Neutral Citation Number: [2023] EWHC 91 (Comm)

Case No: CL-2019-000127 and others

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/23

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

THE REPUBLIC OF MOZAMBIQUE	**Claimant**
- and -	
CREDIT SUISSE INTERNATIONAL AND OTHERS	**Defendants**

- -
- -

Jonathan Adkin KC and Jeremy Brier KC (instructed by **Peters & Peters Solicitors LLP**) for the Republic of Mozambique

Andrew Hunter KC, Sharif Shivji KC, Andrew Scott KC, Tom Gentleman and Emma Horner (instructed by **Slaughter and May**) for Credit Suisse

Timothy Howe KC and Natasha Bennett (instructed by **Rosenblatt**) for VTBC

Philip Riches KC (instructed by **Signature Litigation LLP**) for the Privinvest Defendants

Hearing dates: 19-20 December 2022

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Judgment 6

Robin Knowles J:

Disclosure in litigation

1. Disclosure is the procedure by which parties to litigation before the English Court identify and make available to each other the documents that they have that are relevant to the issues in the litigation. The procedure is "important in achieving the fair resolution of civil proceedings" (Civil Procedure Rules; Practice Directions 51U and 57AD paragraph 2, although the origins of the statement are much longer established). A procedure of disclosure or discovery of relevant documents is adopted in the Courts of other, but not all, parts of the world.

2. The Republic is a party to the present proceedings before the English Court. This Judgment addresses questions of Mozambican law that are said to limit the involvement that the Republic's solicitors may have in the Republic's carrying out disclosure in the proceedings.

3. The Republic acts in the proceedings through its Attorney General. In his sixth witness statement dated 19 April 2022 Deputy Attorney General Matusse assured this Court that the Attorney General "is fully aware of and committed to ensuring compliance with the Republic's disclosure obligations". The Deputy Attorney General however explained, for the Republic:

> "2. Civil litigation in Mozambique does not provide for disclosure to be given. Prior to these proceedings, the concept of disclosure as it operates in English litigation was generally unknown within the Republic. The Republic has never before been involved in international litigation that involves the extensive disclosure obligations imposed by the English courts. As a result of this, there is no prior experience in the Republic in dealing with these matters. This disclosure exercise as a whole is novel and unprecedented."

4. As a party to proceedings before this Court the Republic is under a number of duties to this Court in relation to disclosure. These include (PD51U/ PD57AD paragraph 3.1):

> "(1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings;
>
> (2) … to disclose known adverse documents, unless they are privileged. This duty exists regardless of whether or not any order for disclosure is made;
>
> (3) to comply with any order for disclosure made by the court;
>
> (4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;
>
> (5) to act honestly in relation to the process of giving disclosure …"

5. The Republic's solicitors are the law firm Peters & Peters LLP ("Peters & Peters"). As its legal representatives with the conduct of litigation on its behalf, Peters & Peters are under duties to this Court that include the following (PD51U/ PD57AD paragraph 3.2):

> "…
>
> (2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;
>
> (3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;
>
> …
>
> (5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained."

6. These duties, of client and of legal representatives, are continuing duties that last until the conclusion of the proceedings (PD51U/ PD57AD paragraph 3.3).

7. Among other things, law firms acting in accordance with their duties as legal representatives bring knowledge, independence and objectivity to the procedure. In the present proceedings, each of the law firms instructed by the parties also have great experience and expertise.

8. The Court is pleased to trust the individual lawyers - solicitors, barristers and Chartered Legal Executives - at the law firms. They are individually officers of the Court. It is relevant to emphasise this trust. The lawyers are the lawyers to a party but their duties to assist on disclosure are there to help ensure that the disclosure procedure has integrity and is not simply performed as a service to the party.

9. The need for this involvement, on all sides, is reinforced by the nature of the issues in the present proceedings, which include alleged bribery in connection with major transactions involving or affecting the Republic. Serious allegations are made against parties to the proceedings, and in the case of the Republic, against some of the Republic's present and past most senior officials and office holders.

10. The Republic's disclosure obligations require a search for relevant documents at a number of state entities, largely comprising ministries, councils and offices. This of course presents challenges because classified documents will be involved, with associated confidentiality or secrecy.

11. A related, important and relevant point is that, where appropriate, this Court is able to adopt procedures that assist in respecting confidentiality (including secrecy) in various forms, whilst ensuring that documents are nonetheless available to the Court to assist in achieving a fair resolution of the proceedings. These procedures can variously limit review of, access to and use of documents. All the law firms involved in these proceedings, specifically including Peters & Peters, have experience of dealing with material of the highest confidentiality.

"State secrecy" under Mozambican Law

12. The term "state secrecy" has been used in two senses in the exchanges of correspondence, evidence and argument to date in these proceedings and on the current issue.

13. First, it is the term given to a whole process of classification of documents or information by the Mozambican state into one of four grades: "state secret", "secret", "confidential" and "restricted". Second, state secrecy is sometimes the term used to refer solely to documents classified into the first of those four grades.

"Need-to-know" designation

14. In a letter dated 17 December 2021 Peters & Peters explained that they would not be undertaking the search and collection of documents in relation to certain of the Republic's ministries, councils and offices where "state secrecy" issues were said to be "pervasive". However, they advised that the Attorney General would ask the Republic's Commission for the Implementation of State Secrecy ("CPISE"):

> "… for a direction that certain named solicitors of this firm receive special designation which would allow them to participate in the initial [internal] review for relevance".

15. This form of "designation" has been described by the Republic as a "need-to- know" ("necessidade de conhecer") designation. The letter also stated that the Attorney General would seek from CPISE declassification of documents subject to "state secrecy".

16. A letter dated 23 February 2022 from Peters & Peters then explained that certain "practical challenges" had arisen since certain ministries, councils and offices had "expressed concern" as to the involvement of individuals from outside those entities participating in the initial document gathering. Nevertheless, the Republic confirmed that its disclosure process would be "supervised by [Peters & Peters] in the ordinary way as appropriate in each instance".

17. In a witness statement of 19 April 2022 Deputy Attorney General Matusse explained that "[g]enerally, the "Need to Know" principle has always been understood to be restricted to individuals within the apparatus of the Republic". However, he went on to say that he was informed by the Attorney General that "she intends to continue her discussions with the relevant decision makers in an effort to persuade them to permit a designation" of Peters & Peters "to review documents subject to state secrecy".

18. On 26 July 2022, the Republic informed this Court that the designation of Peters & Peters:

> "cannot be done as a matter of Mozambican law and/or policy".

19. Other parties to these proceedings, including Credit Suisse, do not accept that that is Mozambican law. Addressing the consequences, and expressing a concern shared by other parties to the proceedings, Credit Suisse went on to state:

> "… [it] would be inimical to basic fairness, and rob the disclosure exercise of any integrity, if the search and review processes were undertaken without direct

> solicitor involvement by the very [ministries, councils and offices] whose senior officials are implicated in wrongdoing".

20. This is a concern to which this Court must have serious regard. Even had a party not expressed the concern, the Court itself is concerned, as a matter of the administration of justice, to ensure that the disclosure procedure has integrity.

This hearing

21. Given the potential importance to these particular proceedings, and the importance that all parties should as far as possible know where they stood, in September 2022 I gave directions towards a concise substantive hearing to determine two questions.

22. The first, and main question, was whether it would be unlawful under Mozambican law to designate Peters & Peters as "need-to-know". A second question was whether there is a real risk of prosecution in Mozambique if Peters & Peters were to be so designated.

23. The argument of the first question takes place in a special context. The Republic (represented by the Attorney General) has the disclosure duties identified earlier in this judgment. It follows that for the purpose of these proceedings the proper limit of the Republic's interest in the question is that the correct answer is established, rather than the limit of a party's self-interest.

24. The argument at this hearing by Mr Jonathan Adkin KC, with Mr Jeremy Brier KC, as Leading Counsel for the Republic (represented by its Attorney General) properly contributes to the end of establishing that correct answer. The Attorney General's appreciation of the correct answer to either or both of the two questions may change, and indeed on the face of the correspondence referred to above has already done so. The position must be kept under continuing review, not least because the Republic's disclosure duties are continuing.

25. The concise substantive hearing took place on 19 and 20 December 2022. The Court had the benefit of full written expert reports, and oral evidence under cross examination extending over 6 hours, from two distinguished legal academics: Professor Dario Vicente, engaged by the Republic, and Professor David Duarte, engaged by Credit Suisse.

26. The two are colleagues with a primary specialism in Portuguese law. Their obligations as experts giving written and oral expert evidence to this Court include an obligation to give their independent expert opinion regardless of the party engaging them. Each made a valuable contribution, enabling the position to be tested and ultimately (as appears below) enabling a clear conclusion to be reached on what the answer to the first question is.

Mozambique Constitution and legislation

27. In their written argument, Mr Adkin KC and Mr Brier KC also provided a helpful summary introducing Mozambican law, drawing on expert evidence from both Professor Vicente and Professor Duarte. For present purposes I can gratefully adopt that summary and set out its essentials below, largely in the same language used by Mr Adkin KC and Mr Brier KC.

28. The Republic won independence on 25 June 1975 and in a new Constitution of that date, it was provided that the laws and regulations that were previously in force in Mozambique would be incorporated into the Republic's legal system, insofar as they were not contrary to the Constitution.

29. Accordingly, laws of Portuguese origin remained in force provided that they complied with the Constitution. This is the case, for example, with the Portuguese Civil Code of 1966 as the Civil Code of the Republic, albeit with certain amendments.

30. A new Constitution was introduced in 2004 and last amended in 2018.

31. The legal system is considered a civil law system and legislation is the primary source of law upon which the Courts base their judgments. Under Article 182 of the Constitution, legislative initiative belongs to Members of Parliament; Parliamentary Benches; Parliamentary Committees; the President of the Republic or Members of the Government.

32. Transparency and a right to information are principles at the heart of the Constitution of the Republic. Article 48 of the Constitution refers to "a right to information" and Articles 73 and 78 provide for citizens' permanent participation in public life. Access to administrative information in Mozambique can therefore be understood, at least prima facie, as permitted. There are however some significant exceptions to that general principle, including over access to documents which are subject to "State Secrecy".

33. State secrets are characterised by Law No. 12/79, of 12 December 1979, on State Secrecy, as essential to protect fundamental State interests, namely sovereignty, territorial integrity, and the proper functioning of the national economy. They are interests protected by the Constitution.

34. Law No. 34/2014, of 31 December 2014, on the right to information, by Article 20 (concerning restrictions and limits) provides as follows, addressing classification:

> "(1) The right to information may be restricted, conditioned or limited when the information requested has been classified as State secret, secret, restricted and confidential.
>
> (2) Without prejudice to other restrictions expressly established in specific legislation, the restrictions referred to in the preceding paragraph shall apply in the following cases:
>
> a) state secret;
> b) secrecy of justice;
> c) information in the possession of the Public Administration received subject to confidentiality, in the context of relations with other States or International organisations;
> d) professional secrecy;
> e) banking secrecy, except in cases where specific legislation allows access;
> f) personal data contained in electronic files held by public or private authorities in the possession of public or private authorities;
> g) within the scope of special protection measures for victims, whistle-blowers and witnesses;

> h) information concerning the life and private intimacy of citizens;
> i) commercial or industrial secrecy;
> j) confidentiality related to literary, artistic or scientific property;
> k) information related to criminal, disciplinary or other proceedings when its disclosure might jeopardise the investigation in progress or other constitutionally enshrined principles;
> (l) scientific and technological research and development projects or final reports of research projects, of which secrecy is indispensable to the security of society and State."

35. The position is further set out at Article 21 of Law No. 34/2014, as follows:

> "(1) For the purposes of this Law, State secret shall mean data, materials and documents, regardless of their form, nature and means of transmission, to which a degree of security classification has been attributed and which require protection against unauthorised disclosure, the knowledge of which by unauthorised persons is likely to jeopardise or endanger national independence, the unity, the integrity of the State and internal and external security. […]
>
> (3) The classification of information as a State Secret is made according to the law and its classification, in concrete, is a competence of the official that produces it, in accordance with the provisions of the information classifier."

36. Further, Annex IV of Decree No. 84/2018, of 26 December 2018, which approved the National State Archive System, provides as follows:

> "Information and materials of the highest degree of access restriction shall be classified as State Secret, whose disclosure or knowledge by unauthorised persons may imply exceptionally serious consequences for the country and other states or International Organisations to which Mozambique is a party to by virtue of the fact that they may:
> - Lead to situations that may affect the conditions of the defence of the country or the high interests of the State;
> - Jeopardise the security of the State or matters of a technical or scientific nature of high national interest."

CPISE and CEDIMO

37. In the context of classification of documents and information, two bodies in Mozambique are of particular dedicated relevance.

38. The roles and functions of the first, CPISE, already mentioned in correspondence referred to above, are described as follows by Professor Vicente in his First Report:

> "33. CPISE was created by Presidential Decree No. 5/79, which first defined its structure and functions.
>
> 34. Law 12/79, on the protection of State Secrecy, subsequently entrusted CPISE with two basic functions: (i) "Establishing the additional security instructions it deems necessary for the protection of the State Secret" (Article 6); and (ii)

> "Defining the structures within which classified information controllers must be designated" (Article 8(1)).
>
> 35. CPISE's role was readjusted by Presidential Decree No 9/93, which also renamed it as the "National Commission for the Implementation of the Norms on State Secret" and laid down new rules on its composition, functioning, financing and specific functions.
>
> 36. The latter comprise, according to Article 4 of Presidential Decree No. 9/93, the following: (i) "To propose to the President of the Republic draft Laws, Decrees, Regulations, and other normative instruments on the protection of State Secret"; and (ii) "To issue instructions and ensure the strict application of the rules and measures adopted for the protection of classified information, fundamentally at the level of the State apparatus."
>
> 37. CPISE is, moreover, the Mozambican Classified Information Management Body pursuant to Article 7(4) of Decree No. 84/2108."

39. Professor Duarte adds, in a passage adopted by Mr Adkin KC and Mr Brier KC in their written argument, that Article 13 of Decree No. 84/2018 provides that CPISE is the central body for the management of classified information in Mozambique, which is the basis for CPISE's power to classify information.

40. The second body is CEDIMO. Mr Adkin KC and Mr Brier KC provide this written summary description of CEDIMO which I gratefully adopt:

> "CEDIMO on the other hand is the State archive. It was created by Decree No. 40/77, of 27 September 1977, out of the Documentation Centre of the Bank of Mozambique. In essence it is responsible for overseeing and monitoring the State archives and documentation and supervising the public access to information comprised in that system. Its relevance to the present issue is that it is entrusted with both "supervising compliance with the restrictions and limits on the right to information by public and private entities covered by the Right to Information Law"; and "giving its opinion, when requested, on the refusal or deficiency in the manner in which information is made available by public and private entities"."

Professor Vicente's taxonomy

41. It was agreed between Credit Suisse and Professor Vicente that Law No 12/79, of 12 December 1979 "is and remains the foundational legislative provision with respect to state secrecy in Mozambique".

42. Professor Vicente helpfully assists with a taxonomy drawing together the legal framework pertaining to State Secrecy and classification under five pillars:

(1) The first pillar comprises (what he terms) rules governing the definition of which information is to be classified as a State Secret (see in particular Law No. 12/79, of 12 December 1979 and Law No. 34/2014 of 31 December 2014).

(2) The second pillar comprises what he terms rules concerning State entities that are responsible for overseeing the implementation of legal framework on State Secrets (these are CPISE and CEDIMO).

(3) The third pillar includes (what he terms) rules that provide guidance to public officials on the classification procedures of information as secret or otherwise. This form of guidance is contained in Annex IV of Decree No. 84/2018, of 26 December 2018, as well as in what he describes as "non-normative texts produced by CPISE and CEDIMO, such as: (i) the Handbook on Procedures of the National State Archive System …, produced by CEDIMO in 2009; (ii) the leaflet on Treatment of Classified Information, published by CPISE in 2016; and (iii) the Handbook on Procedures Concerning the Law on the Right to Information … issued by CEDIMO in 2019."

(4) The fourth pillar is composed of what he terms the legal provisions that enshrine the administrative and judicial guarantees of compliance by public institutions with the provisions on access to information and the limits imposed thereupon. These include Articles 33 to 36 of Law No. 34/2014, of 31 December 2014 on the right to information.

(5) The fifth pillar consists of what he terms the rules that ensure the enforcement, at the disciplinary, criminal, the evidentiary and the civil law levels, of the legal framework on State Secrets.

Classification of documents and information

43. I can here again draw from the written argument of Mr Adkin KC and Mr Brier KC, which in turn draws on expert evidence from both Professor Vicente and Professor Duarte.

44. As noted above, Article 21(3) of Law No. 34/2014 (and see also Article 73(3) of Decree No. 30/2001) provides that the classification of information as a State Secret "is a competence of the official that produces it, in accordance with the provisions of the information classifier". CPISE also has a power to give instructions on the classification of information.

45. Further, in Decree No. 84/2018:

i) Article 3.1 of Annex II provides that the process of classification includes the study of documents, to determine their classification; and the codification of documents (which consists in assigning to each document a code corresponding to the subject dealt with in it).

ii) Annex IV of the same Decree contains a "Classifier of Information in Public Administration", which provides for the existence of four levels of confidentiality of documents: (i) State Secret; (ii) Secret; (iii) Confidential; and (iv) Restricted. The same Annex contains a brief description of what type of documents should be classified under these categories, as well as a sample list of such documents, the duration of their classification, and the level of access granted to classified documents.

46. The first of the two Handbooks by CEDIMO to which Professor Vicente refers under his third pillar (the 2009 Procedures Manual) seeks to help officials and agents of the State in applying these rules to preserve State Secrecy. The introduction to the 2009 Procedures Manual provides:

> "(…) [It shall be used by] State officials and agents in general, leaders, managers and, specifically, the professionals linked to the management area and handling of documents and files (…)".

47. The 2009 Procedures Manual goes on to define the concept of classifier of information; explain the structure of the classifier of information; describe the four degrees of confidentiality; identify the period of restricted access to classified information; and identify the levels of access to classified information and the "Need-to-Know" principle governing that access.

48. Specifically, there is what Professor Vicente describes as a "strict regime" that works by operation of law mandating that all documents relating to the Council of State, Council of Ministers and SISE (State Information and Security Services) are to be classified according to the laws of State Secrecy.

49. Professor Vicente explains in his First Report that Mozambican law allows no "waiver" of State Secrecy. There is instead designation of individuals to allow access (which is the subject of the first question on this substantive hearing) and there is declassification of the document or information (which is not the subject of this substantive hearing, although it is addressed separately in these proceedings).

The first question: designation

50. Article 8(4) of Law No 12/79 (agreed as the foundational legislative provision) contemplates the designation of "persons who may have access to classified documents".

51. In their written argument, Mr Adkin KC and Mr Brier KC summarise "Need-to-Know" status as a status which can be granted in order to enable certain individuals to have authority to review a document which is classified as a State Secret, or subject to State Secrecy (and so would otherwise be inaccessible to all individuals, other than the authority competent to classify the document).

52. They accept that "there is no comprehensive definition or explanation of "Need-to-Know" status or its regulation in any of the primary laws of Mozambique."

53. The expression is used in two places: Annex IV of Decree No 84/2018 and Chapter VI section 5 of the 2009 Procedures Manual. In the former it is entered in the column headed "Access Level" for the "Classification Levels" of "State Secret", "Secret", "Confidential" and "Restricted", but not defined. On the latter, Chapter VI, section 5 states:

> "5. Access levels

> Levels of access correspond to the authorization that is granted for the knowledge of certain information according to the need-to-know principle that the civil servant has for the performance of his duties."

54. The first question for this substantive hearing is asked in a very focussed context. It is not about Peters & Peters as general members of the public. Nor is it about Peters & Peters being given a general brief to look at classified documents regardless of their purpose in looking. Nor, in this context, is it about all those who work for Peters & Peters.

55. Rather, the question concerns whether particular individuals at Peters & Peters who are each qualified solicitors, barristers or Chartered Legal Executives, and who are acting both on behalf of the Republic represented by its Attorney General and as officers of this Court, may lawfully be authorised or designated by the proper Mozambican authority or authorities to review classified documents for the purpose of advising the Republic whether the documents are relevant to these proceedings and disclosable. This advice will include advice on whether, if documents are relevant and disclosable, one or more procedures to assist in respecting confidentiality or secrecy are available or appropriate (see above).

56. Why is this advice important? If the Republic has this advice, then the Court and the other parties can be assured that disclosure will be given of documents required to be disclosed or that the Court will know where and why it is not being given (because the Republic, on advice from the solicitors, or the solicitors themselves, will say so). The Court will be in a position to reach a fair decision on what the consequences are in these proceedings.

PGR, the Republic's internal legal function

57. In all this, the nature and adequacy of the involvement of the Republic's own internal legal function, known as the "PGR", will fall for consideration alongside all other material circumstances.

58. It is understood that the PGR (or, presumably, individuals at the PGR) have been designated "Need-to-Know". There may however be exceptions: Credit Suisse states that its understanding is that the PGR has been refused access in the case of the Office of the President, the Office of the Prime Minister, SISE and the Council of State; Deputy Attorney General Matusse also said in his witness statement dated 19 April 2022 that:

> "Because of the nature of these entities, their particular roles and the highly sensitive nature of the documents held by them, SISE, the Office of the President and the Council of State will not formally designate me or my team to carry out searches, collections and reviews of documents held by them."

59. In the course of his oral argument in reply, Mr Adkin KC for the Republic pointed out that:

> "… the focus of this hearing has been what's the answer to the Mozambique law question and is there a risk of prosecution. What your Lordship hasn't really heard is[,] is there actually a problem that we need a way round on the ground."

60. I appreciate I will hear more in this connection at a later, but near, point in these proceedings, but even at this stage I draw attention to the fact that it was said on behalf of the Attorney General herself, in December 2021, that asking CPISE for a direction that certain named solicitors of Peters & Peters receive special designation "would allow them to participate in the initial PGR-led review for relevance". If there has not been a designation of certain named solicitors of Peters & Peters it would appear to follow that they have not been allowed to participate in initial review for relevance at some of the ministries, councils and office, even if initial review was "PGR-led".

Professor Vicente's opinion

61. In his First Report, Professor Vicente wrote as follows:

> "Question 9: Would it be lawful for the Republic to designate Peters & Peters as Need-to-Know (i) to review logbooks recording brief details of classified documents and (ii) to review classified documents generally?"
>
> 89. Absent of a specific rule on the matter, decisions on which individual persons may access to (*sic*) classified documents and information, or parts thereof, and under what conditions, should fall with the entity that classified the document or information at stake.
>
> 90. Concerning State Secrets, the general instructions on the matter pertain to CPISE, which is empowered to "issue instructions and ensure strict application of the rules and measures adopted for the protection of Classified Information" (Article 4(b) of Presidential Decree No. 9/93).
>
> 91. As per article 7(4) of Decree No. 84/2018 of 31 December CPISE is also the Classified Information Management Body.
>
> 92. In deciding whether to grant access to classified documents, the competent entity seemed to enjoy considerable discretion. This discretion is nonetheless limited by the interests protected by the classification itself …: (i) national independence; (ii) the unity and integrity of the State; and (iii) its internal and external security; (iv) preservation of technical and scientific information of high national interest. Only persons who are not in a position to jeopardize such interests should therefore be granted access to classified documents.
>
> 93. Granting such access to foreign lawyers (i.e. to lawyers established abroad) is not automatically excluded by this criterion. Nevertheless, the fact that [the Procedures Manual] refers solely to access by civil servants ("funcionarios") suggests that, when regulating access to classified documents, the Mozambican Government did not intend to include other persons to such access.
>
> 94. Moreover, foreign lawyers providing legal services to the Republic cannot be included in the notion of State agent, because such an agent must be a citizen (i.e. a Mozambican citizen) employed or designated for the performance of certain activities in the institutions of the State apparatus (Article 3(2) of the General Statute on Officials and Agents of the State approved by Law No. 4/2022 of 11 February), and is subject to a disciplinary regime common to that of civil servants, which is clearly not the case of Peters & Peters or its solicitors.

> 95. Even the broader notion of public servant, referred to above, does not include foreign lawyers: public servants are individuals performing functions in a Mozambican public institution, which are subject to uniform ethical and remuneration rules laid down in the law. This is also clearly not the case either of Peters & Peters or of its solicitors acting for the Republic.
>
> 96. On the other hand, admitting such access by foreign lawyers would most likely give rise to problems regarding the enforcement of rules on State Secrecy. Indeed, compliance with those rules is fundamentally ensured by means of criminal and disciplinary provisions (in the case of civil servants and State agents), and the applicability of these provisions to persons of foreign nationality and domiciled or established abroad, over whom the Mozambican courts are unlikely to be able to fully exercise their jurisdiction, would inevitably face major difficulties, which would potentially undermine the effectiveness of the legal regime on State Secrecy.
>
> 97. Regarding information produced by SISE (whose members may only be natural born Mozambican nationals pursuant to article 8(a) of Law No. 13/2012), special restrictions of access apply by virtue of Law No. 12/ 2012, of 8 February, which even limits access of Parliament to such information (see Article 7). A fortiori, this circumstance strongly suggests that access to SISE information by foreign private persons, domiciled or established abroad, such as Peters & Peters solicitors, is not intended by Mozambican law.
>
> 98. In light of the above it must be concluded that it would not be lawful for the Republic to designate Peters & Peters as Need-to-Know for the purpose of accessing classified documents or parts thereof including those contained in log books."

62. Dissecting and distilling the above, the points made are: (a) persons who are not in a position to jeopardise the four interests identified in paragraph 92 may be granted access; (b) lawyers established abroad are not automatically excluded by this criterion; (c) such lawyers are not State agents or public servants; (d) admitting access by foreign lawyers would most likely give rise to problems (or major difficulties) regarding the enforcement of rules on State Secrecy; and (e) in the case of SISE information there are special and greater restrictions and limits to access.

63. While these points may (among others) be considered by the relevant classifying authority or CPISE in reaching decisions whether to accord designation they simply do not support the conclusion expressed by Professor Vicente that it would be unlawful to designate specified individual solicitors from Peters & Peters, i.e. that no decision could ever lawfully be reached by any classifying authority to grant designation to a lawyer established abroad.

64. Professor Duarte could not support Professor Vicente's conclusion. When Professor Duarte was challenged in cross examination by Mr Adkin KC that his view, in contrast to that of Professor Vicente, would mean that any private person who is asked by the state to do anything is potentially within the scope of the law on need-to-know, Professor Duarte accepted that that was potentially the position and explained why. In doing so he also explained why, far from the law as a result lacking clarity over who cannot see state secret documents, the law in fact had clarity and specificity.

65. Thus:

> "Mr Adkin KC: [In the context of the criminal consequences of breach of the law in relation to access to classified documents] isn't it rather important that the law on who can and cannot see classified state secret documents operates in a way which is clear, which has clarity. Would you agree with that proposition.
>
> Professor Duarte: Of course.
>
> Mr Adkin KC: The suggestion you are advancing, as I understand it, is that any private person who is asked by the state to do anything is potentially within the scope of the law. Is that right?
>
> Professor Duarte: It is potentially … but I would like to stress potentially.
>
> Mr Adkin KC: Potentially, and whether it turns from a potential to an actual depends on a precise parsing – is this right? -- of the particular terms and the particular context of the arrangement between the state and the private body?
>
> Professor Duarte: I think I cannot agree with you.
>
> Mr Adkin KC: What does it turn on?
>
> Professor Duarte: The transition between being a potential holder of the need to know status – to be granted the need to know status is made by a specific decision to confer to such person access to information and this decision has to be taken considering all the interest at stake.
>
> Mr Adkin KC: But what we are talking about, Professor, is how the decision-maker makes that decision and I understand your evidence to be that potentially anybody in the world could be granted need to know access and whether or not they are actually within the scope of that principle depends on understanding the precise terms of their arrangement with the state? Is that your evidence?
>
> Professor Duarte: No, and yesterday I also stressed there is a specific limit, which is the suitability condition. It is a condition for granting the need to know status that the information to be accessed is somehow appropriate to the tasks the person at stake has to carry out. So it is not everybody in the world. There must be the satisfaction of this very specific condition."

The 2009 Procedures Manual

66. Mr Adkin KC and Mr Brier KC argue that the 2009 Procedures Manual is the best (and only) formal guidance on the question of designation and it confines "Need-To-Know" status to being a designation which can only be given to "civil servants". They point out that while there is not an express limitation to civil servants there is no indication that others may be contemplated. Professor Vicente describes the Procedures Manual in his Second Report as "a comprehensive set of instructions concerning classification procedures" which "manifestly did not consider it necessary to contemplate the granting of access to other entities besides civil servants".

67. These points are about the purpose of the Procedures Manual. As Professor Vicente himself recognised in his First Report, it "may have been conceived as a means of regulating internal access to classified documents by civil servants". That is, that it was only looking to address that area of access.

68. Taking the reference to "civil servant" in Chapter VI section 5 of the 2009 Procedures Manual (quoted above) Mr Adkin KC and Mr Brier KC argue:

> "Further, the 2009 Handbook specifically and expressly states that "Need-To-Know" status can be granted where there is a need for certain knowledge "that the civil servant ["official"] has for the performance of his duties". That is, the "Need-to-Know" status is confined to what is required for the performance of the official duties by the official. It is a closed category because the "Need to Know" status is defined in relation to what the "official" (and not someone else) needs to know.
>
> Professor Duarte is right insofar as the 2009 Handbook does not expressly state "civil servants and no one else". But such additional wording would be surplusage in circumstances where the instructions are being directed at this closed category of "officials" only and where designation is expressly confined to being proportionate to that which the official has "for the performance of his duties" (being public duties). This further limitation cannot expand to include a private individual with no public function in relation to the Republic (let alone a foreign party)."

69. The argument again is met by Professor Vicente's recognition that the Procedures Manual may have been conceived as a means of regulating internal access by civil servants. Where the question being addressed is which officials "need-to-know" it is obvious that the "Need-to-Know" status will be "defined in relation to what the "official" (and not someone else) needs to know" or will be "expressly confined to being proportionate to that which the official has" "for the performance of his duties" (being public duties)". The Handbook does not claim to impose a "further limitation [that] cannot expand to include a private individual with no public function".

70. Professor Vicente added that "it would be inconsistent with the fact that access … is strictly regulated by a Handbook if access to persons who are not civil servants were free". With respect, no-one suggests that access to persons who are not civil servants is free. The absence of a Handbook does not make access free. In the case of civil servants, neither Professor Vicente nor Professor Duarte suggest that in the absence of the Procedures Manual access by civil servants would be free. As was brought out in the course of Professor Vicente's cross examination, for 30 years since Law 12/79 there was no Procedures Manual at all, even dealing with internal access by civil servants.

Professor Vicente's analysis "based on principle"

71. In the course of cross-examination, Professor Vicente offered this analysis:

> "… Even if the handbook did not exist, my conclusion would be the same, and this is so because, as we have discussed earlier, state secrecy protects fundamental interests of the state. It concerns the most sensitive information that is produced within a sovereign state and in order to protect those interests, access to this type of information has to be restricted, and that is what several pieces of legislation in

> Mozambique, including on general access to information, state, that state secrets are outside the scope of access to information.
>
> In order to determine who may have access to classified information, notably state secrets, it's only reasonable to conclude that this access should be restricted to persons who require such access by virtue of their functions, and these functions must somehow be connected with public interest because this is what is fundamentally protected by state secrecy.
>
> … the conclusion that I've reached is not exclusively based on this handbook but rather on principle."

72. With respect, the analysis adds an element that principle does not require. Thus, it is indeed "reasonable to conclude" that "access should be restricted to persons who require such access" ("need-to-know") and that the need is "connected with public interest". But the element that principle does not require to be added is that to be eligible as a designee, the designee's "functions" must be connected with the public interest. Often, no doubt, they will be but the debate shifts wrongly, as it has in this case, to what is meant by "functions" and who has them. The element that principle does require is an exercise of discretion that has regard to the particular nature of the documents and information involved, the nature of the need for access to those documents and that information, and the protections that can be afforded as part of the proposed designation.

73. Towards the end of his cross examination Professor Vicente said this:

> "… the issue we are discussing here is [a] difficult issue …. It's difficult for the court but it is also difficult for the Mozambican authorities. There may very well not be any precedent of access to state secrecy being granted in Mozambique to a foreign law firm, so the issue was new, it is an issue that may affect overriding public interests of the state. As I've also tried to explain in my expert reports, there is a concern that information granted to a foreign law firm may not be properly preserved against undue access by third parties.
>
> So there are many difficult points that have to be considered by Mozambican authorities when deciding this issue. …"

74. Again, with respect, this may not bring out the correct analysis. Professor Vicente is of course fully entitled to express the view that the issue is difficult in different ways. But whereas he says the concern may be that information granted to a foreign law firm may not be properly preserved against undue access by third parties, it is there that I would expect him to bring out the element of the analysis that is the exercise of discretion. That allows focus on the matters mentioned above including the protections that can be afforded as part of a proposed designation of individual solicitors.

The CPISE Leaflet

75. The CPISE Leaflet entitled "Treatment of Classified Information ("Tratmento da Informacao Classificada a Luz da Lei do Direito a Informacao") states that it is prepared in order to "facilitate the implementation of Law No. 34/2014, of 31 December – Right to Information Law by Public Servants".

76. Professor Vicente states, and I can accept, that "its purpose is merely informative and explanatory of that Law (to which it is subordinate), not to lay down new rules, and it is intended for purely internal use by the Public Administration.", that it has no endorsement from a Minister, that it cannot be characterised as an administrative regulation, and that it is "purely descriptive of existing rules, which it seeks to restate in plain language".

77. The leaflet answers the question "[w]ho may access classified information" with a reference in these plain terms:

> "Public servant duly accredited or with the necessity to know, private entities can be included in the latter case".

However, Professor Vicente suggests that there are three requirements in respect of this reference, and says that Peters & Peters do not fulfil any of them.

78. The first suggested requirement is that "even if that reference entails that private entities may be granted need-to-know status, only those that are assimilated to public entities … could be comprised in the need-to-know category". He suggests that such a private entity is one that "perform[s] public functions in Mozambique by virtue of a concession or delegation of the State". He says these are "such as those mentioned in paragraph 1 of the leaflet", where the following is mentioned:

> "the bodies and institutions of the State, the direct and indirect administration, representations abroad, local authorities as well as private entities that, under law or contract, carry out activities of public interest".

79. The language from paragraph 1 just quoted does not contain anything to support Professor Vicente's suggestion that a private entity must be one that "perform[s] public functions in Mozambique". There is also, with respect, no adequate explanation from Professor Vicente why undertaking the defined work on disclosure identified earlier in this judgment falls outside the description of a "private entit[y] that, under … contract, carr[ies] out activities of public interest".

80. Mr Adkin KC and Mr Brier KC bring argument in an attempt to support the position taken by Professor Vicente. They argue that a foreign law firm representing the Republic in overseas proceedings "would not even fall within a broad notion of public servant as a matter of Mozambican law". Reference is made to a recent definition of public servant in Article 3 of Law 5/2022 of 14 February 2022 which as Professor Vicente says is a law "concerning the remuneration of public servants". But that is not the relevant requirement, and nor is it an adequate description of the law firm and its role.

81. As previously emphasised, Peters & Peters and its solicitors are the legal representatives of the Republic acting by its Attorney General before the Courts of England & Wales. As the Republic's legal representatives they enable the Republic to pursue and defend in the present proceedings claims and allegations that are of the greatest economic, political and reputational significance to the Republic and its people. As such representatives and as officers of this Court, and taking every precaution that is appropriate and proportionate, the role involves identified solicitors reviewing classified documents for the purpose of advising the Republic whether the documents

are relevant to these proceedings and disclosable, and if they are whether one or more procedures to assist in respecting confidentiality or secrecy are available or appropriate.

82. The second suggested requirement is that:

> "… within the sphere of those entities, only those that are "competent to take administrative measures aimed at protecting State secrets … would be capable of being awarded need-to-know status."

83. The CPISE Leaflet expressly includes a "private entit[y] that, under … contract, carr[ies] out activities of public interest" as "competent to take administrative measures", referring to administrative measures "to protect State Secrets". An argument that the reference to competence to take administrative measures rules out private entities is not open to Professor Vicente. The reference to "administrative measures" in the CPISE Leaflet cannot mean measures that a private entity cannot take.

84. Of course "administrative measures" may also, and perhaps most often will, be taken by public rather than private entities. In oral expert evidence at the hearing reference was also made to Article 39.2 of Law No. 12 of 1979 which refers to:

> "the entities entrusted with the protection of State secrecy may take administrative measures with a view to immediately prevent access to, or disclosure of, information classified as State secret, whereby the citizen may appeal against such measures."

This does not however take the matter of Professor Vicente's second suggested requirement further. Although Professor Vicente expresses the opinion that Peters & Peters "is not competent to take administrative measures aimed at protecting Mozambican State secrets", Article 39.2 does not exclude any category of person from those who may be designated "need-to-know".

85. Professor Duarte explained in an exchange with Mr Adkin KC in the course of cross examination:

> "Professor Duarte: … Administrative in the sense of managing. You administrate the information. There is no reason whatsoever, in my view, to assign to this word here the meaning of an administrative law kind of activity.
>
> Mr Adkin KC: There is a reason, isn't there, because the citizen is given a right of appeal against that particular administrative measure. Look at what Article 39.2 says: "… administrative measures with a view to immediately prevent access to, or disclosure of, information classified as State secret, whereby the citizen can appeal against such measures." That's a reason, isn't it?
>
> Professor Duarte: It is a reason, of course --
>
> Mr Adkin KC: It's a compelling one, isn't it?
>
> Professor Duarte: -- but we can be speaking about private law measures. We can be speaking about some measures which are not the consequence or do not come from some administrative decision.

> Mr Adkin KC: But what I'm speaking about is what Article 39.2 is addressed towards and I just want to put it to you and invite you to agree that when it is talking about administrative measures, whereby the citizen may appeal against such measures, it's not talking about locking documents in a safe, it's talking about public law acts in respect of which a right of appeal is conferred by this article.
>
> Professor Duarte: No."

However even if Professor Duarte is wrong, and the reference to administrative measures in Article 39.2 is to be read as applying only to public law measures that the state may take, the Article does not prevent management measures of the type that a person who is not a civil servant could instigate. Nor does it prevent access to the courts in circumstances where management measures were taken that should be undone.

86. If Professor Vicente's view about competence is a conclusion on the ability to take management measures, I must reject it as outside his expertise as a legal expert, and as factually wrong. The question whether available measures are sufficient or suitable in the context of protecting documents or information at different levels of classification goes to the exercise of discretion whether to designate, not to the question whether designation is unlawful. There are a whole range of measures available, including with the assistance of enforceable orders of this Court, and these can address (among other things) location of review, method of review, selection of individual reviewing solicitors, and treatment of reviewed material. As I have already said, Peters & Peters have experience of dealing with material of the highest confidentiality.

87. Professor Vicente's third suggested requirement is that "as happens within the Public Administration, access to classified information can only be provided to specific individuals and not to entire organisations … –, since [continues Professor Vicente] these would potentially expose such information to dozens, hundreds or even thousands of persons with no need to access it". Professor Vicente observes that Peters & Peters "is a corporate entity, not an individual in need to access classified information for the performance of its public functions".

88. There is a short answer to this third point, and one that was quickly cleared up in exchanges at the hearing and has been anticipated earlier in this judgment. If access can only be provided to specific individuals then it would be acceptable to this Court that the review be undertaken by individually named solicitors (or barristers or Chartered Legal Executives).

89. In its first five questions and answers, read as a whole, the CPISE Leaflet provides as follows:

> "1. Why can the citizen not access classified information under the control of the bodies and institutions of the State, the direct and indirect administration, representations abroad, local authorities as well as private entities that, under law or contract, carry out activities of public interest.
>
> Because they are classified as State Secret whose unauthorised disclosure is likely to jeopardise or damage national independence, unity, the integrity of the State and internal and external security.

> Thus, the above entities have power to take administrative measures to protect State Secrets.
>
> 2. Is all confidential information considered State Secret?
>
> Yes, at the level of the entities mentioned above. The information is classified in four (4) grades/ degrees, namely: (1) State Secret, 2. Secret, 3. Confidential and 4. Restricted. These grades comprise the State Secret or State Secrecy.
>
> 3. How to reconcile the obligation to publish documents with the restriction of access to information?
>
> The restriction of access to Classified Information is legally excepted, including by the Law on the Right to Information (Article 20), and it is up to the public servant to know how to distinguish classified information from public information, based in the Information Classifier in force in his institution.
>
> 4. What is the Information Classifier?
>
> Information classifier is a normative instrument prepared in accordance with the activities of the institution that aims to guide the Public Servant in assigning the degree of confidentiality to information subject to such procedure.
>
> [5.]Who can access Classified Information?
>
> Public servant duly accredited or with a need to know, private entities may be included for the latter case."

90. It must be correct that, as Mr Adkin KC and Mr Brier KC write, the CPISE Leaflet does not provide a "basis for a new legal principle". But no new legal principle is needed. It is plain on the face of the leaflet that, without any inconsistency with the legal provisions cited by Profession Vicente and Professor Duarte, it is saying:

    a. The leaflet is dealing with all 4 "grades/ degrees" of classification (i.e. including Confidential and Restricted);

    b. The "entities" that have "the power to take administrative measures to protect State Secrets" include "private entities that, under law or contract, carry out activities of public interest"; and

    c. A public servant duly designated "need-to-know" can access classified information, and a private entity may be included for this.

91. Mr Adkin KC and Mr Brier KC draw attention to the surrounding words in question in the CPISE Leaflet 5 ("may be included in the latter case"), arguing that "the latter case" is "when acting as a public entity with a need to know". But that is to sweep in the words "public entity" (in fact "public servant") when the sentence readily allows reference only to "need-to-know" where a private entity is involved. Only individuals who are not in a position to jeopardise the four specific public interests should be granted access to classified documents, they add. But it is obviously not the case that only civil or public servants can be in that place.

92. Mr Adkin KC and Mr Brier KC address the possibility that persons who are of foreign nationality and domiciled or established abroad may include persons over whom the Mozambican courts are unlikely to be able fully to exercise their jurisdiction. This may be a relevant consideration in whether or not to designate an individual "need-to-know". But it simply does not "undoubtedly undermine the effectiveness of the legal regime on State Secrecy" as Mr Adkin KC and Mr Brier KC argue.

93. It is also fully appreciated that, as Mr Adkin KC and Mr Brier KC argue, heightened restrictions upon access apply to information produced by SISE (whose members may only be natural-born Mozambican nationals pursuant to Article 8(a) of Law No. 13/2012). But that too is relevant to the exercise of discretion to designate "need-to-know" and not something that makes the result of a careful exercise of the discretion unlawful.

Section IV of Professor Vicente's Second Report

94. In his Second Report, Professor Vicente contributes this Section IV:

> "IV The criteria to award need-to-know status
>
> 23. It is acknowledged that a decision on the need-to-know status is discretionary in the sense that the law gives the Public Administration the power to choose between different alternatives, namely whether to grant or deny such status.
>
> 24. However, this does not mean that such a decision is free or arbitrary. A discretionary decision must be reasoned and is limited by the public interests pursued by the administrative act at issue.
>
> 25. The reasoning of the decision granting access to information classified as State secret should therefore take into consideration the interests protected by the Constitution and the statutory regulation of State Secrecy.
>
> 26. These interests may lead to the conclusion that such access should either be granted or denied. This is acknowledged in paragraph 44 of [Professor Duarte's Report] which states that the interest protected by State Secrecy "can support a decision whether to confer need-to-know status". Logically this entails that those interests may also support a decision not to confer a status.
>
> 27. [Professor Duarte's Report] moreover acknowledges that public interest is a limit to discretion (paragraph 45). The conferral of the need-to-know status cannot therefore fail to consider the extent to which access granted may imperil the specific public interests protected by State Secrecy, namely: (i) safeguarding national independence, (ii) the unity and integrity of the State, (iii) its internal and external security; and (iv) the preservation of scientific information of high national interest.
>
> 28. These purposes of State Secrecy are expressions of the public interest, which operates as a general limit to any discretionary decision by the Public Administration.

> 29. The interests protected by state secrecy therefore operate both as the normative reasons that support a need-to-know decision and as limits to the discretion enjoyed by administrative authorities when deciding whether to grant such status.
>
> 30. Mozambican legal doctrine expressly admits that the reasons justifying an administrative act - i.e. its normative purposes - operate as limits to administrative discretion.
>
> 31. This is but a corollary of the principle of legality that underpins the activity of Mozambique Public Administration according to Article 4(1) of Law No. 14/2011, pursuant to which:
>
> > "The Public Administration shall act in obedience to law and justice, and within the limits and purposes of the powers attributed to it by the law."
>
> 32. An administrative decision confirming need-to-know status in deviation of the said purposes of State Secrecy can thus be annulled pursuant to Article 34 of Law No. 7/2014, of 28 February 2014, governing administrative procedure."

95. The point that a decision to grant (or refuse) need-to-know status must be reasoned is not controversial. Professor Duarte is in agreement. So too the point that that must involve consideration of "the extent to which access granted may imperil" the public interest including the four specific public interests enumerated as protected by State Secrecy, is not controversial. That this consideration will provide the reasons for the decision to exercise the discretion, is similarly understood and not controversial. So too the availability of a procedure to annul a decision to grant the status.

96. According to his Report, Professor Duarte would disagree that the four specific public interests serve as limits to the exercise of the discretion, but that debate is not ultimately crucial and tempered by the conclusion of cross examination. Indeed, he actively identifies "the prosecution of public interest" as a limit of discretion, but for the different reason that it is one of the general limitations on administrative decision-making under Mozambican law. (In written submissions for Credit Suisse Mr Andrew Hunter KC, Mr Sharif Shivji KC, Mr Andrew Scott KC, Mr Tom Gentleman and Ms Emma Horner note that the Republic has not suggested that those general limitations would be transgressed by a decision to designate Peters & Peters "need to know" for the purpose of its disclosure exercise in these proceedings.)

97. However, it still follows from the above that the four specific public interests ("(i) safeguarding national independence; (ii) the unity and integrity of the State; (iii) its internal and external security; and (iv) the preservation of scientific information of high national interest") invite a decision on designation which will take into account whether any of these specific public interests could be adversely affected by designating particular individuals at Peters & Peters "need-to-know".

98. Thus, Professor Duarte is correct to conclude that:

> "The Republic has discretion to confer [need-to-know status] and there is no restriction under Mozambican law on the persons upon whom or the grounds upon which it may be conferred: they are matters for assessment by the Republic in the exercise of such discretion".

99. It is quite clear that it is not unlawful to designate particular individuals at Peters & Peters "need-to-know".

Some examples canvassed

100. Deputy Attorney General Matusse gives examples of "the type of documents that [he] would expect to be subject to state secrecy in the [State Security Entities]". These examples are:

> "information concerning secret agents and informants; intelligence provided to Mozambique by other countries in strict confidence and which would involve the security of the transmitting country …; operational information about Mozambique's armed forces, including for example in relation to terrorist activity in Cabo Delgado; operational information concerning the police, information concerning internal security and public order threats; cabinet discussions; and consideration of government intervention to support the economy and currency."

101. Deputy Attorney General Matusse says in his witness statement of 14 September 2022:

> "Such matters are vital to the security and operation of the Republic, both domestically and in its international relations with other countries. Should such information not be adequately protected, it would put at risk the lives of the Republic's citizens and service personnel; ongoing criminal investigations; and the Republic's critical intelligence sharing relationships with other friendly countries, whose own interest may well themselves be compromised. It is perfectly proper that the State, in the interests of its citizens, protects those matters."

102. These observations about some of the examples chosen are quite understandable. However, a number of these examples are, with respect, not on point. Designated solicitors from Peters & Peters would be involved in a review of documents that might be relevant to these proceedings and not of documents which are clearly irrelevant to the proceedings. There is also no suggestion that the examples given are representative of all types of documents which have been classified, especially at one of the three levels below state secret.

103. In his oral argument in reply, Mr Adkin KC put forward this suggested parallel by way of example:

> "It's impossible to imagine that if the UK Government was involved in foreign litigation, foreign lawyers would be allowed to trawl through every file of MI6 or MI5 or the Cabinet Office or the Ministry of Defence. That notion, with respect, is absurd."

104. However, there is no question of a "trawl through every file". This is because potential relevance is the focus. For the purpose of foreign litigation in which the UK Government was involved, especially where significant national or public interest was involved in that litigation and its outcome, the notion of a review of potentially relevant classified files by identified lawyers from the law firm that the UK Government had chosen to be its foreign legal representatives is not absurd. The litigation might not be available to the Government without it, or there might be serious consequences to the Government without it. And as in the present proceedings, where potentially relevant

documents are secret or sensitive there can be the most careful consideration of who should be involved and how.

105. Professor Vicente gave this answer to the following question from Mr Hunter KC:

> "Mr Hunter KC: Do you accept that it would be in the public interest of Mozambique to comply with the rules of a foreign court in order to be permitted to pursue litigation?
>
> Professor Vicente: Certainly, to the extent that this does not prove harmful to overriding national interests of the state, such as its independence, national security and so on.
>
> … in my view, the overriding interests that should guide any administrative authority in Mozambique in deciding whether to award need to know status in respect of access to classified information are those laid down in the constitution and the law. Those are the ones that should be primarily taken into consideration, and a balancing of those interests against the possible advantage that the Republic might obtain in the specific proceeding taking place abroad is not an exercise that state security lends itself to, in my view."

106. Take next the examples illuminated in cross examination of Professor Vicente by Mr Hunter KC. These extracts from that cross examination speak for themselves:

> "Mr Hunter KC: I just want to explore with you what a private entity carrying out an activity in the public interest includes. Do you agree it would include a private defence contractor, potentially?
>
> Professor Vicente: It might, but it depends on the terms under which that private contractor was engaged by the state for the carrying out of its activities. I'm afraid the way in which you ask your question is somewhat too broad for me to be very precise in my answer.
>
> Mr Hunter KC: Imagine an example of [the] Republic of Mozambique engaging a private defen[ce] contractor to build a ship for its navy and for that purpose it needed to provide classified information to the contractor. Imagine that example.
>
> Professor Vicente: I don't think that this is the type of situations that are covered by question number 1 [in the CPISE Leaflet]. Question number 1 concerns private entities or includes private entities that carry out activities of public interest and, in the context of those activities, they produce or have under their possession information which is classified.
>
> Mr Hunter KC: That might be the case because they are provided with it in order to do their job. Do you accept that?
>
> Professor Vicente: They might have been provided with that information. If they conform with the requisites for such provision, notably the need-to-know rule.
>
> Mr Hunter KC: This question from CPISE contemplates the private entities who are contracted to carry out activities of public interest might properly be provided with classified information; correct?

Professor Vicente: In certain cases, yes.

Mr Hunter KC: And so another example might be a private law firm acting for Mozambique in litigation provided with classified information that was relevant to the case. Do you agree?

Professor Vicente: I'm afraid that we are trying to define examples of the applicability of this question which are formulated in very broad terms. It would all depend on the exact functions that were attributed or delegated on those private entities in order to determine whether or not they are carrying out activities of public interest and hence may have access to classified information.

Mr Hunter KC: Suppose, though, just to see whether I can understand what you consider this to be concerned with, how far it goes, imagine a -- again, my example of a private defence contractor contracted by the Republic of Mozambique to build a ship and let's suppose Mozambique provides the defence contractor with classified state secret information, in order to specify what its requirements are. Suppose that; yes?

Professor Vicente: Well, I would not include in this private entities carrying out activities of public interest any private entity acting for the state on the basis of a contract.

Mr Hunter KC: But it says, "or contract", Professor?

Professor Vicente: I said [“]any entity[”]. So it would depend on the nature of the activity entrusted to that private entity. I would be prepared to admit that, for example, a concessionaire of public service or an entity that was delegated with public functions, a private entity delegated with private public functions would fall into this category and might therefore be in the possession of confidential information.

Mr Hunter KC: What about my example, Professor?

Professor Vicente: Sorry?

Mr Hunter KC: What about my example of a private defence contractor contracted by the Republic of Mozambique to build a ship for its navy? Would the Republic of Mozambique, in your opinion, be entitled to designate certain individuals within that entity as need-to-know and provide state secrets?

Professor Vicente: I don't exclude that this might happen.

Mr Hunter KC: And what about if there was a need to audit the finances in such a contract? So suppose that the Republic of Mozambique wanted to engage a private auditor to look at the costs that the defence contractor had incurred. That would be an activity in the public interest, wouldn't it?

Professor Vicente: It would be an activity in the public interest but it would not necessarily mean that classified information should be provided to that entity. It depends of the nature of the work being performed by that entity.

Mr Hunter KC: The amount of money that the Republic is paying for particular defence contracts -- let's assume that's a classified state secret; yes? So could the Republic engage an auditing company and provide that information to it, designating it as need-to-know so that it can do its task?

Professor Vicente: Maybe. I haven't thought of that possibility but it may be the case, yes.

Mr Hunter KC: Suppose there is a legal dispute about the defence contract between the defence contractor and the Republic of Mozambique about whether their specifications have been met, whether too much money has been paid, whatever, the Republic of Mozambique could engage a private law firm to represent its interest, couldn't it?

Professor Vicente: Yes, it has done.

Mr Hunter KC: It can provide that private law firm, because it needed to know, with the classified information that was relevant to the dispute, couldn't it?

Professor Vicente: Well, my view, as I've expressed in my second expert report, is that corporate entities as a whole do not fall into the category of possible need to know entities, which should be specified individuals, not corporate entities.

Mr Hunter KC: Let me repeat the question but assume the question is about specified individuals within the law firm?

Professor Vicente: Well, I think that it is possible to convey classified information to specified individuals within private entities insofar as these entities carry out activities of public interest and to that extent they are assimilated to public entities. But in order to assess whether or not these private entities should be granted such access, it would be necessary to determine whether and to what extent in fact the carrying out of their functions required having that information. That is the essence of the need- to-know rule.

Mr Hunter KC: I understand that, but in the example I've just given you, of a dispute between the Republic of Mozambique and a defence contractor about whether a ship had been built in accordance with the specifications or in accordance with the agreed price, you agree with me, one, that the Republic could instruct a private lawyer; yes? To represent it in that case.

Professor Vicente: Yes.

Mr Hunter KC: Two, the private lawyer would be carrying out activities of public interest under contract with the Republic; yes?

Professor Vicente: Yes, but it's not enough that a private entity carries out activities of public interest in order that it may be granted access to classified information, it is also necessary that the nature of the activities to be carried out by that private entity require access to such information; otherwise, the requirement of necessity to know, as the basis of granting such access, would not be met."

107. Professor Duarte's analysis of this exchange in cross examination from Mr Adkin KC explains the position correctly by taking two examples:

> ".. Mr Adkin KC. … [W]hat I want to suggest to you is that the state archive regime that we see in the 2018 decree, 2009 manual, and the Right to Information law regime, which we have seen explained in the 2019 manual, divides the world into two parts: state bodies, together with private entities carrying out public services on the one part, and everybody else on the other part. Do you agree with that.
>
> Professor Duarte: Yes. I agree.
>
> Mr Adkin KC: And an example of a private entity carrying out a public service might be a private company which has been granted the concession to operate a national airport and therefore controls entry into the country. I think that's an example that you yourself gave in your report.
>
> Professor Duarte: Yes, I think so.
>
> Mr Adkin KC: A firm of attorneys acting in foreign litigation for the state of Mozambique would not fall within the ambit of a private entity carrying out a public service because they would not be carrying out a public service, would they? They would be rendering a private service as a private contractor for the state of Mozambique. Do you agree with that?
>
> Professor Duarte: No, I don't.
>
> …
>
> Mr Adkin KC: … Could you explain to me please, how a foreign law firm acting for the state of Mozambique in foreign litigation in front of a foreign court is a private entity carrying out a public service?
>
> Professor Duarte: The defence of a sovereign state is a public interest of that state, so by definition this private entity will be exercising a public service and … we cannot forget that in the ultimate instance at stake is the principle of financial capacity of the Republic and this is evidently something which is of the most – of the utmost public interest."

108. Mr Adkin KC and Mr Brier KC argued that "a narrow definition of who can be "Need-to-Know" is exactly what you would expect from a country which has afforded State Secrecy its highest classification, a rare exception from a permissive principle of access to information and where those afforded access to State Secrets must be within the direct jurisdiction of the Republic". But this helps show only that what one might expect is rigour in a decision whether to make a person "need-to-know". It is not controversial that, as Professor Vicente suggests, a stricter regime will apply to documents classified at the level of "state secret" rather than at a lower access level.

109. Generally, "need-to-know" means the Republic needs a particular person to know in order to serve the interests of the Republic. Professor Duarte shows in his Report how not granting need-to-know status can jeopardise the interests protected by state secrecy. Professor Vicente himself recognises in his First Report that a "Need-to-Know" rule

> "must be seen as a necessary component of any system of classification of official documents and information, such as the one in force in Mozambique, which would otherwise be of limited use."

110. The "need-to-know" regime under Mozambican Law described by Professor Duarte will not release a classified document, at any level of classification, to anyone unless the relevant authority or CPISE has decided that the public interest requires that the status of "need-to-know" should be granted to the particular person in the particular circumstances (including safeguards and protections) and for the particular purpose.

Conclusion on the first question

111. I will make a declaration that it is lawful under Mozambican law to designate individual solicitors at Peters & Peters "need-to-know".

112. I respectfully invite the Attorney General of Mozambique, as representing the Republic before this Court, to study this judgment carefully and with the assistance of Peters & Peters. I respectfully invite further reflection in keeping with the high responsibilities of the holder of an office such as that of Attorney General.

113. I also invite Professor Vicente to consider further his professional opinion in light of this judgment so as to share any revision to that opinion with the Attorney General through Peters & Peters.

114. Credit Suisse contend that the background to a decision by the Republic not to designate Peters & Peters can reasonably be inferred to be what they term a conscious decision on the part of the Republic's executive. I do not propose at this stage to reach a conclusion on whether to draw an inference. The Attorney General and the Republic should have the opportunity to consider their position further first.

115. Mr Adkin KC informed me at the hearing, with proper frankness, that the Attorney General had formed her opinion on Mozambican law and it would not change. But I trust that the Attorney General will bring to mind the point that, with further reflection, and in light of the further material developments there have now been, a change in conclusion on a matter of law is possible and proper.

116. Indeed, as noted already, in the present case the Attorney General appears to have held a different opinion on Mozambican law herself at an earlier stage. My conclusion is to the effect that she and her advisers were plainly correct at that earlier stage in taking the view that designation could lawfully be made.

Risk of prosecution

117. As indicated above, a second question was whether there is a real risk of prosecution in Mozambique if Peters & Peters were to be designated "need-to-know".

118. In a witness statement dated 14 September 2022 Mr Keith Oliver, partner and Head of International at Peters & Peters explains:

> "As the Court is aware, the employees and partners of Peters & Peters regularly visit and spend lengthy periods of time in Mozambique for the purpose of the Proceedings, including for the purpose of conducting the disclosure exercise in the

> Proceedings. For reasons which are obvious, my firm would not wish to place any of its partners and employees in a position where they were exposed to any risk of being prosecuted for committing a criminal offence in Mozambique, and would regard such a step as breaching the duty of care which it owes to those persons."

119. I fully understand this. Indeed, and with respect, Mr Oliver is right to take the position he does. The Deputy Attorney General is also entitled to consider the position of Mozambican officials.

120. There is of course no suggestion that any partner or employee of Peters & Peters should be asked to look at classified documents without being designated "need- to-know". And it seems there will only be designation if the Attorney General reflects on the matter and changes her opinion on whether lawful designation is possible at all. The relevant authorities or CPISE would then be free to undertake the necessary exercise of discretion.

121. It is only in that situation that a definitive assessment of any risk of prosecution could reliably be made in these proceedings, always with every understanding of the matters properly referred to by Mr Oliver. In the circumstances I will not at this stage make a declaration whether there is a real risk of prosecution in Mozambique if Peters & Peters were to be designated "need-to-know". I will instead adjourn the second question. If there is no designation then the second question does not engage. If there is a designation then that is the point at which the second question is most suitably addressed, and in the then attendant circumstances.