who appeared with Mr Alan Roxburgh, Mr Edward Harrison and Ms Sarah Tulip on behalf of the Bank, said that the Bank's conduct falls well short of being inexcusable. That is on account of the predicament in which the Bank finds itself, through no fault of its own and despite its best efforts, of having to choose between defying the express requirements of its regulator, SAMA (breach of whose rulings is a criminal offence), and acting contrary to the orders of this Court. He submitted that, given the Bank's breach is excusable, the Court should accommodate the Bank's defence to the extent that this is consistent with the overriding objective and a fair trial. They argue that a fair trial is possible, in the absence of full disclosure by the Bank; alternatively that there should be tried preliminary issues while the process of diplomatic engagement proceeds, which might lead to the Bank being able to give disclosure at a later stage; alternatively there should be a trial on the limited issues of law, or mixed law and fact where relevant facts cannot sensibly be disputed, which would enable the Bank without unfairness to the Claimants to seek to make out its defence on essentially legal grounds.

16. The directions at CMC1 provided for exchange of factual witness statements and hearsay notices on 31 January 2020, and a timetable for the exchange of expert evidence on Saudi Arabian law and valuation of the shares, including meetings of experts and the preparation of joint statements, between 13 March 2020 and 12 June 2020. A pre-trial review has been listed for hearing between 22 and 24 July 2020 and the trial is due to start in the week commencing 5 October 2020, with a 6 weeks estimate. By consent orders made before and after the hearing, the orders for exchange of witness statements and expert reports have been stayed for further consideration after this judgment is handed down.

17. I shall approach the applications that are before me by addressing issues in the following order:

    i) Should the SAMA disclosure order be set aside?

    ii) Should the Court send a letter of request to the Ministry of Foreign Affairs of KSA to ask it to direct SAMA to permit the Bank to give disclosure?

iii) Should the order for the Bank to give standard disclosure be set aside?

iv) If not, should the Court direct the trial of preliminary issues instead?

v) If not, should the Defence now be struck out and the Bank debarred from defending, or an unless order be made to that effect?

vi) Can there be a fair trial of certain issues in the claim in the absence of disclosure by the Bank, and if so should the Court allow the Bank to defend those issues, and if so on what terms?

Before turning to those questions, I must say something about the nature of the claim; the issues that, as things stand, are to be tried in October 2020; and the procedural history of the claim as regards disclosure.

II. Introduction: factual background to the claim

18. The claimants are the liquidators of a Cayman Islands limited company ("SICL"). SICL was one of a group of companies, the Saad Group, formed by Mr Al-Sanea in 1980. SICL was indirectly owned by Cayman Islands trusts established by Mr Al-Sanea but he effectively and indirectly controlled what SICL did. SICL and other Saad Group companies were administered in Switzerland. Mr Al-Sanea was a director of the Bank from 2003 to 2006, with which he and SICL had long-established banking relationships (in SICL's case with its London branch). Mr Al-Sanea was a guarantor of SICL's US$60 million bilateral loan facility from the Bank.

19. Between 2002 and 2008, Mr Al-Sanea entered into various transactions with SICL ("the Six Transactions"). For present purposes it is enough to say that by the Six Transactions Mr Al-Sanea purported to sell to and hold for SICL, or hold on trust for SICL, large numbers of shares in five Saudi Arabian banks ("the Relevant Securities"). Title to the shares remained with Mr Al-Sanea: SICL, an unregistered foreign company, was not licensed under Saudi Arabian law to invest in these shares.

20. In 2009, as a consequence of the worldwide credit crunch, the Saad Group of companies collapsed leaving huge debts. SAMA obtained a freezing order against SICL's and Mr Al-Sanea's assets in May 2009. SICL went into provisional liquidation in August 2009 in the Cayman Islands. Between 16 and 30 September 2009, notwithstanding the freezing order, Mr Al-Sanea transferred to the Bank, in purported discharge of his liabilities, large numbers of shares in the five banks and other shares ("the September Transfer"). Most of these shares were held in Mr Al-Sanea's investment account with the Bank's subsidiary, Samba Capital.

21. The Claimants' case is now that these transferred shares included the shares that were held on trust for SICL ("the Disputed Securities"), worth about US$318 million at the time, and that the Bank received the Disputed Securities with knowledge that they were held on trust for SICL; alternatively that the Bank should reasonably have known that they were so held, or should have made inquiries that would have revealed that fact. The consequence is that the Bank was a constructive trustee of the shares or, more broadly, that it was unconscionable for the Bank to treat the Relevant Securities

as its own. The Claimants do not seek to recover the Relevant Securities specifically but claim equitable compensation in the value of the shares on the date of the September Transfer or the date of trial, and interest.

III. The issues for trial

22. The parties have sensibly agreed, for case management purposes, a list of the main issues that would have to be determined at a trial. That list is annexed to this judgment.

23. The Claimants' claim raises a host of issues about the applicable or governing law of the claim and discrete issues within it. Apart from the question of whether the Claimants' claim against the Bank is governed by Saudi Arabian or Cayman Islands or English law, there are issues about whether the Six Transactions and the relationship thereby created were governed by Saudi Arabian or Cayman Islands law - on which depends the important question of whether the Claimants obtained any equitable or proprietary interest in the Relevant Securities; and whether the September Transfer was governed by Saudi Arabian law or Cayman Islands law.

24. In addition to those conflict of laws issues, there are the following main issues: what shares were actually transferred by the September Transfer and did these include some or all of the Relevant Securities; did the Bank know or sufficiently suspect that Mr Al-Sanea held the Disputed Securities on trust for SICL; the quantum of liability; whether if the governing law of the principal claim is Cayman Islands or English law the claim is statute-barred; and whether in any event the claim should be dismissed on the basis that it would be contrary to public policy or international comity to grant relief to the Claimants.

25. It is common ground that if the governing law of the claim is Saudi Arabian law then the Claimants' principal claim based on constructive trust cannot succeed, since Saudi Arabian law does not recognise the common law trust or any division between legal and equitable ownership and does not apply foreign law. In those circumstances, the Claimants advance a claim based on the general or unifying theory of claims for pecuniary loss or damage under Saudi Arabian law, which are said to be analogous to the common law of tort, and which require fault (negligence or wrongful acts), harm and causation. The fault is based on the Bank's actual or imputed knowledge of the Claimants' interest in the Relevant Securities and the harm is to the interest of the Claimants in the Relevant Securities under a *muhassa* (analogous to joint venture or partnership rights) or a *wakala* (agency).

26. All of these issues are, on the face of it, issues of mixed fact and law, or, in the case of issues about the effect of Saudi Arabian law, issues of fact on which the Court would hear expert evidence.

27. The current proceedings were issued in 2017 after the stay of the original proceedings (issued in 2013) following the decision of the Supreme Court in Akers v Samba Financial Group [2017] UKSC 6. The Claimants also applied to amend the 2013 claim to plead a claim based on knowing receipt of trust property. The 2017 claim

was issued in case amendment of the 2013 claim form was refused for limitation reasons.

28. The Bank opposed the amendment and applied to stay the new claim on *forum non conveniens* grounds and to strike it out as an abuse of process. It contended that even if trusts were created by the Six Transactions (which it denies), Saudi Arabian law was clearly the law that governed the effect of the September Transfer and the claim for financial loss suffered by the Claimants, with the consequence that the claim was bound to fail because the Bank obtained good title to the Disputed Securities under Saudi Arabian law and incurred no personal liability to the Claimants.

29. Birss J held ([2017] EWHC 3106 (Ch)) that there were properly arguable grounds for Cayman Islands law being the governing law of the personal claim against the Bank, which required to be tried. He therefore granted permission to amend and dismissed the application to stay or strike out the new claim.

30. The Bank was granted permission to appeal the order permitting the 2013 claim form to be amended, on grounds relating to limitation, but refused permission to appeal the dismissal of the application to stay or strike out the new claim. Refusing permission to appeal, Asplin LJ stated that Birss J was entitled to come to the conclusion that he did and "that the court would be required to consider all the relevant facts and circumstances in order to come to a concluded view [on whether Saudi Arabian law or Cayman Islands law applied]".

31. Later, the Court of Appeal allowed the Bank's appeal against the grant of permission to amend on the ground that it had arguable limitation arguments available to it, the effect of which was that the 2013 proceedings came to an end and the 2017 claim now proceeds, with the additional limitation issue (if English or Cayman law applies) in consequence.

IV. The claim since 2017: disclosure history

32. It is obvious from the main cause of action and some of the issues for trial that documents of the Bank and Samba Capital are likely to be of central importance in determining at least the knowing receipt claim at trial. The documents in question are those relating to Mr Al-Sanea's relationship with and obligations to the Bank, Mr Al-Sanea's use of SICL and his relationship with and influence on SICL and other companies in the Saad Group, his ownership of the Relevant Securities, the making and recording of the Six Transactions, the transfer of the Disputed Securities by the September Transfer and the Bank's own records of those matters. Their central importance was noted by Judge Klein at CMC1 and referred to in my judgments at CMC2 in March 2019 and at the hearing of the Bank's 27 September 2019 application in October 2019. The Bank has never suggested otherwise.

33. The Claimants instigated and pursued insolvency proceedings against the Bank in this country, under s.236 of the Insolvency Act 1986. That application was issued on 17 December 2010. Shortly before a hearing, the Bank told the liquidators that SAMA had approved its giving the information about SICL that the liquidators had requested. As a result, documents relating to SICL's account with the London branch were

produced by the Bank to the liquidators. The liquidators requested further information and, after a delay, the Bank provided documents relating to Mr Al-Sanea's alleged discharge of the debt under the $60m facility. Although these documents included correspondence between the Bank and Mr Al-Sanea, the Bank then maintained that SAMA had only authorised it to provide documents from the London branch relating to SICL's accounts, not documents from KSA or third party documents. After further pressure from the liquidators, however, the Bank eventually disclosed that the debt had been discharged by the transfer of bank shares held by Mr Al-Sanea on 16 September 2009 (the September Transfer).

34. The liquidators requested further evidence of the shares that had been transferred and, after a delay, the Bank released to them in a letter dated 20 October 2011 a quantity of documents and information relating to Mr Al-Sanea's shareholdings held by the Bank. Further documents relating to Mr Al-Sanea were disclosed in early 2012. When the liquidators asked specifically for further information about the Disputed Securities and whether the Bank was aware of SICL's interest in them (by letters dated 10 February 2012 and 9 March 2012), the Bank first said that it had prepared a draft response and was seeking the advice of its regulator. Then, on 23 May 2012, it said that "certain of your enquiries relate to the confidential business and affairs of third parties, which Samba cannot lawfully disclose without appropriate consents". Up to that point, although the Bank said that it was asking SAMA for its consent to disclose, there was no indication that SAMA objected; indeed, if it was correct that SAMA's consent had been sought, either it must have consented or the Bank was happy to give the information sought without consent.

35. A degree of information supported by documents was therefore provided by the Bank in the period 2010-2012 and some further documents in proceedings in the Cayman Islands. As the Claimants demonstrated on day 3 of the hearing before me, they included documents that showed that SICL had a substantial facility from the Bank in 2004; that the then chairman of the Bank and brother-in-law of Mr Al-Sanea, Mr Saud Algosaibi, was involved as a party in one of the Six Transactions and so would have known about it; and that Mr Algosaibi had complained to the King of Saudi Arabia about Mr Al-Sanea's illegal raiding of funds in June 2009. This was no doubt sufficient to persuade the liquidators that they had a valid claim to bring, but it falls far short of standard disclosure of documents on the disclosure issues identified in para 23 above, in particular the extent of the Bank's knowledge of SICL's interest in the Disputed Securities.

36. Further documents were disclosed by the Bank on 8 July 2019, as the first tranche of disclosure pursuant to the order made at CMC1. These were the documents for which no third party consent to disclose was required, and therefore are probably documents held by the London branch of the Bank related to the accounts of SICL, or documents that the Bank had already provided to the liquidators. The first tranche included documents that showed that before the September Transfer in that year the Bank had documents that showed that SICL had substantial equity assets, a large proportion of which were stated by BDO to be held in trust for it by Mr Al-Sanea. Although 536 documents were disclosed by the Bank in this first list, they amount to a very small fraction of the vast number of documents (up to half a million, according to Mr Onslow at the October 2019 hearing) that were being reviewed for disclosure, and in view of the position on disclosure being taken by the Bank by May 2019 none of

those documents would be ones requiring the consent of Mr Al-Sanea or SAMA to be disclosed. With the possible exception of documents previously disclosed in 2010-2012, therefore, the stage 1 disclosure documents will not contain documents relevant to the bank accounts of Mr Al-Sanea or any other companies controlled by him at the Bank in KSA, including the account with Samba Capital in which many of the Relevant Securities were held. These were among the documents to be disclosed by the Bank by 27 September 2019.

37. By letter dated 14 June 2019, the Bank's solicitors wrote to the Claimants' solicitors saying that SAMA had "very recently provided conditional approval in principle for Samba's external professional advisers to also conduct, with Samba, a further search, collection and review exercise which Samba expects will comply with the parameters set out in the Directions Order". The Bank's solicitors explained that SAMA's sole condition was that all documents identified as a result of that exercise would require its consent before they could be disclosed. It said that the process would take time and that the Bank would expect to be able later to make specific proposals about revised disclosure deadlines. It invited the Claimants' views on a rolling disclosure programme. A letter of 22 July 2019 said that the Bank would be able to make specific proposals about revised deadlines soon after the beginning of August. No such proposal was made until a letter of 9 September 2019 in which an extension of time from 27 September to 6 January 2020 was suggested, on the basis that it was expected that obtaining SAMA's approval to disclosure would take a month after the exercise of listing the disclosure documents was completed.

38. By reply, the Claimants' solicitors said that such a delay would cause serious prejudice and that the Bank should either revert with a reasonable proposal or apply to the Court immediately. The Bank applied on 27 September 2019 for an order simply that time for disclosure be extended until 6 January 2020. In evidence in support of that application, Mr Al-Missaind, General Legal Counsel of the Bank in Riyadh since October 2018, said that he had sought SAMA's approval to allow the Bank to use external counsel in the disclosure exercise on at least four separate occasions, and that at a meeting on 9 June 2019 SAMA provided its approval in the following terms:

> "(i) SAMA had decided that it would provide conditional approval in principle for Samba's external professional advisors, Latham & Watkins and Alvarez & Marsal, to conduct (with Samba) a search, collection and review exercise.
>
> (ii) The sole condition of SAMA's approval to such a further search and review exercise taking place was that all relevant documents identified as part of this exercise would need to be provided to SAMA, at which point SAMA would consider whether to provide its approval for such documents to be disclosed, and that all relevant documents would require SAMA's approval before they could be disclosed.
>
> (iii) Any search for documents must be conducted in accordance with all information security requirements applicable to Samba (and it is in this sense that the approval was provided "*in principle"*).

> (iv) SAMA would not give approval for the disclosure of any documents in the English proceedings (i.e. these proceedings) until Samba had completed its search, collection and review process (i.e. once all disclosable documents had been identified and presented to SAMA".

No meeting notes or letter of confirmation was exhibited. It will be seen that the terms in which Mr Al-Missaind described SAMA's conditional approval were more onerous than those previously described by the Bank's solicitors. As further explained by Mr Al-Missaind, SAMA would not start to consider whether to give approval for the disclosure of any documents before the Bank had completed the search and review process and presented all disclosable documents to SAMA.

39. Neither in the evidence in support of the application nor in the submissions made to me at the hearing on 22 October 2019 was any particular concern expressed that SAMA would, for whatever reason, decline to approve disclosure. The Bank's lawyers were optimistic, but they did advert to the possibility of the need for a further application if approval was not given. There was evidence from the Bank's then expert witness, Mr Haberbeck, that SAMA's conditional permission was in the nature of a ruling within the scope of its powers of regulation; that such a ruling was final and binding, subject only to judicial review; and that a failure by a bank to comply with such a ruling can result in serious sanctions "ranging from censure of the concerned individuals or suspending or barring them from working in a bank, to censure of the bank or suspension or cancellation of its banking licence".

40. In light of the evidence, I granted an extension of time until 13 December 2019, but I expressly directed that:

> "In the event that the Defendant makes an application for a further extension of time for compliance with, or otherwise to vary its obligations under, paragraph 11 of the Directions Order, on grounds that are in any way connected with its regulation by the Saudi Arabian Monetary Authority ('SAMA'), the Defendant shall:
>
> > 2.1 at that stage disclose to the Claimants, and (subject to paragraph 2.2 below) give inspection of, correspondence and attendance notes recording its communications with SAMA from 6 December 2017 to the date of such application concerning the provision of documents or information to the Claimants or any of them…; and
> >
> > 2.2 file and serve a disclosure list (supported by a statement of truth) in respect of the disclosure in paragraph 2.1 above. Such list shall also identify any disclosed document(s) which the Defendant seeks to withhold from inspection on grounds of privilege; and the Claimants shall have liberty to apply to require inspection of (and challenge any assertion of privilege over) any such documents, that application to be determined by Mr Justice Fancourt prior to the hearing of

> any variation application (whether at a further hearing or on the basis of written submissions)"

The reason for the SAMA disclosure order was to ensure that, on any further application, the Court would be able fully to assess to what extent problems of the Bank in providing disclosure by 13 December 2019 were genuinely attributable to SAMA and not to the Bank's own default, or any failure on its part to explain to SAMA the terms and consequences of the order for disclosure or to emphasise its wish to be able to comply and the importance of its being able to comply.

41. The matter was next brought before the Court by the Bank when it issued an application on 13 December 2019 (once again at the last possible moment) for a further extension of time and/or variation of the disclosure obligations. The draft order annexed to the application contained wording appropriate to relieve the Bank in full from its obligation to give standard disclosure, and sought an order revoking the SAMA disclosure order.

V. Should the SAMA disclosure order be revoked?

42. The question of whether the Bank should disclose its communications with SAMA was first raised in an application made by the Claimants dated 8 March 2019. I dealt with it at paras 62-97 of my judgment dated 22 March 2019 ([2019] EWHC 951(Ch)). I will not repeat those paragraphs, but I decided that the communications falling within category four identified by Mr Laher in a witness statement dated 15 March 2019, made on behalf of the Bank, should be disclosed in the event of any further application for a substantive variation of the order for disclosure made at CMC1. I said that I had no doubt that the class of documents was necessary for the fair disposal of any application by the Bank to vary the disclosure obligations in the event that SAMA did not authorise disclosure.

43. When making that order, I considered on the evidence before me whether such disclosure would be unlawful under Saudi law. I noted that only Mr Al-Missaind asserted that it would be and that Mr Haberbeck (the Bank's expert witness) made no such claim. I therefore concluded, on this paucity of evidence, that there was only a small residual risk that SAMA might construe circulars relating to banking confidentiality as extending to its own correspondence with a regulated bank. I also concluded that the risk of prosecution by SAMA in the event of a breach of Saudi law by the Bank would be small, given the non-confidential nature of the SAMA correspondence and the fact that the Bank would be acting pursuant to a court order in disclosing it, and said that:

> "The balance as between the potential importance of the documents to resolution of a larger and very important disclosure issue and the risk of any adverse consequences to the Bank therefore falls in favour of disclosure."

44. In order further to protect the Bank, I declined the Claimants' request to order disclosure regardless of any application to vary the Bank's disclosure obligations and concluded that disclosure was only required in the event that the Bank later applied

substantially to vary its disclosure obligations. That was because the SAMA correspondence was not at that time relevant to any trial issues but was relevant to an application to vary the extent of the Bank's disclosure obligations.

45. There was no attempt by the Bank to appeal my order dated 22 March 2019 in this regard.

46. The Bank's application dated 27 September 2019 did not trigger the requirement to disclose the SAMA correspondence because it only sought an extension of time for disclosure. However, the application dated 13 December 2019 sought a variation of the disclosure obligations. The Bank should therefore have disclosed the SAMA correspondence when making the application, in compliance with the orders dated 22 March 2019 and 22 October 2019, but it did not do so.

47. In his fourth witness statement in support of the Bank's application, Mr Al-Missaind says that on 20 October 2019 – i.e. two days before the hearing of its 27 September application – he wrote to SAMA requesting SAMA's approval to disclose all SAMA correspondence. He says that SAMA had previously rejected such a request. Neither the letter to SAMA nor the previous request or rejection was exhibited. Mr Al-Missaind says that on 5 November 2019 SAMA wrote to the chief executive officer of the Bank with a formal ruling prohibiting the disclosure to any third party of relevant correspondence between the Bank and SAMA. The document said to be SAMA's letter of 5 November 2019 together with a translation is exhibited. The translation says that in view of continuing requests from the legal liquidators of SICL and the Supreme Court of the United Kingdom, the Bank should respond to the Court supported by a letter from SAMA "very urgently at the next hearing session". The translation states:

> "I would like to inform you that SAMA affirms that it does not approve the disclosure of the relevant correspondence between Samba and SAMA, as it is confidential and private to both parties. It is prohibited to provide such correspondence to any third party based on the local regulations in Saudi Arabia. SAMA approves to submit this letter to the concerned court if necessary required."

There is no date on the translation of the letter.

48. Mr Al-Missaind says that, as a result of this letter, the Bank will not be able to disclose any other relevant correspondence with SAMA because to do so will result in the Bank "violating its obligations under Saudi Arabian law". Despite receiving this letter on 5 November 2019, the Bank did not send a copy of it to the Claimants or apply promptly to the court to vary the SAMA disclosure order. The Bank now seeks revocation of the Order of 22 October 2019 on the basis that there has been a material change of circumstances, namely clarification by SAMA that disclosure of the SAMA correspondence would indeed be unlawful, contrary to the Court's assessment in its earlier judgment, and that compliance with the Order would be a direct contravention of an express ruling from SAMA.

49. The Bank relies on the jurisdiction under CPR 3.1(7) for the court to vary its own interlocutory orders: see Tibbles v SIG plc [2012] EWCA Civ 518; [2012] 1 WLR

2591. It submits that the court should apply the principles in Bank Mellat v HM Treasury [2019] EWCA Civ 449 and weigh the reality of the risk of prosecution under Saudi Arabian law against any prejudice resulting from the absence of the SAMA correspondence. The Bank submits that there is a real and serious risk of prosecution if it acts contrary to an express ruling from its regulator, SAMA. It is not in dispute that SAMA's rulings have the effect of law in KSA.

50. I am not persuaded that the SAMA disclosure order should be varied. My reasons are the following.

i) There has been no relevant material change in circumstances. When originally resisting the Claimants' application at CMC2 for disclosure of the SAMA correspondence, the Bank chose to rely on the evidence of Mr Al-Missaind that disclosure would be unlawful, and did not present expert evidence of Saudi Arabian law or regulatory compliance (despite having two experts engaged and otherwise providing evidence at the time) or seek clarification on the point from SAMA itself, as it could have done and apparently did later. The position now is that the Bank wishes to rely on better evidence in support of the same argument. It is not suggesting that SAMA has changed its policy or that the letter of 5 November 2019 creates new law. SAMA's letter says that it is prohibited to provide such correspondence to a third party based on the local regulations in KSA, not because SAMA has so declared.

ii) The ground of the Bank's application as regards the SAMA disclosure is in reality that the court was wrong to conclude that SAMA would not consider the disclosure of that correspondence to be contrary to Saudi Arabian law. But there was no appeal against the orders of March 2019 or October 2019 in that regard.

iii) I am sceptical about the degree of reliance that can be placed on assertions made in individual letters said to have emanated from SAMA. When it suits the Bank's needs, isolated letters are produced out of context, but otherwise the correspondence between the Bank and SAMA is kept out of the Court's view. Mr Al-Missaind has recently acknowledged that he has given the Court only an incomplete picture of dealings between the Bank and SAMA. Only two letters from SAMA were before the Court at the recent hearing: in both cases those letters were procured from SAMA and produced in support of the Bank's case. As I have noted in previous judgments in this case, there is a real concern that the Bank (acting through Mr Al-Missaind) is taking advantage of the inscrutability of SAMA's regulation, for its own purposes, and that the true and complete picture has not emerged.

iv) Even taking the letter from SAMA dated 5 November 2019 at face value, I would not have arrived at a different conclusion about the appropriateness of the SAMA disclosure order. The Bank's only reason for seeking to vary the substantive disclosure obligation (by revoking the order for the second tranche of standard disclosure entirely) is that SAMA has refused to give consent to any further disclosure and that non-compliance with its ruling will create a real and substantial risk of prosecution in KSA with severe penalties. The SAMA correspondence would in my judgment be essential for a fair and accurate evaluation of that risk.

v) For reasons that I will explain more fully in connection with the application to vary the substantive disclosure obligation, I consider in any event that the Bank's evidence overstates the likelihood of prosecution and of severe penalties being imposed, though I accept that there is a residual risk of prosecution if the SAMA correspondence is disclosed.

vi) Accordingly, in weighing the risk of prosecution of the Bank in KSA and the need for disclosure of the SAMA correspondence in order to evaluate fairly the Bank's application to revoke its disclosure obligations, the balance falls heavily on the side of disclosure.

vii) That is particularly so because the SAMA disclosure order does not require the Bank to disclose the SAMA correspondence in any circumstances. I declined to make such an order in March 2019. The directly relevant parts of the SAMA correspondence only fall to be disclosed by the Bank in the event that the Bank chooses to apply for a variation of its disclosure obligations for reasons connected with SAMA.

viii) Mr Onslow submitted that it could not be fair to require the Bank to disclose the SAMA correspondence, thereby creating a risk of criminal sanction, which is the very consequence that its application to vary its disclosure obligation seeks to avoid. The matters are not in my judgment comparable. With probably over 100,000 disclosure documents, SAMA may be properly concerned as banking regulator with the confidentiality of third parties in relation to Bank documents that will be scrutinised and publicised at trial. In the case of limited correspondence between it and the Bank, SAMA is concerned only with its regulatory oversight. As demonstrated by its consent to the production of its letters of 5 November 2019 and 1 January 2020, SAMA has no fixed objection to such matters being seen by the Court on an interim application. The risk of prosecution for complying with an order to disclose the SAMA correspondence is in my judgment small and is materially less than in the case of disclosure of large quantities of third party confidential documents, and I consider that the risk of any sanction other than a fine is smaller still.

ix) The Bank could and should have done more to ensure that a complete (or at least fuller) picture of its interaction with SAMA was placed before the Court. Instead, I consider that it has turned to its advantage the alleged inability to present the full picture. There is no convincing reason why the SAMA correspondence could not have been disclosed as a confidential exhibit, as SAMA agreed could happen in relation to its letter of 1 January 2020 on which the Bank was keen to rely. The Bank did not ask SAMA for permission to do so, or explain why it was important for it to be able to do so. Further, there is no convincing reason that has been advanced why Mr Al-Missaind could not have made full and frank disclosure in his witness statements of what has been said by the Bank to SAMA. The Bank has not sought SAMA's permission to do so or at least does not suggest that it has.

51. I therefore refuse the Bank's application to revoke the SAMA disclosure order.

VI. Should the Court send a letter of request to the Saudi Arabian Foreign Affairs Ministry?

52. In his evidence in support of the Bank's 13 December 2019 application for a further extension of time or variation of the disclosure order, Mr Al-Missaind states that on 12 December the Bank received a letter from SAMA dated 11 December "which advised Samba of SAMA's view that the request of the court in London must be through diplomatic channels of the government of the Kingdom of Saudi Arabia after coordination with the Saudi Ministry of Foreign Affairs". The letter of 11 December is not exhibited and has not been produced. Mr Al-Missaind does not say that he asked SAMA if this letter could be disclosed. Mr Al-Missaind says that although the letter did not contain an express direction prohibiting the disclosure of the second tranche of documents, it is to be understood as such, with the consequence that the Bank cannot give disclosure without putting itself in breach of Saudi Arabian law and exposing itself to a serious risk of regulatory and criminal penalties.

53. Against that background, the Bank asked for time to do two things. First, as Mr Al-Missaind puts it, to take urgent steps with a view to senior Samba personnel making urgent representations to SAMA to persuade SAMA to change its position and allow disclosure and inspection to take place:

> "I have had numerous meetings and calls over the past four days with senior Samba personnel to discuss these matters. I can confirm that senior Samba personnel (although Samba has not yet decided who this will be) will seek to persuade SAMA to give its approval, and will also make enquiries as to whether approval might be granted on particular terms or conditions acceptable to SAMA. In particular, Samba will continue to impress upon SAMA the severe consequences that might arise if Samba fails to give disclosure in the proceedings"

He confirmed that the Bank would continue to progress matters urgently. Secondly, to continue with the review and translation of disclosure documents, which had not been completed by 13 December 2019 and would not be fully completed until 20 January 2020.

54. It is notable that in neither Mr Al-Missaind's evidence up to that time nor Mr Laher's evidence, nor in the expert evidence of Mr Haberbeck on Saudi Arabian law or Mr Omar Abdallah (who provided expert evidence for the Bank on practical matters surrounding the banking regulatory environment in KSA), has there been a suggestion that the right way in which to obtain approval for disclosure of banking documents pursuant to a foreign court order is for the court to petition the Foreign Affairs Ministry of KSA. Instead, Mr Al-Missaind's reaction to the 11 December letter was that, by a process of urgent engagement, SAMA should be persuaded to reconsider.

55. On 20 December 2019, I rejected the Bank's application for a further extension of time ([2019] EWHC 3690 (Ch)). I adjourned the remainder of the Bank's application and the Claimants' application to strike out the Bank's Defence to be heard in the New Year. Mr Onslow notified the Court on that occasion that the Bank was in the course of obtaining further expert evidence to assist the resolution of those applications.

56. In fact, the Bank did not convene a high-level delegation to SAMA and no engagement of that kind took place. Instead, as confirmed by Mr Al-Missaind in a further witness statement dated 10 January 2020, he wrote a letter to SAMA dated 24 December 2019 (which has not been exhibited) updating SAMA on the outcome of the hearing on 20 December 2019 and "requesting information on SAMA's position in the event that Samba disclosed any documents without SAMA's approval, and the possible sanctions". That appears to have been an attempt to secure evidence from SAMA that would help the Bank to try to revoke the order for disclosure and resist the Claimants' strike out application. Instead of requesting an urgent high-level meeting to review the content of SAMA's letter of 11 December 2019, Mr Al-Missaind says that his letter said that "Samba was ready to attend a meeting at SAMA's request if SAMA wished to clarify any information with Samba". That is, self-evidently, something very different from what Mr Al-Missaind told the Court in his previous witness statement that the Bank would do.

57. As for the suggestion of a diplomatic approach intended to secure provision of the Bank's disclosure documents, Mr Al-Missaind says in his witness statement dated 10 January 2020 that "the Ministry would consider the request and, if appropriate, direct the request to SAMA for approval". It is wholly unexplained how Mr Al-Missaind knows what the Ministry would do. No communication from it has been exhibited or any conversation with the Ministry described.

58. The Bank produced an expert report dated 10 January 2020 from a new expert witness, Mr Al-Tammami, in support of its case. Mr Al-Tammami is a practising lawyer in his own firm in Riyadh (of four lawyers and three support staff), which is associated with Herbert Smith Freehills LLP. He was a senior associate in the predecessor firm from 2016 to 2018 and before that general legal counsel in a private company. It appears that Mr Al-Tammami qualified in KSA in 2006 and obtained an LLM in law in England in 2010. He worked between 2011 and 2013 as a legal adviser in the Saudi Stock Exchange (Tadawul). He says that his expertise lies in regulatory, corporate and dispute-resolution practices, which he provides to local and international members and entities.

59. Mr Onslow confirmed on instructions that Mr Al-Tammami was not given copies of the correspondence between SAMA and the Bank other than the two letters (5 November 2019 and 1 January 2020) that have been exhibited by Mr Al-Missaind. Mr Al-Tammami therefore has not seen the letter from SAMA dated 11 December 2019 that suggests a diplomatic approach is required.

60. Much of Mr Al-Tammami's expert report is concerned with banking control law and liability for breach of that law. I will refer to some of that in the next part of this judgment. Part VII of his report is headed "Requesting Consent from SAMA under Saudi Arabian Law". Mr Al-Tammami asserts that "SAMA is usually much more cooperative when it receives a letter through diplomatic channels (which is the only recognised method for requesting consent from SAMA)" and that the Bank does not have legal standing to submit to SAMA a court order for disclosure of customers' banking details. Only the Ministry of Foreign Affairs has legal standing to request disclosure. Mr Al-Tammami says that it is common practice for courts to submit requests for banking information or any assistance through diplomatic channels, and that the court would submit the request to its own ministry of foreign affairs which would then communicate the request to the Ministry of Foreign Affairs of KSA.

61. The single example given by Mr Al-Tammami of such a practice is a case in 2010 in which the US District Court for the District of Oregon submitted a "'request for international judicial assistance' to the judicial authorities of Saudi Arabia." The reference given is "U.S. District Court, District of Oregon, Criminal Matters, Letter Rogatory, Case No. CR 05-60008-02-HO (April 16, 2010)". Mr Wheeler, the Claimants' solicitor, says in his third witness statement dated 30 January 2020 (para 27) that that was a case in which the Court in Oregon sought assistance from a Saudi Arabian court in obtaining evidence for criminal proceedings from a non-party, who was outside the jurisdiction of the Oregon court. The Court's judgment records that no response was received from the Saudi Arabian court.

62. Mr Al-Tammami is clearly mistaken in considering that the Oregon case is any precedent for a foreign court petitioning the Foreign Affairs Ministry of KSA for assistance in persuading a regulatory arm of the Saudi Arabian government to permit a bank to comply with an order of a foreign court made against it. It is an example of the (broadly) recognised international practice of a court requesting the assistance of a foreign court to obtain evidence from beyond the limits of its own jurisdiction. That is quite different from a request to a foreign government to direct or permit a party who is subject to the jurisdiction of the court to comply with an order made against it. Mr Onslow was constrained to accept that there was no precedent for the latter case. That in itself is not a reason for the Court to reject the application, but I consider that the Bank derives no support from the opinion of Mr Al-Tammami, which in the absence of any supporting evidence I am unable to accept.

63. The most telling evidence contrary to Mr Al-Tammami's opinion is that none of the other experts or the Bank's experienced general counsel had ever suggested that the Bank was setting about securing SAMA's authority in the wrong way. Moreover, the evidence of the Bank and the evidence of the Claimants' witnesses proves that, on previous occasions, SAMA has indeed been responsive to direct requests from the Bank for authority to disclose information or documents to the Claimants. It appears to me that Mr Al-Tammami has simply picked up and used what he was told that SAMA said in its letter of 11 December (without even seeing the letter). There is no other evidence in support of his opinion that that is the established way in which the authority of SAMA for the disclosure of documents pursuant to a foreign court order is obtained. The Claimants' expert witnesses dispute that there is any such established procedure and say that it would be wrong to make such a request.

64. There seems to me to be a real possibility that, as a result of the communications between Mr Al-Missaind (who has not been present at the court hearings in London) and certain officials at SAMA, SAMA has recently misunderstood that the Court has made an order for disclosure. Mr Laher, who engaged with SAMA on behalf of the Bank until October 2018, says that he had previously explained to SAMA that the Court would be likely to order disclosure and that SAMA's reaction was to await the Court's order. The person or persons with whom he was then communicating are not identified, however. Although it appears that someone at SAMA may previously have understood that the Bank was faced with an order for disclosure, there is no indication that the authors of the 5 November 2019 letter, the 11 December 2019 letter and the 1 January 2020 letter had been previously involved. Nor does Mr Al-Missaind identify the person or persons with whom he has been communicating. The translation of the letter dated 5 November 2019 refers twice to a "request" having

been made by the liquidators of SICL and by the court for the disclosure of correspondence between SAMA and the Bank, and the translation of the 1 January 2020 letter from SAMA refers to the disclosure of documents being a "request" of the Court. As explained above, the Court is not making a request for assistance; it has ordered the Bank to give standard disclosure.

65. Mr Onslow submits that the court can and should issue a letter of request, addressed to the Ministry of Foreign Affairs in KSA, asking for a direction or request to SAMA to approve disclosure by the Bank. He submits that any further orders should be delayed for a month or more to see whether the letter bears fruit. The terms of the draft letter say that it is necessary for the purposes of justice and for the due determination of the matters in dispute that the Bank be able to comply with the disclosure orders, and requests urgent assistance. He submits that since SAMA itself has required the letter of request, there is no reason to assume that it will not have a positive outcome. The argument is advanced that the court has inherent jurisdiction to issue such a letter, and the case of Panayiotou v Sony Music Entertainment UK Ltd [1994] Ch 142 is cited as authority.

66. Panayiotou is a case concerned with seeking the production of specified documents from a foreign company that was not a party to the proceedings, for use as evidence in the proceedings. Sir Donald Nicholls V-C explained that letters of request were concerned with obtaining evidence, not disclosure, a distinction that was established by statute in relation to incoming letters of request and which was reciprocated in the court's exercise of discretion to issue outgoing requests. He said:

> "The jurisdiction of the High Court to make a request to the court of another country for assistance in obtaining evidence does not derive from statute, or even from the Rules of the Supreme Court. These rules regulate and prescribe "the practice and procedure" to be followed in the Supreme Court: section 84 of the Supreme Court Act 1981. They regulate the exercise by the court of its jurisdiction; they cannot extend the court's jurisdiction or confer a jurisdiction which, in the absence of rules, the court would otherwise lack. In my view the court's power to issue a letter of request stems from the jurisdiction inherent in the court. Inherent in the court is a power to do those acts which the court needs must have to maintain its character as a court of justice: see Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] A.C. 909, 977. It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make a request to a foreign court for assistance. It is not making an order."

Having referred to other authorities, the Vice-Chancellor said that he approached the application on the footing that the plaintiffs were not entitled to seek what in substance was discovery.

67. It is therefore clearly established that the court's inherent jurisdiction to issue a letter of request is exercised for the purpose of securing evidence that is material to an issue at trial. The distinction between evidence and disclosure is fundamental, as

demonstrated by that case. Where a party to a case, over whom the court has jurisdiction, is ordered to give disclosure, the court has all the power it needs to enforce its order.

68. In my judgment, the court should not issue a letter of request to the Ministry of Foreign Affairs of KSA for the following reasons:

i) Such an order is wrong in principle: attempting to engage the support of a foreign government to remove an obstacle to a foreign litigant's compliance with an order for disclosure is not a request for assistance from a foreign court to secure material evidence. This court does not have diplomatic relations with foreign governments.

ii) There is no credible evidence that such an approach is likely to bear fruit. The Court would not normally embark on issuing a letter of request unless there was reason to suppose that the foreign court would be receptive to the request: Panayiotou at p.150G. Not even the Saudi Arabian court was receptive to the request made by the Oregon court. There is no evidence that the Ministry of Foreign Affairs would act on the letter of request.

iii) Even if there were a positive response, it would almost certainly be too late for a fair and effective trial to take place in October 2020. Allowing one month for the diplomatic approach to have effect, the Bank's legal team has further work to do to complete the review of disclosure documents, which must then be provided to SAMA for its authority. Given that the Bank stopped work on disclosure with up to a month's work still remaining, on its own estimate, disclosure could be expected some time in May 2020. The directions at CMC1 were for witness statements to be exchanged at the end of January 2020 and expert reports by the end of April 2020. Given the very substantial volume of disclosure documents likely to be disclosed and, in a case of this nature, the near inevitability of further correspondence and applications for further searches to be made and for specific disclosure, and the possibility of an application for enhanced disclosure in certain areas, there would be a huge and unfair pressure likely to be placed on the Claimants to be ready for trial by 5 October 2020.

69. I therefore decline to make an order that a letter of request be sent to the Ministry of Foreign Affairs in KSA.

VII. Should the order for the Bank to give standard disclosure be revoked?

70. The premise underlying the Bank's application in this regard is that it is now clear that it is prohibited by Saudi Arabian law from giving standard disclosure and that its giving disclosure would be a breach that resulted in prosecution and severe sanctions. The prohibition is said to arise under regulatory circulars (in so far as third party confidential banking documents are concerned) and because SAMA impliedly "ruled" at the meeting with Mr Al-Missaind on 9 June 2019 that disclosure must not be given by the Bank unless SAMA authorised it to do so, after having been provided with all the disclosure documents on completion of the process of review of the Bank's

documentary records. It is also said to arise because on 11 December 2019, in the unseen letter from SAMA of that date, SAMA impliedly "ruled" that disclosure must not be given but that the court should approach the Ministry of Foreign Affairs of KSA with its request in that regard. The Bank relies on a confidential letter from SAMA of 1 January 2020, which was provided to the Court, which confirms that the Bank would be liable to prosecution if disclosure were given and that the Bank would be punished according to law.

71. The Bank submits that it should not be placed in the invidious position of having to choose between deliberately acting in breach of the law in KSA, thereby exposing itself and its employees to severe criminal punishment on the one hand, and deliberately disobeying the orders of this Court and the likely consequence that it will be debarred from defending a $318 million claim on the other hand. It submits that the evidence of real and substantial risk of prosecution and severe punishment is so compelling that, applying the relevant considerations and carrying out the balancing exercise identified in Bank Mellat v HM Treasury, the court should now remove the obligation on the Bank to give standard disclosure.

72. It acknowledges that this would be an unusual step for the court to take, but says that the circumstances are most unusual and that the evidence in favour of it is very clear. It submits that although a trial without the Bank's relevant documents is unsatisfactory, the absence of the documents is likely to (or could) disadvantage both parties equally, not just the Claimants, since the undisclosed documents could prove the Bank's lack of knowledge of SICL's interest in the Relevant Securities just as much as they could prove its knowledge.

73. As regards the absence of disclosure being potentially unfair to both parties, it must be borne in mind that the Bank's legal team has mostly completed the exercise of reviewing relevant documents, so much so that the Bank's lawyers felt able to state in evidence that there were no documents in a certain category that had been seen by any member of the team. It is therefore not the case that the Bank is unaware of the effect that disclosure would have on its case, though the Claimants are entirely in the dark. The Bank has not even allowed the Claimants' legal team to see the provisional list of documents that has been prepared, as sent to SAMA; nor has it confirmed in answer to requests made by the Claimants whether the documents of Samba Capital have been searched and reviewed, nor has it even confirmed how many documents are on its provisional list. The Bank also has the advantage of having had about six months already to scrutinise the Claimants' disclosed documents. It is therefore wrong to say that the disadvantage resulting from non-disclosure by the Bank is even-handed as between the parties. Further, the fairness of the trial is adversely affected whichever side's case would be assisted by full disclosure.

74. The Bank then submits that, though a trial without relevant documents would be unsatisfactory, it would be even more unsatisfactory for there to be no effective trial at all, if the Bank is debarred from defending as a consequence of failing to comply with the Court's order; or for the Bank to be severely punished in KSA, possibly with the loss of its business or licence and the imprisonment of particular individuals, if it does what is necessary for a fair trial to take place.

75. This is not a case of the Bank resisting the making of an order for extended disclosure or inspection. Although the Bank maintained consistently that it would need to obtain

SAMA's authority to give disclosure of documents, the order for standard disclosure was not opposed by the Bank in November 2018. Indeed, the time specified for the second tranche of disclosure was extended to allow sufficient time for the Bank to approach SAMA and obtain authority. It was only on 13 December 2019 that the Bank applied to revoke the order, after having applied for and obtained an extension of time in which to comply and failed to do so. The question is whether the Court should undo the effect of an order that was made almost 18 months ago with the Bank's acquiescence if not consent.

76. The Claimants criticise the Bank for "electing" to submit to an order for disclosure and then seeking to have it varied later, instead of opposing the order in the first place. I do not consider that election is the right analysis, or that the Bank can be criticised for not opposing the standard direction for disclosure at CMC1. It would have made little sense for the Bank to oppose an order for standard disclosure then because of a risk (as it saw it) that SAMA's approval might not be given. The Bank has at all times reminded the Claimants and the Court that, in its view (always disputed by the Claimants), giving disclosure would require approval. Nevertheless it is relevant that the order was made a significant time ago and both parties have acted upon it.

77. Where the Bank does merit criticism is in its failure to engage appropriately and early with SAMA; in its serious delays in applying to the Court when it was obvious that it would need relief or be unable to comply with the Court's orders; and in failing to put the full picture before the court when it belatedly did apply. I have made criticisms of its conduct in my judgments of October 2019 and December 2019 and it is not necessary to repeat them extensively here. I regret to note that the delay in progressing matters with SAMA and in completing the work needed for it to give disclosure has continued after the conclusion of the hearing on 20 December 2019. The Bank did not, as it assured the Court at that hearing that it would, send a high-level delegation to SAMA to negotiate the necessary authority to give disclosure. Instead it wrote a letter asking SAMA to spell out the consequences of breaching SAMA's ruling of 11 December 2019. Having explained on 19 December 2019 that there remained about a month's work in order to complete the review of documents for disclosure, the Bank stopped work and has not resumed it. The consequence is that even now there remains a month's work to be done before the Bank could give a complete disclosure list and disclosure statement. The Bank stopped work, Mr Al-Missaind says, on the basis of a conclusion reached at a meeting of "Samba seniors" (who are not identified) and "external experts" (who are not identified) that "it would be useless to spend further time in communications with SAMA" and that there was no chance of SAMA changing its mind unless the Court directed a letter of request to be sent to the Ministry of Foreign Affairs of KSA. At the hearing in February 2020, the Bank indicated that it would resume work if the Court saw fit to direct that such a letter be sent.

78. The effect of the delay by the Bank is that the Court has repeatedly had to consider what relief could properly be granted to the Bank at a time when orderly preparation for trial was already at risk. If the Bank were, belatedly, to comply with the order for disclosure as a result of the Court refusing to revoke or vary it, the Claimants could not fairly prepare for a trial starting in early October 2020. Disclosure is expected to comprise a figure in the high tens of thousands of documents, if not more (though the Claimants do not know how many because the Bank has conspicuously failed to

provide that information). Witness statements and expert reports have been put on hold pending the resolution of the disclosure issue.

79. Another effect of the Bank's delay is that it is seeking to be released from its obligation to give disclosure at a time when the Claimants have already fully complied with their obligation. In consequence, the Bank has all adverse documents that the Claimants were obliged to disclose, as well as the knowledge of what its own documents contain. It would therefore be most unfair if the Bank could be relieved from its own disclosure obligation and proceed to trial with the benefit of witness evidence in support of its Defence but there be no proper means for the Claimants to verify that evidence.

80. It is necessary to consider first on what basis the court has jurisdiction to revoke the order for disclosure. The application notice and submissions of Mr Onslow invoked rule 3.1(7) of the Civil Procedure Rules:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

Case law has established that although the wording of the rule is wide, its application to interim orders of the court is limited. It normally only applies where there has been a material change of circumstances since the order was made or where the facts on which the original decision was made were misstated: Tibbles v SIG plc, per Rix LJ at [39(ii)].

81. Has there been a material change of circumstances since the court ordered the Bank to give standard disclosure? The Bank says that there is a change in circumstances in that SAMA has since November 2018 prohibited it from giving disclosure. However, it was always a known risk that SAMA might not give its approval. The Bank's most recent evidence, given by Mr Al-Missaind and Mr Al-Tammami, does not establish a relevant change in circumstances so much as a mistake made by the Bank in the way that it set about obtaining SAMA's approval. At the time when the order was made at CMC1, the Court was told that SAMA's approval to give disclosure was required and might not be granted. At the 9 June 2019 meeting, SAMA gave conditional approval to the start of the disclosure process, the condition being that its authority to give disclosure would be required once the process of reviewing documents had been completed and it had been provided with all the documents. The process has not been completed by the Bank. The Bank sent SAMA an incomplete list of documents at the end of November 2019; it did not send SAMA a complete set of the documents intended to be disclosed.

82. The Bank contends that, by the (unseen) letter dated 11 December 2019, SAMA impliedly refused to give approval, though it (through Mr Al-Missaind) accepts that there was no express refusal or direction that disclosure should not be given. Instead SAMA apparently said that the Court should approach the Saudi Arabian government. It is wholly unclear what effect such an approach might have had or what SAMA expected it to have.

83. The argument that SAMA has prohibited the Bank from giving disclosure depends on the evidence of Mr Al-Missaind that the letter "clearly represented a direction by SAMA … prohibiting Samba from giving that disclosure." No one else who has given

evidence has seen the letter. In his sixth witness statement dated 12 February 2020, however, Mr Al-Missaind states that "… it did not constitute an absolute refusal of the English court's order and so was not a complete rejection of SAMA's approval …" Although Mr Haberbeck, the Bank's expert witness on Saudi Arabian law made a further expert report following the letter of 11 December 2019, he does not mention the letter. Mr Abdallah, the Bank's expert on regulatory practice has not made a further expert report about the significance of that letter. Instead, Mr Al-Tammami has prepared a report dated 10 January 2020, and as referred to in paras 60 above, states that the only recognised method for requesting disclosure from SAMA is through diplomatic channels. (This was later corrected in Mr Al-Tammami's second expert report dated 12 February 2020 to being "the only recognised formal method in the case of a request from a foreign court".)

84. In the absence of the SAMA correspondence, it is difficult to know what to make of Mr Al-Missaind's evidence that SAMA impliedly refused permission to give disclosure by a letter received by the Bank on 12 December 2019. Only he has seen the letter and says what it impliedly means. Mr Al-Tammami says (on the basis of Mr Al-Missaind's description of the content of the letter) that it is not a permanent and absolute barrier to disclosure.

85. It is unknown what stance SAMA would have taken if the Bank had complied with the terms of the conditional permission granted at the 9 June 2019 meeting, or if the Bank had taken all the steps it should have taken to seek to persuade SAMA that disclosure was in its interests, or to explain to the relevant officers at SAMA the nature of the obligation that it had and the consequences of breaking it. In the absence of the SAMA disclosure and based on the views that I have formed about the opaqueness and inadequacy of Mr Al-Missaind's evidence, I infer that the Bank did not take those steps, even though Mr Laher might well have explained to someone at SAMA in 2018 that there would be an order of this Court for disclosure. I conclude that Mr Al-Missaind did not, at any time after October 2018, sufficiently explain, or arrange for "Samba seniors" to explain, to senior officers at SAMA that the Bank wanted to give disclosure and needed to do so, in order to be able to pursue its defence to this claim. It is evident from the terms of the 5 November and 1 January letters that whoever was dealing with the issue at SAMA did not have a sufficient understanding of the position that the Bank was in.

86. There is in my judgment no evidence of a material change in circumstances, merely evidence that the Bank did not comply with SAMA's requirements and did not adequately communicate with SAMA, with the consequence that the risk of which the Bank was aware throughout has come to fruition.

87. Even if SAMA's letter of 11 December 2019 were considered to be a material change in circumstances, the question would still arise whether it is just to revoke the order for disclosure almost 18 months after it was made, at a time when the Claimants have fully complied with it. For the reasons previously given, that would create an unfair imbalance in the rights of the parties in a case where (as is common ground) the most important factual issues for trial are particularly sensitive to the Bank's documents. In my judgment, a fair trial could not take place in circumstances in which the large majority of the Bank's relevant documents were not disclosed to the Claimants but the Claimants have disclosed all relevant documents, including adverse documents, to the Bank. That would leave the Bank in the advantageous position of being able to give

evidence that the Claimants could not properly assess or challenge, and able to make use of any helpful documents disclosed by the Claimants.

88. There may of course be other circumstances in which the court is justified in varying or revoking a previous interim order. The decision in the Tibbles case is not to be read as if it were a statute. Indeed, para 18 of the Disclosure Protocol (CPR 51UPD) provides a general power to vary an order for extended disclosure, but the party applying for the variation must satisfy the court that varying the original order is necessary for the just disposal of the proceedings and is reasonable and proportionate. Given the Protocol's emphasis on limiting disclosure to what is necessary for the fair disposal of the proceedings, I consider that para 18 could include revocation of a previous order for extended disclosure. However, revocation of an order where extended disclosure is necessary for the fair disposal of a claim is another matter altogether.

89. The argument relied on by the Bank is that the consequences of complying with the standard disclosure order would be so serious for the Bank (as now clarified by the 1 January 2020 letter from SAMA) that the Court should relieve it from the dilemma of having to act contrary to Saudi Arabian law to comply with the Court's orders or otherwise suffer sanction by this Court.

90. In dealing with that argument, the court must balance the importance of disclosure of the Bank's documents against the reality of the risk of prosecution of the Bank in KSA. The decision of the Court of Appeal in Bank Mellat v HM Treasury is the leading authority on the extent to which a risk of prosecution of a foreign litigant in its home state is a material consideration when the court is making or enforcing an order for disclosure or inspection of documents, and on the relevant considerations that have to be weighed by the Court.

91. In that case, Bank Mellat claimed damages under the Human Rights Act 1998 against HM Treasury for the consequences of an unlawful financial restriction that HM Government had imposed. The issue on appeal concerned the production in unredacted form of documents containing confidential banking data relating to identifiable customers. Bank Mellat claimed that, if forced to permit inspection of the documents in unredacted form, it would be exposed to a risk of criminal prosecution in Iran. The judge had found in favour of the Treasury, on the basis that the risk of prosecution and sanction in Iran following compulsory production of the documents in unredacted form was not as great as the bank's evidence suggested.

92. Gross LJ emphasised that where a conflict arises between a litigant's disclosure duties and the requirements of foreign law, the court is faced with a discretionary case management decision, which involves balancing two conflicting considerations: the constraints of foreign law and the respect due to it and the need for the documents in question to ensure a fair disposal of the trial. He reviewed the relevant case law and summarised the relevant principles as follows at [63]:

> "(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 (discussed in *Dicey, Morris and Collins, op cit,* at paras 1-008 and following). 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."

93. Applying that approach, and having already explained the importance of disclosure of the Bank's documents for a fair trial, I must assess the reality of the risk of prosecution of the Bank in this case. The Bank's evidence, principally that of Mr Al-Missaind and Mr Al-Tammami but also previously that of Mr Haberbeck and Mr Abdallah, is that a ruling of SAMA has the force of law in KSA (a point which is not in dispute) and that deliberate disobedience by the Bank to such a ruling would inevitably give rise to prosecution.

94. The force of the argument advanced by Mr Onslow is the following. First, that SAMA is an authoritarian body that expects its circulars and rulings to be obeyed. SAMA can refer breaches to the public prosecutor as well as impose regulatory sanctions itself. These assertions are not in dispute. Second, that this is a case where – according to the Bank's witnesses – SAMA has issued a specific instruction to the Bank not to provide disclosure in these proceedings. That is said to emanate from the 9 June conditional approval of the Bank's own external advisors being given access to the Bank's documents and, more specifically, to be implicit in the 11 December 2019

ruling that the Court must apply through diplomatic channels. I have already expressed doubt about the reliance that can be placed on the unseen 11 December letter, which has only been seen by Mr Al-Missaind and not by any of the expert witnesses. On balance, I accept, however, the evidence that on 9 June 2019 SAMA required all disclosure documents to be provided to it at the end of the search and review process for its consent to disclose them to the Claimants, and that this was impliedly a ruling that the Bank must not otherwise give disclosure of those documents.

95. Third, Mr Onslow submits, it is a matter of common sense and obvious that if the Bank deliberately acts contrary to a specific direction not to do something, SAMA would be likely to take it very seriously. Fourth, giving disclosure of tens of thousands of documents, many of which would be confidential banking documents, would by its nature be regarded by SAMA as a serious breach. Fifth, that the evidence is that SAMA would inevitably refer such a breach for prosecution and that those responsible would be severely punished.

96. The latter point depends on Mr Al-Tammami's interpretation of SAMA's letter of 1 January 2020. This letter reflects a misunderstanding by SAMA of the nature and effect of the court's orders. It refers to the court's "requests" for documents and characterises the hearing on 19 December 2019 as a request by the Bank for an extra four weeks in which to check with SAMA about the Bank's risks in the event of non-compliance with the Court's request. It was of course a request by the Bank first for extra time in which to persuade SAMA to allow disclosure to happen, and to complete the exercise of reviewing documents. I regard it as telling that this basic point appears not to have been adequately explained by Mr Al-Missaind to SAMA. The letter also seems to imply, wrongly, that the Bank's application was refused because of its failure previously to procure SAMA's approval. Having heard four applications now relating in a greater or lesser degree to issues between the Bank and SAMA, I consider that there has been a real problem with effective communication between the two since October 2018, for which Mr Al-Missaind is responsible. It is unnecessary to repeat what I have said in previous judgments in that regard.

97. SAMA's letter of 1 January 2020 ends by confirming that if the Bank discloses the SAMA correspondence or disclosure documents, then in view of powers granted under the Banking Control Law, namely to impose financial fines and imprisonment penalties for violation of the prohibition on disclosure or use of information derived from the performance of duties to implement that Law, the Bank will be "liable to the penalties prescribed by law". That letter was clearly written as a response to Mr Al-Missaind's letter of 24 December 2019, but what exactly that letter requested SAMA to confirm or say is unknown. The obvious inference is that it did not ask SAMA to reconsider the letter of 11 December 2019 or to convene a meeting with the Bank's senior officers but instead asked it to spell out what SAMA's attitude would be if the Bank deliberately disobeyed a ruling from SAMA and gave disclosure. SAMA itself responded in the letter of 1 January with some restraint, but Mr Al-Missaind says that in his view the consequences of contravening SAMA's directions would be severe. Mr Al-Tammami says that such a letter can only be interpreted as a warning and that non-compliance will result in only one possible outcome, namely a reference to the public prosecutor. He also says that SAMA will impose financial penalties and

commence criminal proceedings against all of the relevant bank personnel, and that the risk of harsh criminal penalties is particularly high.

98. The Bank felt emboldened to ask SAMA if it could disclose the letter of 1 January 2020, as Mr Al-Missaind put it "in order to support Samba's position regarding its inability to give standard disclosure in this litigation". The letter of request has not been disclosed. SAMA confirmed its permission, subject to the letter not being publicly disclosed. Mr Al-Missaind did not ask SAMA if it could show the court other correspondence with SAMA on a similar basis. The inference that I draw is that this was because Mr Al-Missaind had already obtained authority to show the Court the correspondence that suited the Bank's purpose at that time.

99. In the absence of the SAMA disclosure, and given Mr Al-Missaind's acknowledgment that he has not been able to put the full picture of the communications before the Court, it is difficult to assess reliably the likelihood of the Bank being prosecuted. The reason for the difficulty is the Bank's own default. It demonstrates forcefully why disclosure of the SAMA correspondence was ordered; the Bank's failure to do so leaves the Court unable fully to evaluate the Bank's case about a real risk of prosecution.

100. I am not impressed with the evidence of Mr Al-Tammami. I do not accept that Mr Al-Tammami has any substantial expertise in the matter. He clearly has no prior experience of these issues other than some experience of practice as a lawyer in the regulatory and financial sphere. His opinion that a diplomatic approach was required to gain approval to disclose documents was wholly unsubstantiated and, in truth, appears to have been based on nothing except Mr Al-Missaind's description of what the 11 December 2019 letter said. His first report misstates materially what the 1 January 2020 letter from SAMA says and the circumstances in which it was written (para 20.6). It also misstates a number of other matters relating to what SAMA had previously said (paras 32, 33). Given the paucity of evidence or precedent on which he can draw, it is in my judgment much too dogmatic in the conclusions expressed. Remarkably, for an expert witness who has had the benefit of seeing other experts' opinions, it makes no comment on the difference in the views expressed. The argument in his second expert report that a Saudi Arabian court would be almost bound to impose a sentence of imprisonment was wholly unconvincing. I regret to say that I consider that Mr Al-Tammami was brought in to provide evidence that would support the Bank's case, and that he did not see his role as giving independent, considered, expert opinions. Indeed, he does not even identify in his reports the information or documents with which he was provided for the purpose of compiling his reports.

101. The Claimants' expert witnesses, Professor Mallat and Dr Hammad, consider that Mr Al-Tammami "highly exaggerates the risks of prosecution and punishment for Samba or its employees". They confirmed their opinion previously stated that a failure to comply with a SAMA instruction would only be likely to result in a fine, and that there is no evidence of anyone having previously been imprisoned or of a bank having its licence suspended or revoked as a result of failure to comply with a SAMA instruction. They do not think it likely that the Bank would be prosecuted but, if it were, the penalties would most likely be limited to a fine. They also say that they have been unable to find any precedent of SAMA or the public prosecutor fining, prosecuting or imprisoning any individual for breach of confidentiality or breach of a

SAMA direction, or revoking a bank's licence. Mr Onslow's answer to that is that there is no evidence of any bank having previously dared to disobey a specific instruction of SAMA.

102. I consider that Professor Mallat's and Dr Hammad's opinion may be a little optimistic about the risk of prosecution, if (as I find) the outcome of the 9 June 2019 meeting is taken to be an implied ruling that disclosure may not be given without first showing SAMA all the documents to be disclosed. I cannot conclude that it is unlikely that the Bank would be prosecuted, if by that they mean that the chance of it is small, but rather conclude that there is a risk but that it is difficult reliably to assess its extent. Otherwise, I accept the Mallat/Hammad conclusions about the risk of severe penalties being imposed, namely that the risk is not great and that a fine would be the most likely outcome.

103. In weighing the extent of the risk, it must be borne in mind that the Bank is a leading commercial bank in KSA. It is listed on the Tadawul and its main shareholders are identifiable. There are three Saudi Arabian government bodies or funds (a public investment fund (which I was told is a sovereign wealth fund supported by the Crown Prince), a public pension fund and the general organisation for social insurance) that together own about 41% of the shares in the Bank. This is a material factor in considering the real likelihood of severe enforcement action being taken.

104. Further, the risk may be reduced further when the relevant officials at a high level in SAMA understand better the circumstances in which the disclosure order was made, the difference between such an order and a request by the court for assistance from a foreign court, and that the order must be complied with. I am not persuaded that those who wrote the 1 January letter in response to the Bank's request fully understand – because it has not been properly explained to them – that the order for disclosure is one made as part of standard trial procedure by a foreign court that has jurisdiction over the Bank. The Bank is in my judgment at fault for not having engaged with SAMA in a constructive way – in the way that it promised the Court on 19 December 2019 that it would do – to explain its obligations and its professed desire to be able to comply with them. Instead, it has – as I have previously found – sought to shelter to some extent behind the implacable regulation of SAMA and has procured from SAMA letters that serve its own purposes.

105. Weighing all the evidence that was before me in relation to the risk of prosecution, bearing in mind that the incompleteness of the picture is the result of the Bank's breach of the SAMA disclosure order, I am unable to conclude that there is a strong likelihood of prosecution but do accept that there would be a risk of that, if the Bank were to give standard disclosure. I consider that SAMA might wish to mark what it could see as deliberate disobedience, if it has been as aloof from the matter as Mr Al-Missaind says. How SAMA would choose to mark the breach is difficult to say, since SAMA acts within the scope of wide discretionary powers and is unpredictable because there are no legal precedents. There must therefore be a residual, real risk of prosecution.

106. To the extent that Mr Al-Missaind and Mr Al-Tammami predict dire consequences for the Bank if it were to comply with the Court's order, I find that they substantially overstate the nature of any likely punishment. I do not find either to be a reliable witness and I cannot accurately evaluate the risk of severe punishment because of the

absence of the SAMA correspondence. I consider that a financial penalty is a real possibility, but that further punishment is unlikely, though it cannot entirely be ruled out.

107. The balancing exercise that the Bank Mellat case requires to be carried out clearly comes down in favour of refusing to vary the disclosure order. My reasons for that conclusion and for otherwise declining to revoke the order are (in summary) the following:

i) The Bank's documents are likely to be of the highest importance for a fair trial of the knowing receipt claim (and the equivalent Saudi Arabian law claim) in particular, and quite likely other factual issues in this claim too;

ii) The Bank's application was made very late: it applied to revoke the order for disclosure on the very day that the (previously extended) deadline for compliance expired;

iii) Not only would the Claimants be seriously disadvantaged in their conduct of a fair trial by not seeing the Bank's disclosure but the Bank, by not applying for a variation earlier and requiring the Claimants to comply with the disclosure and inspection orders, has secured the considerable advantage of seeing all the Claimants' documents, including adverse documents, as well as having reviewed almost all its own documents without having to reveal any of its documents to the Claimants;

iv) For those reasons, a trial of the parties' pleaded cases without the Bank's disclosure would be contrary to the overriding objective and would not be fair;

v) There is a real risk of regulatory action and a risk of prosecution in KSA if the Bank complies with the order for disclosure, and the extent of the risk is difficult to assess, but the size of the risk is overstated by the Bank's witnesses;

vi) The risk, if there is one, arises at least in part from the Bank's failure to engage appropriately with its regulator and to take steps that it could and should have taken to explain to SAMA, at high level if necessary, why disclosure was obligatory and that it wished to give disclosure so that it could defend the claim;

vii) The risk to the Bank, if there is one, could even now be mitigated to some extent, if it took those appropriate steps;

viii) Even if prosecution does result, the risks of severe punishment of the Bank or its employees are significantly overstated by the Bank's witnesses and the most likely consequence is a fine, not imprisonment or revocation or suspension of the Bank's licence;

ix) To the extent that there is a risk of severer sanctions being imposed, that is again partly a consequence of the Bank's failure to engage with SAMA and its concern to obtain evidence from SAMA that would support its application to revoke the disclosure order;

x) The risk of prosecution is not a sufficiently strong reason to exonerate the Bank from providing standard disclosure; on the facts of this case, the importance of the documents to a fair trial significantly outweighs the real risk of prosecution of the Bank in KSA;

xi) The public prosecutor and SAMA can be expected to recognise, as a matter of international comity between friendly states, that the Bank's compliance with its disclosure duty is in response to a lawful order of a foreign Court that has jurisdiction over the Bank, and which was done so that the Bank can proceed to defend itself against a very substantial claim.

VIII. Should there be a trial of preliminary issues?

108. In the alternative to revoking the order for the Bank to give standard disclosure, the Bank applied on 10 January 2020 for an order for the trial of preliminary issues in October 2020 and for the directions made at CMC1 to be suspended. In the event that the preliminary issues were determined in a way that was not dispositive of the Claimants' claim, the Court would then give further directions for a trial. To the extent necessary, the Bank also applied for relief against sanctions. That application was issued subsequently to the Claimants' application (of 16 December 2019) to strike out the Defence, or alternatively for an unless order in relation to compliance with the order for disclosure.

109. The effect of the Bank's application would therefore be that the Bank could continue to defend the claim for some time, notwithstanding the serious breaches of the disclosure orders, while certain issues were tried without disclosure from the Bank. The question of disclosure would be revisited if the claim was still live after the trial of the preliminary issues. The application seeks directions for the exchange of witness statements of fact and expert reports of witnesses on the law of KSA for the trial of the preliminary issues.

110. The issues proposed by the Bank to be tried as preliminary issues are the following:

i) What is the governing law of the Six Transactions?

ii) Did the Six Transactions create trusts of the Relevant Securities in favour of SICL, or any other legal relationship between Mr Al-Sanea and SICL in relation to the Relevant Securities, and, if so, by what law were such trusts or other legal relationships governed?

iii) Did the Six Transactions confer upon SICL any equitable or other proprietary interest in the Relevant Securities?

iv) What is the law governing the effect of the September Transfer on property rights in the Disputed Securities?

v) If Saudi Arabian law governs the effect of the September Transfer on property rights in the Disputed Securities, did the September Transfer extinguish

SICL's alleged interest in the Disputed Securities regardless of whether Samba had knowledge of the alleged trusts?

vi) What is the governing law of the claim?

vii) If the governing law of the claim is Saudi Arabian law, do the facts alleged by the Claimants give rise to a cause of action against Samba?

viii) If the governing law of the claim is English or Cayman Islands law, but Saudi Arabian law governs the effect of the September Transfer on property rights in the Disputed Securities, does the claim fail for want of an undestroyed proprietary base?

ix) Should the claim be dismissed on the grounds that it would be contrary to public policy and international comity to grant the relief sought by the Claimants?

111. It can be seen, by reference and comparison to the appendix to this judgment, which sets out the agreed main issues in the claim, that the proposed preliminary issues comprise the issues of law and many of the issues of mixed fact and law in the claim. They are not preliminary issues in the sense of issues that will be tried on agreed or assumed facts: there will be factual and expert evidence on the basis of which the court will decide the relevant facts, the relevant content of Saudi Arabian law and the issues themselves. It appears to me that a trial of these issues would be likely to last about 3 weeks. The Bank's application is, in substance, an application for a split trial, with the trial first of issues that (it contends) can fairly be tried without the Bank giving disclosure. If, in law (whether Cayman Islands, English or Saudi Arabian law), the claim is defeated then judgment will be entered for the Bank at that stage. If the outcome is that the Claimants' claim may succeed, depending on the facts relating to the other issues, the Court must then consider what directions to give for the trial of the second group of issues, depending on whether the Bank is then able to give disclosure.

112. Neither party nor the Court had previously suggested a split trial, or the trial of preliminary issues of law. The directions were either agreed or decided by Judge Klein in November 2018 on the basis of agreement that there should be a trial of all issues in October 2020, with a time estimate of 6 weeks. It was only in January 2020 that the Bank contended that there should be in effect a split trial, with the intended trial date being used for the trial of the first group of issues.

113. It is impossible to see, at this stage of the pre-trial preparations, how a split trial could be said to further the overriding objective. The result might well be a need for two trials, and possibly two appeals, and the final determination of the claim delayed by 2 years or more. That would result in significant delay, more expense and (quite likely) more of the court's resources having to be expended on this claim. The context for that is a dispute between the parties that has already resulted in a hearing in the Supreme Court and a second hearing in the Court of Appeal and which has been running since 2013, or 2010 if one includes the prior insolvency proceedings.

114. The application for (in effect) a split trial is made for only one reason. That is evident from the fact that it is made in the alternative to an order revoking the order for the

Bank to give standard disclosure. Were the Bank to obtain such revocation, there is no suggestion by the Bank that the trial could then be more conveniently disposed of by trying first potentially determinative issues, which might render unnecessary a trial of the principal factual disputes and so save time in court and expense. Trial of the first group of issues is a means of delaying consideration of the sanction that should attach to the Bank's serious breaches of the court's orders until after the Bank has had an opportunity to win the case. Though the Bank has carefully not said that it will not comply with the Court's orders, to avoid being held to be in contumacious breach, it is evident that having failed in its applications for a letter of request or for revocation the Bank will not comply.

115. If the advantage to the Bank of avoiding immediate sanction coincided with good reasons for a split trial, the Bank's motives and its breaches would not necessarily preclude the Court from ordering a split trial. However, there is no other good reason for a split trial (or the trial of preliminary issues). Although the test for deciding preliminary issues is more flexible today than it was before (and even in the early years of) the Civil Procedure Rules, with their greater emphasis on flexibility of case management and facilitating alternative dispute resolution, given the well-publicised risks inherent in preliminary issues there must still appear to be a preponderance of benefits over disadvantages by trying certain issues first, as compared with a single trial of all issues, before the Court will make such an order.

116. Had important preliminary issues of law or of mixed fact and law that were not dependent on disclosure been identified at the outset, it is possible that the balance might have fallen on the side of one or more preliminary issues. There are important issues of law, and foreign law, to be decided. The cost of determining such issues would have been relatively small, compared with the cost of disclosure and the preparation of witness statements and expert reports on all issues in this very substantial claim. It might also have resulted in a quicker resolution of the claim. However, a substantial part of those costs will by now have been expended (including the very high costs of both parties conducting a process to search for and review disclosure documents). The parties are within six months of the trial date, and the application is to use the trial date for the trial only of the first group of issues. That creates a substantial risk of greater expense and significant delay in the final resolution of this claim.

117. In my judgment, what cannot otherwise be justified in furtherance of the overriding objective cannot be justified on the basis that it will avoid the need to address at this stage the Bank's breaches of its disclosure obligations. Although, as Mr Onslow submitted, the preservation of the right for a defendant to seek to establish a defence to a large claim may be in the broader interests of justice, that benefit has to be evaluated taking into account the conduct of the defendant in question and the impact on the other parties to the claim. It does not justify making an order that is otherwise unjustified in the circumstances of the claim.

118. For these reasons, I decline to order the trial of any preliminary issues or a split trial. If, despite the Bank's default, it would be proportionate to allow it to contest certain issues, where no unfairness to the Claimants would result, that can be accommodated in a different way in the terms in which the sanction for the Bank's default is imposed.

IX. Should the Bank's Defence be struck out?

119. Is the Bank's default so serious that the appropriate sanction is to strike out its Defence and debar it from defending the claim, or is such a sanction disproportionate to the culpability of the Bank and the harm caused by the breach? Would a debarring order result in an unjustified windfall for the Claimants, in being able to enter judgment for $318 million plus interest from 2009?

120. An order striking out a defence and debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances. Lord Clarke said in Summers v Fairclough Homes Ltd [2012] UKSC 26; [2012] 1 WLR 2004 at [61], giving the judgment of the Supreme Court that: "the test in every case must be what is just and proportionate", and he emphasised the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. Rix LJ similarly emphasised in Aktas v Adepta [2010] EWCA Civ 1170; [2011] QB 894 at [92] the flexible remedies that the court had at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach.

121. I have refused to vary or revoke the order for standard disclosure. I did so on the basis that the Bank's disclosure was and remains necessary for a fair trial of the action, and because the importance of disclosure substantially outweighs the existence of a risk to the Bank in complying with the order. The Bank is now in serious breach of the order and will remain in breach: I have formed the view that the Bank will not give disclosure while SAMA's ruling remains in place and that it is unwilling to approach SAMA to change it. In those circumstances, there is little real alternative available to the court but to strike out the Defence and debar it from defending at the very least those issues that are fact sensitive and to which the Defendant's disclosure documents could be relevant. The question that I have to decide is whether the breach is so serious and inexcusable that the Bank must be taken to have forfeited its right to a trial even of issues of law or foreign law, where documents of the Bank will be irrelevant to the outcome of those issues.

122. There was an interesting argument at the Bar as to whether a full debarring order is a "normal" or "usual" response of the court to serious non-compliance with its orders. The Claimants relied on Caven-Atack v Church of Scientology Religious Education College Inc (unrep, 31.10.94, C.A.), cited in Matthews and Malek on Disclosure (5th ed., 2016), the dicta of Christopher Clarke J in JSC BTA Bank v Ablyazov (No.3) [2010] EWHC 2219 (QB); [2011] 1 All ER (Comm) 1093 at [38] and the dicta of Soole J in Michael v Phillips [2017] EWHC 1084 (QB) in support of that proposition. I do not consider that those decisions establish that under the Civil Procedure Rules an order striking out the whole of a claim or defence, as the case may be, is the standard or expected order in the case of a serious breach of a court's order. In many cases of serious breach such an order may be the only effective and proportionate sanction, but

– at least where the breach is not contumacious – it would be surprising if there were a standard approach under the flexible approach mandated by the Civil Procedure Rules.

123. I prefer the approach described by Lord Clarke and Rix LJ to which I have referred. The court must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective. The seriousness of the breach, the extent if at all to which it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just.

124. The choice for the Court now is to strike out the Defence and debar the Bank entirely from defending the claim, or to strike out and debar save as regards those issues that can fairly be tried without disclosure by the Bank. It clearly would not be just to allow the Bank to defend any factual issue where it might have relevant documents that it should have disclosed. The risk of whether the Bank's documents might be relevant to such issues would clearly have to fall on the side of the Bank. In my judgment, the Court can properly except certain issues from a debarring order if it is satisfied, first, that such issues can fairly be tried without the Bank's disclosure; second, that such an exception would be in the interests of justice and fair to both parties; third that the conduct of the Bank is not so inexcusable that a full debarring order is deserved and is proportionate, and fourth that making exceptions from the debarring order in that way does not undermine the authority of the Court. There must clearly also be some sensible purpose served by having a trial of certain issues only.

125. As for the conduct of the Bank, it is clear that its breaches are deliberate. On 13 December 2019, the Bank had not finished the work needed to enable it to serve a complete list of documents, though it had two weeks previously provided an almost complete list to SAMA. On 19 December 2019 it considered that it could finish the work by 20 January 2020, however it has not done so because it caused its external legal team to stop work. Nor has it served the almost complete list that it had prepared. The Bank has therefore not only failed to give disclosure by 13 December 2019 but has deliberately not done what was required in order to be in a position where it could serve a complete list of documents. Further, as I have found, the Bank failed to do what it reasonably could and should have done to obtain SAMA's authority to provide disclosure.

126. The failure, though not limited to recent events, is well illustrated by the Bank's failure, after the hearing on 20 December 2019, to request urgent meetings of senior personnel to explain to SAMA its anxiety to give disclosure and why SAMA should permit it to do so. Although I refused an extension of time on 20 December 2019, I indicated that if, by the time of the adjourned hearing in the New Year, the Bank had provided disclosure I would then consider whether its delay prevented a fair trial taking place. There was every reason for the Bank to convene such a meeting. I have concluded that the Bank has instead taken advantage of SAMA's regulatory reach, and sheltered behind it, to attempt to revoke the disclosure order. The Bank is therefore in serious and deliberate breach of the order for standard disclosure.

127. The next question is whether its breach of the standard disclosure order is excusable. The Bank's case is that its breach is excusable, and should be excused, on account of its genuine fear of regulatory and criminal consequences if it did comply. It has put before the Court somewhat exaggerated evidence (as I have found) to try to support that case. I accept that there is nonetheless genuine concern at the Bank about what SAMA might do if the Bank were to give disclosure in the face of the 1 January letter, and that in consequence the Bank will not do so unless SAMA changes its mind. In that sense, the breach could be said to be excusable because the reason for non-compliance is fear of the possible consequences rather than defiance of the court. I am unable to conclude on the written evidence before me, as the Claimants invited me to do, that the Bank and SAMA have been colluding and that the threat of serious repercussions is merely colourable. Nor do I find that the breach is contumacious. However, the breach is inexcusable to the extent that the Bank has wrongly failed to do what it should have done to persuade SAMA to relent so that it could comply. This is therefore a case in which the breach is serious and culpable rather than wholly inexcusable.

128. Given that there is some, albeit limited, mitigation, would a full debarring order be proportionate and just? The effect of such an order would be to enable the Claimants to apply to enter judgment for $318 million plus interest, even though there are serious issues that should be tried. That is a very serious consequence indeed even for a large commercial bank. I see the force of the argument that it would be in the interests of justice that the Claimants' claim should fail if the Bank has a valid defence as a matter of Cayman, English or Saudi Arabian law. Although the Bank could have applied earlier for the trial of preliminary issues, the fact that certain factual issues now cannot fairly be tried should not preclude the trial of any issues of law (or issues where there are no disputed facts) that are potentially determinative of the claim, if that can be done without unfairness to the Claimants. The Court will be astute not to allow to be tried any issues where the Bank could have been advantaged by receiving the Claimants' disclosure or by denying its own documents.

129. An important consideration is whether allowing certain issues to proceed to trial notwithstanding the serious and culpable breach of the Bank would undermine the authority of the court. The Bank might be seen as having flouted the Court's authority and yet secured the chance to defend the claim in a more limited way. Doing justice between litigants according to the law depends on the court's orders being obeyed and its coercive powers being used where appropriate, otherwise its orders would regularly be flouted and injustice would result. As observed by Gross LJ in the Bank Mellat case, the Business and Property Courts of England and Wales welcome litigants from all parts of the world and treat them all equally; the courts' reputation for fairness and incorruptibility means that they have many cases involving overseas claimants and defendants. If these courts allowed a defendant inexcusably to act in breach of court rules or orders on the basis of alleged foreign law restrictions and as a result obtain a trial of certain favourable issues only, there would be a real risk of encouraging others to do the same.

130. The Bank has not done everything that it reasonably should have done to enable it to comply with the order for disclosure, so its breach is not wholly excusable. Nevertheless, its culpable failure to give disclosure could sufficiently be punished by preventing it from defending any issue where its conduct may give it a forensic

advantage or the Claimants a corresponding disadvantage. Had I concluded that the Bank's conduct was wholly inexcusable, I would not have reached that conclusion. But the Bank's reluctance to provoke and risk prosecution by SAMA is understandable, even though the Bank is at fault for not having taken steps that could have resulted in SAMA giving authority. Importantly, however, there is no certainty that SAMA would have given its authority even if the Bank had used all reasonable endeavours to obtain it, so it cannot be said that the Bank's culpable conduct caused its perceived inability to comply.

131. In such circumstances, the harm that has been done to the prospects of a fair trial will have been sufficiently averted by preventing the Bank from defending issues apart from those where it is clear that the Claimants cannot be prejudiced by the Bank's default. This debarring must extend to preventing the Bank from seeking to participate in a challenge to the factual case of the Claimants or the legal conclusions reached on the basis of their evidence. In my judgment, a sanction that only prevented the Bank from advancing its own case but allowed it to contest the Claimants' case would not be sufficient to punish its serious and culpable breach. If there are issues that can fairly be tried notwithstanding the absence of disclosure from the Bank, and such issues would – if determined in the Bank's favour – enable it to establish a defence, in whole or in part, to the claim, those issues should in principle be tried. As explained in the next section of this judgment, only a few of the Bank's proposed preliminary issues fall into this category.

132. The sanction is therefore a severe one but proportionate to the Bank's breach and the harm caused by it. In my judgment, the outcome for the Bank will not serve to encourage other litigants to advance colourable claims of inability to comply with the Court's orders. The Court will, as ever, be astute to detect and prevent any such abuse.

X. Can issues be fairly tried without the Bank's disclosure?

133. The issues that the Bank says could fairly be tried without its disclosure are the proposed preliminary issues identified in para 110 above.

134. The Bank contends that the resolution of these issues is not sensitive to any documents that would have been disclosable by the Bank, and that there is no substantially disputed factual question (other than the content of Saudi law). It offered to submit to an order that it should not be permitted to call evidence without permission of the Court. In those circumstances, it argues, there is no injustice to the Claimants in having any of these issues determined, but there would be injustice to the Bank in debarring it from a trial on those issues, given that success for the Bank on some of them in combination would provide it with a complete defence to the claim.

135. The argument that the issues are not sensitive to disclosure documents and that no real factual dispute exists (other than as to the content of Saudi Arabian law) was developed as follows:

i) Some of the issues are purely legal issues, or issues of Saudi Arabian law that will be decided by the court on the basis of expert evidence, and so no disclosure documents could be relevant: issues (iii) (equitable or proprietary interest in the Relevant Securities) (v) (effect in Saudi Arabian law of September Transfer on any beneficial interest) (vii) (is claim under Saudi law bound to fail?) (viii) (is claim under Cayman law bound to fail?) fall into this category;

ii) Other issues, although issues of mixed fact and law, are not issues where there is any controversy about the relevant facts – the Bank says issues (i) (governing law of Six Transactions), (ii) (were trusts created) and (iv) (governing law of the September Transfer) fall into this category;

iii) Issue (vi) (governing law of the Bank's claim) will follow in part from the determination of the previous issues, but otherwise depends on the application of either the Hague Trusts Convention in the Schedule to the Recognition of Trusts Act 1987 or the Rome II Regulation for non-contractual claims (Regulation (EC) No 864/2007). The Bank contends that the only relevant facts for applying the decision trees within the Trusts Convention and the Regulation are either undisputed or cannot sensibly be disputed, such that the Bank's documents are irrelevant to the outcome;

iv) Issue (ix) (illegality) is a free-standing issue, assuming that the Claimants will otherwise succeed in their claim, factually and legally, and the question of illegality falls to be determined in those circumstances;

v) To the extent that the Claimants persuade the Court that disclosure documents could be relevant to determining the governing law of the Six Transactions and of the relationship between Mr Al-Sanea and SICL thereby created, the Bank's solicitors give evidence – which the Court should accept – that in carrying out the review of potentially disclosable documents they saw no document relevant to the Six Transactions (to which the Bank was not a party), and so the absence of the Bank's disclosure documents does not prejudice the Claimants in the determination of those issues.

136. Mr Roxburgh on behalf of the Bank took me carefully through the individual issues and explained, one by one, what questions arose for decision and why the Bank submits that no disclosure documents of the Bank could affect the answer to the only relevant questions.

137. Mr Smith QC, for the Claimants, took a fundamentally different approach, which was to emphasise why the Bank's disclosure documents (assuming that the disclosure exercise has been correctly carried out) will inevitably contain documents that are highly relevant to the issue of the Bank's knowledge of the relationship between Mr Al-Sanea and SICL, and are likely to contain documents relating to one or more of the Six Transactions themselves or the circumstances in which they were made, and to the relationship between Mr Al-Sanea, SICL and the Saad Group between 2002 and 2008 (the period during which the Six Transactions were made).

138. Having done so, he submitted that the Court has already determined that the question of the governing law of the Six Transactions and the relationship created is a matter

for trial, to be determined on the basis of full evidence and cross-examination, and that the governing law of the claim is similarly a question that cannot be resolved without all the pre-trial processes having been completed and on the basis of full evidence, as Birss J held. The Claimants further submitted that in any event determination of many of the nine issues as preliminary issues was pointless, because the Claimants have an arguable claim under Saudi Arabian law that the Bank is liable to SICL, which is a matter that has to be tried in any event. That however seemed to me to overlook issue (vii), which was whether if Saudi law governs the claim it is bound to fail, as pleaded.

139. It is important to identify what exactly has previously been decided.

140. In the 2013 claim – which was advanced as a proprietary claim under section 127 of the Insolvency Act 1986, not as a claim of knowing receipt of trust property – the then Chancellor, Sir Terence Etherton and the Court of Appeal heard an application by the Bank to stay the proceedings that was, in substance, an application to strike it out on the basis that Saudi Arabian law governed the relationship between SICL and Mr Al-Sanea, such that a claim that relied on the existence of a trust of the Relevant Securities could not succeed.

141. Sir Terence Etherton held that the claim should be stayed because Saudi Arabian law or Bahraini law (which is for present purposes indistinguishable) governed the relationship between Mr Al-Sanea and SICL and because that law does not recognise any division between legal and equitable ownership. The Claimants appealed on the ground that it was arguable that trusts governed by Cayman Islands law were created, which were therefore valid to create a proprietary interest. The Court of Appeal held that it was arguable that under the Trusts Convention Cayman Islands law governed the Six Transactions and their effect. It rejected the Bank's argument that the Trusts Convention did not apply by virtue of articles 4 or 15 thereof and that English conflict of laws rules would necessarily apply Saudi Arabian law as the *lex situs* of the Relevant Securities. Although the Court of Appeal rejected the Bank's argument that the case could be decided in its favour on a strike out application, it left open for trial the question of whether the Trusts Convention was excluded by article 15 and, if not, whether articles 5, 6 and 7 had the combined effect in any event of applying Saudi Arabian law. In both respects, Vos LJ held that it was important that these questions were decided at trial "after all appropriate evidence has been heard". As regards the decision tree in articles 6 and 7, he concluded:

> "[71]…The question, however, was whether the exercise under articles 6 and 7 was inevitably going to result in the application of Saudi Arabian or Bahraini law to each of the declarations of trust. In our judgment it was not.
>
> [72] We start by considering the free-standing declarations of trust under the later transactions. These documents contained, as we have said, no express choice of law. The first step under article 6 is to seek to identify the law chosen by the settlor. That choice must be "express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case". The Chancellor accepted that he could not reach a final

> decision as to the implied choice for the later transactions. We think he was right. It must at least be arguable that it is to be implied from the terms of the declarations of trust in the later transactions that they were to be governed by a common law legal regime that would validate them, most likely Cayman Islands law. This question needs, as we have said, to be determined in the light of 'the circumstances of the case'. Such an exercise cannot sensibly be undertaken in the absence of full evidence and cross-examination as to the circumstances in which the transactions came about."

142. Under article 7, the law with which a trust is most closely connected has to be identified by reference to various factors. In the event that article 7 identified Saudi Arabian law, article 5 would apply instead, with the consequence that English conflict of laws rules and not the Convention would then arguably apply. Vos LJ said at [76]:

> "We would prefer to express no view on the outcome of an application of article 7, since in our judgment there needs to be a trial of the questions raised by the liquidators' application in any event. The factors mentioned in article 7 would be better applied to the facts as found after the evidence has been heard than on the limited factual material available at this stage of the proceedings."

If English conflicts rules did apply, the test would be the system of law with which the trusts had their closest and most real connection.

143. In the Supreme Court, the case was decided on an entirely different basis, namely that section 127 of the Insolvency Act 1986 could have no application where the equitable interest of SICL had not been disposed of but rather overridden as a consequence of the disposal of the legal title to the Disputed Securities by Mr Al-Sanea. The liquidators' claim therefore could not succeed, as pleaded, and the stay was reinstated. The decision of the Supreme Court therefore casts no doubt on the reasoning or conclusions of Vos LJ on the need for a trial to resolve the issues to which he referred.

144. After the decision in the Supreme Court, the Claimants' application to amend the 2013 claim and an application to strike out the 2017 claim came before Birss J. He had to decide (in addition to the limitation issue on the proposed amendment) whether it was arguable that the governing law of the claimants' claim was Cayman Islands law or English law, as opposed to Saudi Arabian law. The Bank was arguing at that stage that the governing law of the claim under the Rome II Regulation was Saudi Arabian law, so that even if the trusts were valid under Cayman Islands law their effect and any obligations flowing from them would not be recognised under Saudi Arabian law. Birss J acknowledged that there were substantial and competing arguments, both under the Trusts Convention, if it applied, and otherwise under the Rome II Regulation, but that SICL had a properly arguable case that the obligations owed by the Bank had their closest and most real connection to the Cayman Islands, since SICL is a Cayman Islands company and the trusts were governed by Cayman Islands law. He added that it was not even clear that if the applicable law was Saudi Arabian law the Bank would inevitably defeat the claim. Birss J therefore decided, in the 2017 claim as well as the amended 2013 claim, that the question of the governing

law of the claimants' claim should be decided at trial. That conclusion was upheld by Asplin LJ, who refused permission to appeal and stated that "the court would be required to consider all the relevant facts and circumstances in order to come to a concluded view".

145. The question of whether any of the preliminary issues can fairly be tried now is not the same as the questions that the Court of Appeal and Birss J had to consider but it is very closely related to them. It amounts to this: do the issues turn solely on questions of law (or foreign law) or undisputed primary facts such that no trial conducted with the benefit of the Bank's disclosable documents is necessary fairly to resolve them?

146. With that introduction, it is necessary to identify, in relation to each of the issues advanced by the Bank, what the questions are that arise; to what extent they depend on facts that may be disputed, and whether they are potentially sensitive to disclosure of the Bank's documents. If the questions when correctly analysed are questions of law or questions of law and undisputed (or undisputable) facts, then the failure of the Bank to give disclosure may not prevent a fair trial of such questions. If on the other hand there is a relevant factual dispute, or material facts to which the Bank's undisclosed documents are potentially relevant, then a fair trial of that issue is likely to be impossible without disclosure.

147. Issues 1-3. The first three issues are closely connected. The ultimate question that they determine is whether SICL had an equitable interest in the Relevant Securities under trusts or whether it had only contractual rights or other non-proprietary rights under Saudi Arabian or Bahraini law against Mr Al-Sanea. The first issue is: what is the governing law of the agreements made between SICL and Mr Al-Sanea? Although the important issue is whether the continuing relationship created by the Six Transactions is one in trust or in contract, the answer to that may depend on the meaning of the documents creating the Six Transactions. The Bank contends that although the Six Transactions documents use the language of trusts, if interpreted according to Saudi Arabian law the right interpretation will be that something other than common law trusts is meant, as Saudi Arabian law does not recognise trusts but interprets such language to mean something different.

148. On issue 1, the Bank contends that the original Rome Convention on the Law Applicable to Contractual Obligations applies, by virtue of the Contracts (Applicable Law) Act 1990, which gave it the force of law in the United Kingdom. Under the Rome Convention, a contract is governed by the law expressly or impliedly chosen by the parties ("demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case") (art. 3.1). To the extent that the applicable law is not so chosen, the contract is governed by the law of the country with which it is most closely connected (art 4.1). This is presumed to be where the party who is to effect the characteristic performance of the contract has his habitual residence (art 4.2), but that presumption is disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country (art 4.5). The Claimants contend that the Rome Convention is excluded because it does not apply to "the constitution of trusts and the relationship between settlors, trustees and beneficiaries" (art 1.2(g)).

149. If the Claimants are right, the common law conflict of laws rules apply and so the governing law is the law expressly or impliedly chosen by the parties, or failing that

the law with which the contract has its closest connection. In that regard, the Claimants say that SICL was the settlor of the trusts and the initiator of the Six Transactions. The Bank disputes both matters and pleads that "[it is] to be inferred in all the circumstances that Mr Al-Sanea was the initiator".

150. The first two of the Six Transactions have an express choice of law clause, as a result of which Bahraini and Saudi Arabian law will apply as the governing law of the agreements, regardless of whether the Rome Convention applies. The questions that may have to be decided as regards the other four Transactions are therefore:

i) Do the terms of each transaction and the circumstances in which it was made demonstrate with reasonable certainty which law the parties have chosen?

ii) In that regard, who was the settlor of the trusts and who was the initiator of the Six Transactions?

iii) Where at the time of each Transaction was the habitual residence of Mr Al-Sanea, and where did the Saad Group (including SICL) have its headquarters and administration?

iv) Do the circumstances of each Transaction as a whole demonstrate that the agreement had a closer connection with the law of a different country than that of the habitual residence of Mr Al-Sanea?

151. On issue 2, the law governing the relationship between Mr Al-Sanea and SICL created by the Six Transactions, the real questions to be decided are (a) how the reference in the Six Transactions to trusts is to be interpreted (this will depend partly on the answer to issue 1) and (b) whether the Rome Convention applies because the relationship is contractual (in which case the result will be likely to be Saudi Arabian law) or the Trusts Convention applies, in which case the applicable law will either be Cayman Islands law under articles 6 and 7 of the Convention, or otherwise the law with which the trusts are most closely connected. Even if the answer under the Trusts Convention is Cayman Islands law, there is a further issue about the extent to which mandatory rules of the *lex situs* relating to the transfer of title to property will apply (art. 15(d)).

152. Article 6 of the Trusts Convention provides that an express or implied choice of law in the terms of the instrument or the writing evidencing the trust must be interpreted, if necessary, in the light of the circumstances of the case. If that chosen law does not provide for trusts, the choice is ineffective and article 7 applies, such that the trust is governed by the law with which it is most closely connected, account particularly being taken of four specified matters.

153. The additional question that may have to be decided regardless of the express choice of law in the first two of the Six Transactions is therefore the law with which the trusts created are most closely connected.

154. The third issue is, in reality, a consequence of the determination on the first and second issues – at least if the answer is that Cayman Islands law is the applicable law of the relationship. If the answer is that Bahraini or Saudi Arabian law is the applicable law there is a question raised by the Claimants as to whether that law gives

SICL an interest in the Relevant Securities sufficient to enable SICL to bring a claim in respect of them.

155. There are self-evidently factual matters to be decided here, principally an inquiry into the circumstances in which each of the Third to Sixth Transactions was made. It may be that, in reality, the habitual residence of Mr Al-Sanea in KSA at all relevant times cannot be disputed and could conclusively be established by other available means, but the other factual issues that I have identified will remain live ones. As regards the circumstances of each of the Six Transactions, the surrounding facts will cover the period between 2002 and 2008. The dealings between Mr Al-Sanea and his Saad Group of companies - SICL in particular - before and during the Transactions, are likely to be material circumstances. It cannot in my judgment be concluded that only limited known facts that are not in dispute (or cannot realistically be disputed) will be determinative of these issues. Although the decision of the Court of Appeal that these matters required a full trial was made in the previous proceedings, and so does not bind me, I would need very clear reasons to reach a contrary conclusion. By "cannot sensibly be undertaken in the absence of full evidence and cross-examination as to the circumstances in which the transactions came about" it must be assumed that Vos LJ had in mind a trial with the benefit of full disclosure of relevant documents from both sides, i.e. full documentary and oral evidence.

156. It might be expected that the Claimants would have many or most of these potentially important documents; however they are lacking to a large extent because, when the Saad Group collapsed, Mr Al-Sanea ensured that SICL's documents were taken to a location from where it has proved impossible for the liquidators of SICL to access them. The Claimants therefore do not have anything like a complete picture of the important dealings between Mr Al-Sanea and SICL.

157. The Bank submits that it would not have any such documents and does not have them. On that basis, it argues that even if the factual circumstances surrounding the Six Transactions are material, the Bank's failure to give disclosure has had no impact on the determination of the relevant questions. It would not have any documents, it submitted, because the Bank was not a party to any of the Six Transactions, nor involved in them: it only became involved with the subject matter of the Six Transactions when Mr Al-Sanea transferred the Disputed Securities to it in September 2009.

158. I cannot accept that argument. The Bank had an established relationship with both Mr Al-Sanea and SICL from long before the date of the first of the Six Transactions. It was a lender of very substantial sums of money to both; Mr Al-Sanea was a guarantor of SICL's borrowing. The Bank is likely to have some record of their assets, particularly those (like the Relevant Securities) which were held by Mr Al-Sanea with Samba Capital. The Bank would therefore have had an interest in Mr Al-Sanea's proposed sale of shares to SICL (including a large holding of shares in the Bank itself), and an acquisition by Mr Al-Sanea of large quantities of shares from a company related to Mr Algosaibi that were then to be held on trust for SICL.

159. Further, there was a close family connection between Mr Algosaibi, then the chairman of the Bank, and Mr Al-Sanea, who was later a director of the Bank. Mr Algosaibi was a signatory to one of the documents involved in the second of the Six Transactions. Given the scale of the Six Transactions, involving two substantial

debtors of the Bank, in one of which the Bank's chairman had some involvement, I accept the Claimants' argument that it cannot credibly be said that the Bank would have no documents relating to the circumstances in which the Six Transactions were made simply because it was not a party to them. I consider that it is likely that documents of the Bank relating to the affairs of two important customers and borrowers will exist from 2000 onwards and be likely to have relevance to an assessment of the circumstances in which the Six Transactions were made (e.g., who was the initiator, who was the settlor of the trusts, and what was the purpose of putting substantial assets of Mr Al-Sanea into trusts (or a fronting arrangement) for SICL).

160. As for the Bank's contention that it does not have any relevant documents, it relies on the fact that external lawyers working with the Bank's staff in Riyadh have carried out lengthy work searching for and reviewing disclosure documents. It relies on the evidence of Mr Smith of Latham & Watkins, who says that the second and third level review teams have not seen any of the bills of sale or declarations of trust comprised in the Six Transactions or any documents preparatory to the making of the Six Transactions. He goes further and gives assurances on behalf of all members of the review teams except one that they cannot remember having seen a document that would fall within standard disclosure in relation to any matters pleaded about the applicable law of the Six Transactions, save possibly in relation to the domicile and residence of Mr Al-Sanea and the presence of SICL in the Cayman Islands or its headquarters in KSA.

161. It is clear that these assurances are given on the basis of the recollection only of lawyers and paralegals who spent weeks if not months in some cases carrying out the necessary work on the disclosure exercise. Without questioning in any way the good faith of those involved, I am doubtful about the value of such evidence. It may well be that the legal team were not principally (or at all) focussing their searches on documents that related to the circumstances in which the Six Transactions were made. Without a disclosure statement and a list the Claimants cannot assess what has been done. The Bank's evidence in December 2019 was that it had prepared a provisional list of documents and sent it to SAMA at the end of November 2019. That list has not been produced. Nor is there evidence about what classes or types of document over the period 2000 to 2008 are contained in it. Without sight of the list, and without confirmation of whether Samba Capital's documents were searched, it is impossible to form a view of how comprehensive or accurate the search was, or whether relevant files were included or the results sufficiently reviewed. As Mr Smith QC put it, the list might very well have established the need for an application for further searches or specific disclosure. There is the further point that, on its own evidence in December 2019, the Bank would not then (had it continued the exercise) have completed the disclosure process until 20 January 2020. The Court and the Claimants cannot know what further material documents would have been found during that additional month's work.

162. Moreover, the Bank's reliance on the results of its disclosure exercise in this way, using certain information said to be established by that exercise to support its argument, is in my view objectionable. The Bank has failed to comply with the Court's order to serve a list of documents supported by a disclosure statement. It has not allowed the Claimants to see the provisional list that was prepared, nor said how

many documents it contains, nor confirmed whether or not Samba Capital's documents were searched. In an attempt to persuade the Court that that failure does not prevent a fair trial of certain issues, it relies on certain factual information derived from the results of the searches, but without otherwise complying with its duty and without allowing the Claimants to scrutinise the results. In much the same way as the Bank was selecting favourable parts of its SAMA communications and putting only them before the court, it is doing the same with the results of the disclosure exercise.

163. I am not satisfied on the evidence in any event that the Bank has not a single document that it would have to disclose relating to the circumstances in which the Six Transactions were made that might be capable of supporting the Claimants' case or harming its own case on the governing law of the Six Transactions. For those reasons, I do not accept that a fair trial of those issues could take place without a full pre-trial and trial process including disclosure by the Bank having taken place.

164. Issues 4, 5. The position in relation to these issues is much more straightforward. Issue 4 is what law governs the effect of the September Transfer on rights in the Disputed Securities. Issue 5 is whether, if Saudi Arabian law governs, the September Transfer extinguished SICL's rights in the Disputed Securities even if the Bank had knowledge of its interest.

165. The Relevant Securities are (it is common ground) shares in Saudi Arabian companies. Under English conflict of laws rules, the validity of a transfer of moveable property and its effect on those claiming under the parties to the transfer are governed by the *lex situs*, i.e. the law of KSA (Dicey, Morris and Collins on The Conflict of Laws (15th ed.), Rule 133). (Even if the *lex loci actus* governed, there can be no dispute that the transfer took place in KSA, the shares in question being held by Samba Capital and others in Riyadh on behalf of Mr Al-Sanea.) Although the issue was not strictly before them for decision, the Supreme Court and Birss J both considered it to be clear that Saudi Arabian law governed the effect of the September Transfer on SICL's rights.

166. Although in form the Claimants' Reply joins issue with the Bank's pleading that Saudi Arabian law was the governing law of the September Transfer, the Claimants have no positive case that some other law applied. They plead that Saudi Arabian law would not have the effect that the Bank was not a constructive trustee. There is therefore no factual dispute about the September Transfer itself. It is difficult to see what unknown facts might alter the result on this issue.

167. When I pressed Mr Smith about the extent to which there was any dispute about Issues (iv) and (v), he acknowledged that they are not likely to take up a lot of time at trial. The reality, I consider, is that the only relevant facts, which are determinative, are that the Relevant Securities were in Saudi Arabian companies and were transferred by Mr Al-Sanea to the Bank in KSA. There is a live dispute about whether shares that were transferred by the September Transfer included the Relevant Securities but that is a factual issue that is not on the Bank's list of preliminary issues. Given that there is no real dispute about the governing law of the September Transfer and that the *effect* of that Transfer on SICL's assumed equitable rights is then a question of Saudi Arabian law, to be determined on the basis of expert evidence, there is no disclosure from the Bank that will affect the determination of those issues. For

the purposes of issue 5, the facts of the Bank's knowledge or notice are taken to be as pleaded by the Claimants.

168. These are therefore issues that can be determined at a trial without unfairness to the Claimants or unfair advantage to the Bank in the absence of its disclosure. The only factual issue in dispute will be the state of Saudi Arabian law, which is a matter for expert evidence.

169. Issue 6: The governing law of the claim. The Claimants' claim is a personal claim against the Bank for equitable compensation, on the basis that the Disputed Securities belonged to SICL at the time when the Bank acquired them. The Bank contends that the knowing receipt claim is to be equated with a claim in unjust enrichment and is governed by article 10 of the Rome II Regulation on non-contractual obligations, or alternatively by article 4 if to be equated with a tort claim, or alternatively, if the Rome II Regulation does not apply, by the common law conflict of laws rules, and that in either case the answer is that Saudi Arabian law governs the claim. The Claimants contend that the claim is a claim governed by the Hague Trusts Convention.

170. Under the Rome II Regulation, the following disputed questions therefore arise:

i) Do the Bank's non-contractual obligations arise out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily? – if so the Regulation does not apply;

ii) Do the Bank's non-contractual obligations concern a (banking) relationship existing between the parties that is closely connected with the unjust enrichment? – if so the law that governs that relationship (English law) applies;

iii) Is it clear from all the circumstances of the case that the Bank's unjust enrichment obligation is manifestly more closely connected with a country other than KSA or England, i.e. Cayman Islands?

iv) Is it clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than KSA, i.e. Cayman Islands?

171. As to those questions, the Claimants rely on the fact that Cayman Islands trusts had been established, to the Bank's knowledge, and that the non-contractual claim was to vindicate rights under those trusts; and on the banking relationship and facility agreement between SICL and the Bank in London.

172. The Bank submits that the "manifestly more closely connected" provision of the Rome II Regulation is a high hurdle for the Claimants to overcome and that it has been characterised as operating only in exceptional circumstances: see Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd [2016] EWHC 2774 (Comm) at [206].

173. Under the Trusts Convention, the Claimants allege that the governing law of the claim is the law implicitly chosen by Mr Al-Sanea and SICL, alternatively the law with which the trusts are most closely connected, which depends on the circumstances in

which the trusts were established, whether they demonstrate with reasonable certainty the law which the parties chose, and who was the settlor.

174. For the Bank's alternative claim that Saudi Arabian law applies by virtue of the common law conflict of laws rules, it relies on a plea that SICL had no substantial presence in the Cayman Islands but had strong connections with KSA, and that the Bank *did not know or have any means of knowing* that the trusts were governed by the law of the Cayman Islands.

175. It seems to me that there remain important factual matters to investigate before it can be decided which is the governing law of the Claimants' claim. Those include, in particular, the nature and significance of the connection between the banking relationship of SICL with the Bank in London and the acquisition of the Relevant Securities from Mr Al-Sanea; whether the Bank knew or had the means of knowing of the trusts and that they were Cayman Islands trusts; the degree of connection of the claim with the Cayman Islands as compared with KSA (and whether the facts enable the Claimants to surmount the "high hurdle") and all the circumstances in which the trusts were created. The Bank sought to argue before Birss J that the answer to the governing law of the 2017 claim was so obviously Saudi Arabian law that he should strike the claim out, but he declined to do so on the basis that the question was properly arguable for each of the parties and that it could not be dealt with summarily. His conclusion was upheld in strong terms by Asplin LJ. In my judgment, their reasons for refusing to decide the issue then, before a pleaded defence, are also good reasons for not deciding it at trial, in the light of the Defence, without the Claimants having had the advantage of seeing the Bank's disclosable documents and all relevant evidence being before the court.

176. It seems to me to be probable that some of the Bank's documents will cast light on these matters. Some of those documents will be part of the evidence that should be before the court at trial. The issue of the governing law of the principal claim of the Claimants is therefore not one that can fairly be tried without disclosure by the Bank.

177. Issues 7, 8 These issues are issues of pure law. In the case of issue 7, the issue is whether, on the basis of the facts alleged by the Claimants, there is a cause of action against the Bank under Saudi Arabian law. The Court will not have to decide whether such a claim would succeed on the facts, only whether it cannot succeed in law. Similarly, issue 8, assuming that the governing law of the claim is Cayman Islands or English law but that Saudi Arabian law governs the priorities arising from the September Transfer, is whether the claim is bound to fail, even assuming in the Claimants' favour the facts pleaded, because any proprietary interest of SICL was overridden upon the September Transfer (what the Bank's legal team refer to as "want of an undestroyed proprietary base"). The question of English or Cayman Islands law (which in this respect are the same) is whether a claim for equitable compensation from a constructive trustee must fail if the transfer to the constructive trustee ended the proprietary interest of the beneficiary. The *obiter* opinion of Lord Mance in the Supreme Court in Akers v Samba Financial Group, which may have triggered this issue, was:

> "…where under the *lex situs* of the relevant trust property the effect of a transfer of the property by the trustee to a third party is to override any equitable interest which would otherwise

> subsist, that effect should be recognised as giving the transferee a defence to any claim by the beneficiary, whether proprietary *or simply restitutionary*." (emphasis added)

The question is whether the last three words correctly state the law. It is a pure question of law and no disclosure can be relevant to it.

178. Issue 9 Whether relief should be refused on grounds of illegality is clearly a question for the *lex fori*, but it depends on first establishing the content of the law of KSA, as it would apply to the circumstances of SICL's case. The only illegality alleged is that the Six Transactions were illegal under Saudi Arabian law in creating an equitable interest in the Relevant Securities vested in SICL. The issue arises on the hypothesis that the Claimants would otherwise succeed on their claim. If their claim fails for other reasons, issue 9 does not arise. According to the Bank's expert witnesses, under Saudi Arabian law it is unlawful for an unlicensed foreign company to hold securities in Saudi Arabian companies and unlawful to attempt (by offshore trust structures or other "fronting" arrangements) to circumvent that restriction. There is no agreement between the experts about the extent to which the second part of that statement is true and applies in the factual circumstances of SICL's case.

179. It will therefore probably be necessary to have clarity as to the factual circumstances (including who was the settlor of the trusts and the initiator of the Six Transactions, as well as the extent to which in fact Mr Al-Sanea was the relevant directing mind of SICL) in order to determine whether under Saudi Arabian law what SICL (or Mr Al-Sanea, or both) did was illegal. Mr Haberbeck in his original expert report said that a Saudi Arabian court might find in its discretion that SICL had contractual rights notwithstanding a breach of the anti-fronting regulation, but not ownership rights. The question of illegality under Saudi Arabian law therefore does not appear to be clear-cut, and the Claimants dispute that the Six Transactions were unlawful.

180. Resolution of the position under Saudi Arabian law is likely to depend on establishing the circumstances in which the Six Transactions were entered into. The Bank also contends that Mr Al-Sanea must have known at the time of the illegality of what was being done and that his knowledge is to be imputed to SICL. That is denied by the Claimants.

181. I have already held that the Bank is likely to have disclosable documents relating to the circumstances in which the Six Transactions were made and the relationship at the time between Mr Al-Sanea and SICL. Those documents could well be material to establishing the above matters.

182. As for the application of English law as the *lex fori*, the Claimants plead that it would be a disproportionate response to any illegality in KSA to deny the Claimants' otherwise valid claim, particularly where the consequence would be a windfall to the Bank which (it is assumed) knew of SICL's rights at the date of the September Transfer and would give the Bank priority over SICL's other creditors. Mr Roxburgh submitted that the Court need not be concerned about the Claimants' reliance here on the facts known to the Bank because the facts alleged by the Claimants are for this purpose assumed to be established in their favour (because the Claimants have otherwise succeeded on their claim). That, however, is not an answer to the Claimants' case that the circumstances in which the Six Transactions were effected do

not amount to unlawful "fronting" under Saudi Arabian law: the question of illegality under Saudi Arabian law is to be tried and in my judgment may depend on the particular facts surrounding the creation of the trusts.

183. Even if illegality under Saudi Arabian law were established, the question of whether the English court would deny the Claimants relief on that basis is a fact sensitive question. The point is based on public policy and international comity, but I cannot see how the Court could exercise its discretion without regard to the particular facts of the case, proportionality being the touchstone. Relevant to that assessment must be the seriousness of the illegality in the given case, the extent of a claimant's knowledge of it or involvement in it, the importance of his role, the impact of denial of recovery, as between the parties, and whether denial would prevent the making of a profit out of wrongdoing or alternatively prevent wrongdoing. The degree of involvement of directors of SICL other than Mr Al Sanea and their culpability might well be relevant.

184. I conclude that issue 9 cannot be tried fairly without disclosure of the Bank's documents.

185. Quantum issues There are in addition two quantum issues. One is whether the shares transferred by the September Transfer included all or any of the Relevant Securities. The Bank accepts that that issue is fact- and disclosure-sensitive. The second issue is one of pure valuation: what was the value of the Disputed Securities at the date of the September Transfer and at the date of trial? One of the sub-issues is the extent to which a quantum discount should be applied to the quoted share price. The parties have been given permission to call expert witnesses on the value of all the Disputed Securities, which with one exception were (in September 2009) and are publicly listed. The exception is NCB, which was not a listed company at the time of the September Transfer but was listed subsequently. In relation to NCB only, the Claimants submit that documents held by the Bank are relevant to determining the value of its shares at the earlier date: the Bank must have formed a view or received information about the value of the NCB shares that Mr Al-Sanea was transferring to it. I accept that that is probably so but consider that the expert witnesses can nonetheless address fairly the value of NCB's shares in September 2009. An opinion that someone else had in September 2009 is no more than someone's opinion and of limited evidential value. It is the true value that the Bank received and SICL lost that is material, not the Bank's view of what it was prepared to credit against Mr Al-Sanea's or SICL's debt. In relation to all other valuations, there is no suggestion by the Claimants that it would be unfair to allow the Bank to defend these issues if it is to be allowed to defend the claim at all.

186. Summary The result is that the issues that it would be fair in principle to allow the Bank to defend at trial are:

i) The governing law of the September Transfer (issue (iv));

ii) If Saudi Arabian law is the governing law of the September Transfer, whether its effect is to extinguish SICL's rights in the Disputed Securities even if the Bank had knowledge of SICL's interest (issue (v));

iii) If Saudi Arabian law is the governing law of the Claimants' claim, whether that claim as pleaded must fail (issue (vii));

iv) If Cayman Islands or English law is the governing law of the Claimants' claim, whether that claim as pleaded must fail (issue (viii));

v) The value of the Disputed Securities at the date of the September Transfer and at the date of trial.

XI. Disposal

187. In principle, I will therefore strike out the Bank's Defence and debar it from defending the Claimants' claim save in relation to the five issues identified in the immediately preceding paragraph. Since the parties had no forewarning of the conclusion that I would reach, I will hear them on the question of whether a trial of some or all of those issues serves a useful purpose, i.e. whether success on all or some of issues (iv), (v), (vii) and (viii) will result in judgment for the Bank, and on the practicalities of such a trial and directions necessary for it to take place in October 2020.

188. I asked Mr Onslow in argument whether the Bank submits that an unless order should even now be made, giving the Bank a final chance to comply with the disclosure order. The Bank's evidence strongly implies (though it does not expressly state) that the Bank will not comply with the standard disclosure order without SAMA's express authority. Mr Onslow submitted that the Bank had not made a final decision and should be allowed to do so. He explained that the Bank did not wish to be accused of a contumacious breach by indicating in advance that it would not comply if the order was not revoked. I understand that, but the reality is that, as I have found, the Bank has made its decision not to give disclosure while SAMA's ruling remains in place. In those circumstances, making an unless order would be pointless.

189. It appears, in any event, too late now to make an unless order for disclosure to be given and for the trial date to be effective if it were complied with. There remains a further month's work for the Bank's external legal team to do to complete the review of documents, which work the Bank unilaterally stopped at about Christmas last year. Even if disclosure were given today, the Claimants' orderly preparation for trial would be severely hampered. Their lawyers would have to review documents probably numbered in the high tens of thousands of documents and, as previously stated, further applications relating to disclosure are quite likely. The CMC1 directions allowed a year between the second tranche of disclosure and trial, and four months between the completion of disclosure and the exchange of witness statements. In addition, expert evidence on Saudi Arabian law and share valuation would have to be prepared and a great deal of detailed preparation for trial carried out. The current social and business restrictions caused by Covid-19 will increase the difficulty of achieving results under great pressure of time. I cannot see how the trial date could be effective, if the Bank were now to be given a month as a final opportunity to comply with the order for standard disclosure. Absent any indication by the Bank that it might choose belatedly to comply with the disclosure order, it is unnecessary to consider this further.

APPENDIX

LIST OF PRINCIPAL ISSUES[1]

1. What is the governing law of the Six Transactions, and of any relevant interest that SICL had in the Relevant Securities by virtue of the 2002 [Samba] Agreement, the 2003 [Samba] Agreement and the Declarations of Trust?

2. Did the Six Transactions (or any part thereof) create (a) trusts of the Relevant Securities in favour of SICL, or (b) a (Saudi Arabian law governed) legal relationship giving SICL an interest in or right to the Relevant Securities?

3. Did the Six Transactions (or any part thereof) confer upon SICL (a) any equitable or other proprietary interest in the Relevant Securities, or (b) any Saudi Arabian law-governed interest in or right to the Relevant Securities sufficient to enable SICL to bring a claim (and if so against whom) in respect of them?

3A. To what extent, if at all, did the shares transferred pursuant to the September Transfer[2] constitute or fall to be treated as Relevant Securities?

4. What is the law governing the effect of the September Transfer on property rights in, or on any other relevant rights to or interest in, the Disputed Securities?

5. If Saudi Arabian law governs the effect of the September Transfer on property, or any other relevant, interests in or rights to the Disputed Securities, did the September Transfer (a) extinguish SICL's alleged interest in the Disputed Securities and/or (b) have the effect of preventing SICL from bringing this claim)?

6. What is the governing law of the claim? In particular:

    a. What regime determines the relevant choice of law rule: (a) the trusts regime (under the Hague Trusts Convention / the 1987 Act / the common law); or (b) the Rome II Regulation regime?

    b. Under the relevant choice of law rule, which system of law governs the claim?

7. If the governing law of the claim is Saudi Arabian law:

    a. Do the facts alleged by the Claimants give rise to a cause of action against Samba?

    b. If so:

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[1] Capitalised terms are as defined in the parties' statements of case.

[2] The parties disagree about the definition of the "September Transfer" (and the steps which it comprised) but that is not material for the purposes of this list.

i. What are the requirements for such a claim and any applicable defences?

ii. Are the facts proved so as to (subject to Issue [9] below) make Samba liable to the Claimants?

iii. If so, what is the quantum of such liability?

8. If the governing law of the claim is English or Cayman Islands law, but Saudi Arabian law governs the effect of the September Transfer on property or any other relevant rights to or interest in the Disputed Securities, does the claim require, and if so does the claim fail for want of, an undestroyed proprietary base?

8A. If the governing law of the claim is English or Cayman Islands law, and if the claim does not fail in light of the answers to the Issues above:

a. Did Samba know or sufficiently suspect that Mr Al-Sanea held the Disputed Securities on trust for SICL and/or was Samba's knowledge and conduct in respect of the September Transfer otherwise such that it would be unconscionable for Samba to retain the benefit of the Disputed Securities and/or to deal with the Disputed Securities as Samba's own.

b. If so, is Samba (subject to Issues [8B]-[9] below) liable to SICL as a constructive trustee?

c. If so, what is the quantum of such liability?

8B. If the governing law of the claim is English or Cayman Islands law, is the claim time-barred by Section 21(3) of the Limitation Act 1980 or Section 27(3) of the Limitation Law (12 of 1991) (Cayman Islands), or is the primary period of limitation extended (and if so, until when) by Section 32 of the Limitation Act 1980 or Section 37 of the Cayman Islands Limitation Law?

9. Should the claim be dismissed on the grounds that it would be contrary to public policy and international comity to grant the relief sought by the Claimants?

10. In light of the answers to the Issues above, to what relief (if any) is SICL entitled?