Neutral Citation Number: [2024] EWHC 1556 (Comm)

Case No: **FL-2022-000024; FL-2022-000025, FL-2022-000026, FL-2022-000027, FL-2024-000004, FL-2023-000009, FL-2024-000024**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date 23 May 2024

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

(1) AABAR HOLDINGS S.À.R.L & OTHERS	**Claimants**
- and -	
(1) GLENCORE PLC (2) MR IVAN GLASENBERG (3) MR STEVEN KALMIN (4) MR ANTHONY HAYWARD	**Defendants**

- -

Adam Kramer KC and Nicolas Damnjanovic (instructed by **Quinn Emanuel Urquhart & Sullivan, LLP**) for the **QE Claimant**
Andrew Onslow KC, Roger Mallalieu KC and Usman Roohani (instructed by **Stewarts Law LLP**) for the **Stewarts Claimants**
Douglas Paine and Joe Johnson (instructed by **Pallas Partners LLP**) for the **Pallas Claimants**
David Mumford KC and Philip Hinks (instructed by **Bryan Cave Leighton Paisner LLP**) for the **BCLP Claimants**
Tony Singla KC, Kyle Lawson, Emma Mockford and Jacob Rabinowitz (instructed by **Clifford Chance LLP**) for the **First Defendant**
Alexander Polley KC and Andrew Lodder (instructed by **Steptoe & Johnson LLP**) for the **Second Defendant**
Rebecca Loveridge (instructed by **Hogan Lovells International LLP**) for the **Third Defendant**
Charlotte Thomas (instructed by **Travers Smith LLP**) for the **Fourth Defendant**
Pippa Manby (instructed by **Fox Williams LLP**) for **Wirral Council (as administering authority for Merseyside Pension Fund)**

Hearing dates: **21, 22 and 23 May 2024**

- -

APPROVED JUDGMENT

MR JUSTICE BRYAN :

INTRODUCTION

1. The parties are before me on the first case management conference scheduled to take place over three days. In this case, the Claimants are institutional investors and comprise four separately represented Claimant groups. The Claimant groups refer to the QE Claimant, the Stewarts Claimants, the Pallas Claimants and the BCLP Claimants.

2. All of the Claimants bring claims against Glencore plc ("Glencore"). The Pallas and QE Claimants also bring claims against some of Glencore's former directors, namely Mr Glasenberg, Mr Kalmin and (in the case of the QE Claimant only), Mr Hayward ("the Director Defendants").

3. Glencore is a global natural resources company, and the ultimate parent company of the Glencore group of companies ("the Glencore Group"), which includes Glencore International AG, a company incorporated under Swiss law ("Glencore International").

RELEVANT BACKGROUND

4. The Claimants' claims relate to alleged (and, in some cases, admitted) bribery and corruption in the business activities of certain operating subsidiaries within the Glencore Group, in Africa (the Democratic Republic of the Congo, South Sudan, Nigeria, Cameroon, the Ivory Coast and Equatorial Guinea) and South America (Brazil, Venezuela) and alleged oil price manipulation in relation to the fuel oil market at certain US ports.

5. Some of this alleged misconduct has been the subject of investigations by law enforcement authorities in the United States, Brazil and the United Kingdom, and is the subject of other ongoing investigations, including by authorities in Switzerland. Certain companies within the Glencore Group have admitted conduct amounting to bribery or corruption in the period 2006 to 2018 and conduct amounting to oil price manipulation in the period 2011 to 2019. To date, that has led to the imposition of fines on, and confiscation of funds from, companies within the Glencore Group totalling US$1.4 billion. The Claimants rely upon the admissions made by the Glencore Group as part of those investigations.

6. The Claimants allege that Mr Glasenberg and Mr Kalmin (and, in the case of the QE Claimant, Mr Hayward) knew or were reckless as to the existence of this misconduct within the Glencore Group. The Claimants also allege other senior personnel had such knowledge, specifically Mr Mistakidis, Mr Beard and Mr Gibson.

CLAIMS UNDER S.90 OF THE FSMA

7. All the Claimants bring claims against Glencore under s.90 of the Financial Services and Markets Act 2000 ("FSMA"). These claims arise out of the alleged acquisition by the Claimants of shares in Glencore ("the Shares") as part of, or in the aftermath for: (a) Glencore's Initial Public Offering on 19 May 2011 ("the IPO") and (except in the case of the QE Claimant) (b) Glencore's merger with Xstrata plc on 2 May 2013 ("the Merger").

8. The Claimants allege that, in the light of the alleged and/or admitted misconduct referred to above that had occurred by the time of the IPO, the prospectus issued in relation to the IPO ("the IPO Prospectus") contained untrue and misleading statements and omitted information required to be included under Part VI of FSMA. The Pallas, Stewarts and BCLP Claimants also allege that, in the light of the alleged and/or admitted misconduct referred to above that had occurred by the time of the Merger, the prospectuses issued in relation to the Merger ("the Merger Prospectuses") (together with the IPO prospectuses ("the Prospectuses") contained untrue and misleading statements and/or omitted information required to be included under Part VI of FSMA.

9. The Pallas Claimants further advance their claims under s.90 of FSMA concerning the IPO Prospectus and the Merger Prospectus against each of Mr Glasenberg and Mr Kalmin, and the QE Claimant advanced its claims under s.90 of FSMA concerning an IPO Prospectus against all of the Director Defendants. The Pallas Claimants' claims against Mr Glasenberg and Mr Kalmin are advanced only in respect of the alleged statements and omissions concerning the business of the Glencore Group in the Democratic Republic of the Congo.

10. The Claimants contend that they have suffered loss as a result of the alleged misstatements in, and alleged improper omissions from, the IPO Prospectus and/or the Merger Prospectuses, as the case may be, and claim compensation from one or more of the Defendants (in accordance with their respective claims) under s.90 of FSMA for loss suffered in respect of the Shares.

CLAIMS UNDER S.90A OF FSMA

11. The QE Claimant and the BCLP Claimants bring claims against Glencore under s.90A of FSMA.

12. The QE Claimant claims (pursuant to paragraph 3 of Schedule 10A of FSMA) that Glencore's various publications identified at Schedule 7 to the Consolidated Particulars of Claim ("the Schedule 7 Published Information"):

    (1) contained untrue or misleading statements, in circumstances where at least one person discharging managerial responsibilities ("PDMR") at Glencore knew (or was reckless as to whether) the statements were untrue or misleading and/or

    (2) omitted matters required to be included, in circumstances where at least one PDMR at Glencore knew that said omissions amounted to the dishonest concealment of material facts.

13. Both the QE Claimant and the BCLP Claimants claim (pursuant to paragraph 5 of Schedule 10A of FSMA) that Glencore dishonestly delayed the publication of information to which Schedule 10A of FSMA applies, in circumstances where at least one PDMR at Glencore allegedly knowingly acted dishonestly in delaying publication.

14. The QE Claimant claims compensation for Commodities S.à.r.l having allegedly continued to hold Shares in reliance on the Schedule 7 Published Information and allegedly suffering loss as a result of untrue or misleading statements or omissions, as well as for loss allegedly suffered as a result of Glencore's alleged dishonest delay in publishing information. The BCLP Claimants only claim compensation for loss allegedly suffered as a result of Glencore's alleged dishonest delay in publishing information.

CORNERSTONE INVESTORS AND COMMON LAW CLAIMS

15. The QE Claimant, a Pallas Claimant ("GIC") and a Stewarts Claimant ("the Master Fund"), together the "Cornerstone Investors", rely on separate Cornerstone Agreements entered into on 4 May 2011 with Glencore, Glencore International and various banks. The Cornerstone Investors contended that under the Cornerstone Agreements, each investor has a contractual right against Glencore to compensation that duplicates the rights that other investors acquired upon acquisition of the Shares, including rights under s.90 of FSMA and (in the case of the QE Claimant) common law.

16. Finally, the QE Claimant also advanced claims in the tort of deceit, alternatively negligence, against Glencore and the Director Defendants in relation to the alleged false and/or misleading statements and omissions in the IPO Prospectus.

THE DEFENDANTS' DEFENCES

17. In broad summary, the Defendants admit the alleged misconduct by certain companies in the Glencore Group for the purposes of these proceedings insofar as the same has already been admitted by the Glencore Group in the course of settling six specific law enforcement investigations ("the Admitted Conduct"). Otherwise, the Defendants either deny or put the Claimants to proof as to the alleged misconduct.

18. Glencore denies that any of the members of its Board of Directors, including any of the Director Defendants, were aware of or reckless as to the existence of any alleged misconduct. The Director Defendants deny awareness of or recklessness in respect of any misconduct (whether part of the Admitted Conduct or not) at any material time. Glencore admits that certain other former employees of the Glencore Group were aware of facts insofar as admissions have already been made following the investigations referred to above, but not otherwise.

19. The Defendants put each of the Claimants to proof as to their standing to pursue any claims under s.90 and/or s.90A of FSMA (as applicable).

20. As regards the s.90 FSMA claims:

(1) Mr Glasenberg and Mr Kalmin admit that they were persons responsible for the IPO Prospectus and the Merger Prospectuses. Mr Hayward admits that he was a person responsible for the IPO Prospectus.

(2) Glencore, Mr Glasenberg and Mr Kalmin deny that the IPO Prospectus or Merger Prospectuses contained any of the alleged untrue or misleading statements or omitted any matters required to be included. Mr Hayward variously denies or does not admit those allegations in relation to the IPO Prospectus.

(3) Each Defendant relies on the exemption from liability under paragraph 1 of Schedule 10 of FSMA and contends that, at all relevant times, they reasonably believed: (a) that the statements in the IPO Prospectus and Merger Prospectuses were true and not misleading and/or (b) that any omitted matters had been properly admitted.

21. As regards the s.90A FSMA claims:

(1) Glencore denies that (a) any of the Schedule 7 Published Information or Prospectuses contained any of the alleged untrue or misleading statements or omitted any matters required to be included and (b) it dishonestly delayed the publication of any information that it was required to publish.

(2) Glencore accepts that the Director Defendants were (at certain times) PDMRs of Glencore, but denies that Mr Mistakidis and Mr Beard were.

(3) Glencore denies that any PDMR dishonestly delayed publishing information and that any PDMR knew of misleading statements or dishonest omissions from the Schedule 7 Published Information or the Prospectuses.

22. As regards the Cornerstone Investors' claims, Glencore admits that the Cornerstone Agreements provided the investor under the relevant Cornerstone Agreement with a contractual right to compensation that duplicated the rights which other investors who purchased or subscribed for shares in the International Offer would have had under s.90 of FSMA and/or at common law in respect of the contents of the IPO Prospectus (if any).

23. As regards the QE Claimant's claims in deceit and/or negligence:

(1) Glencore and the Director Defendants deny that they owed any common law duty to the QE Claimant in respect of the IPO Prospectus and/or that the statements in the IPO Prospectus can have caused any loss and deny that the alleged misrepresentations and/or omissions in the IPO Prospectus were made dishonestly and/or negligently.

(2) Glencore and the Director Defendants also deny that the omission of any information amounted in law to an actionable misrepresentation (whether dishonest or negligent).

24. As to alleged loss, the Defendants repeat their case on the alleged misstatements and omissions (with Glencore and Mr Glasenberg denying on that basis that the Claimants have suffered loss in respect of the Shares) and otherwise put the Claimants to proof of the individual alleged loss.

LIMITATION

25. The Defendants contend that certain of the Claimants' claims are time-barred.

26. The Claimants deny that any of their claims are time-barred and rely, insofar as necessary, on the extended limitation period under s.32 of the Limitation Act 1980. The QE Claimant also relies on s.14A of the Limitation Act 1980 as regards its claims for negligent misrepresentation.

ISSUES ARISING ON THE CASE MANAGEMENT CONFERENCE

27. As I have said, this is the first case management conference. It is envisaged that there will be a second case management conference later on in the year. As already noted, this case management conference is scheduled to take place over three days.

28. I am pleased to say that, as the Commercial Court would expect, the parties have liaised extensively prior to the commencement of the case management conference in relation to the issues for determination on this case management conference and many of those issues have been resolved between the parties, subject to the approval of the court.

29. The remaining issues which arise for determination on the case management conference can be identified under the following headings: (1) standing; (2) trial structure and quantum RFI; (3) disclosure; (4) privilege; (5) trial 1 listing/directions; (6) costs management; (7) costs of Glencore ATE/funding application.

A. STANDING

30. One of the issues that arises relates to standing. A claim may only be brought under s.90 and s.90A if and insofar as a Claimant has "standing" to bring the claim. More particularly:

    (1) a claim can only be brought under s.90 insofar as the Claimant "acquired securities to which the particulars apply" and suffered loss "in respect of them": see s.90(1)(a) to (b) of FSMA.

    (2) A claim can only be brought under s.90 insofar as the Claimant "acquired, continued to hold or dispose of securities" and suffered loss "in respect of the securities": see paragraphs 3(1)(a) to (b) and paragraph 5(1)(a) to (b) of Schedule 10A to FSMA:

    > "…the acquisition or disposal of securities includes-
    >
    > (a) acquisition or disposal of any interest in securities, or
    >
    > (b) contracting to acquire or dispose of securities or of any interest in securities,
    >
    > except where what is acquired or disposed of (or contracted to be acquired or disposed of) is a depositary receipt, derivative instrument or other financial instrument representing securities."

(See paragraph 8(3) of Schedule 10A to FSMA).

(3) A claim can only be brought under either any cause of action (or at all) insofar as the Claimant is a legal entity with capacity to sue.

31. In such circumstances, it is said to be imperative that the Claimants provide sufficient "information regarding standing" (or "IRS") and that they do so at an early stage in the proceedings to enable the Defendants to understand the case they need to meet and to make admissions or denials as appropriate and so as to ensure that objective is achieved.

32. On 22 March 2024, the Defendants served a request for information on the Claimants under CPR Part 18 ("the Standing RFI"). On 22 February 2024, Stewarts wrote to Clifford Chance for the Defendants on behalf of the Stewarts, Pallas and BCLP Claimants proposing that the Claimants would provide information regarding standing in the form of an Excel document, allowing space for the Defendants to respond as appropriate in that document ("the IRS Table"). Once the IRS Table had been populated, it would be, it is said, clear which issues of standing (if any) would need to be resolved at trial.

33. The Defendants have considered their position and are prepared to go down the route of the completion of the IRS table as opposed to answers being given to the Standing RFI. There are a number of Columns in the IRS Table, being lettered and starting with the letter A.

A.1 COLUMN F & G

34. In relation to the Columns which will be answered by different Claimants, there has again been a useful level of co-operation and negotiation between the parties, as a result of which very little remains in issue between the parties. What does remain in issue, however, is whether the BCLP Claimants should populate and provide answers in relation to Columns F and G.

35. Column F provides:

> “Does the Claimant allege that it acquired Glencore shares 'as part of': (i) the IPO; (ii) the Merger and/or (iii) aftermarket for the IPO and/or the Merger? Please specify which.”

36. And Column G provides as follows:

> “If the Claimant allege to have acquired Glencore shares in the aftermarket for the IPO and/or Merger, what period of time constitutes the aftermarket?”

37. All the Claimants with the exception of the BCLP Claimants have agreed to provide answers to Columns F and G. The BCLP Claimants object to providing answers to Columns F and G on the basis, certainly before this hearing, that they will be answering Column E, which provides "Date shares first purchased", which they say should suffice to provide the requisite information that Glencore needs.

38. In this regard, Mr Singla KC, who appears on behalf of Glencore, draws my attention to the fact that the Pallas Claimants, in a schedule to their Particulars of Claim, have been able to plead out paragraph 3 thereof as follows:

> "Where a Pallas Claimant is indicated to have acquired IPO Shares, it is a Pallas IPO Claimant, and where it is indicated to have acquired Merger Shares, it is a Pallas Merger Claimant. For these purposes, a Pallas IPO Claimant is a Pallas Claimant that acquired Shares as part of Glencore's IPO and/or in the aftermarket thereof, where such aftermarket runs up to and including 1 May 2013 (the 'Pallas IPO Period'). A Pallas Merger Claimant is a Pallas Claimant that acquired Shares as part of the Merger and/or in the aftermarket thereof, being the period from 2 May 2013 to 15 September 2015 (the 'Pallas Merger Period')."

39. Mr Singla says that if the Pallas Claimants are capable of identifying and defining what is the aftermarket as part of their pleaded case, so should the BCLP Claimants, who have also brought a claim in relation to acquiring shares in the aftermarket, be able to do so.

40. Mr Mumford KC, who appears on behalf of the BCLP Claimants, objects to the BCLP Claimants providing answers to Columns F and G. In his oral submissions, he raised a new point, which I understand not to have been foreshadowed before, which was to suggest that to answer what was the relevant aftermarket would require expert evidence.

41. He also said that the information in F and G was not so much going to standing but was more relating to matters which would go to causation. He did say, however, during the course of his argument that his clients would be prepared to articulate what their case was in relation to the aftermarket.

42. I consider that the BCLP Claimants should provide answers to Columns F and G and populate those Columns. Mr Mumford KC, at one point during the course of his oral submissions, seemed to indicate that the answer that might be given to Columns F and G would be generic and not specific to any particular period. I consider that would be an unhelpful approach because, essentially, one would be back to square one with Glencore no doubt effectively asking for further information about that answer in order to define the period.

43. I do not see why the BCLP Claimants are in any different position to any of the other Claimants and I consider that they should provide answers and populate Columns F and G, including not only generic particulars, but particulars which define the aftermarket. If they really feel that they cannot identify particular dates, then they will obviously be at risk of a further request for further information and/or any other associated application, which would no doubt occur at the second CMC, if not before.

44. I do, however, consider that that would not be a helpful approach because the whole purpose of the completion of the IRS table is to enable Glencore to respond to that admitting, not admitting or denying what is said so that by the time of the second

CMC, everyone is clear, including the judge on that second CMC, as to what issues remain live in relation to standing.

A.2 COLUMN N

45. The next issue in relation to the completion of the IRS table relates to Column N, which provides:

> "If the Claimant held the Glencore shares indirectly, please provide full particulars of the chain of custody, including identity of any custodian, depositary, sub-custodian, nominee and/or legal title/registered holder, as applicable."

46. So far as that request is concerned, Mr Douglas Paine and his clients, the Pallas Claimants, have agreed to provide those particulars and they represent 94 separate Claimants. Mr Paine has made clear that they of course can only answer that with the information they have and the matters over which they have control, but they intend to respond to that request and set out what their position is in relation to it.

47. Mr Singla on behalf of Glencore says, well, if they can do it, why cannot any of the other Claimants do it, particularly as the Claimants bear the burden of proof in relation to showing that they have standing; that they have title effectively to bring the claims that they are bringing?

48. The Stewarts Claimants', represented by Mr Onslow KC, position as at the time of their Skeleton Argument was as follows. They say the Defendants pleaded a blanket non-admission and that it was unclear what pleaded issue the question went to. They said there is no issue between the parties which appears to turn on, for example, identities of depositories, sub-custodians and so on. They say, further, the Stewarts Claimant intend to evidence their standing by providing certificates from custodians, all of whom are regulated entities, certifying that they acquired and held the relevant shares and that they are the last in the chain of custody. They say it is unclear as to on what basis the Defendants propose to challenge the custodian certificates. They say, moreover, provision of granular information of the kind requested is a very substantial task because of the time periods covered and also the large numbers of Stewarts Claimants.

49. In his oral submissions, Mr Onslow seemed to have moved slightly, if not somewhat, from the position in the Skeleton Argument because he also indicated that they would be in a position to identify who is at the top of the chain, the registered shareholder, and also the entity that his clients were in direct relationship with.

50. Mr Singla said that the reason that Glencore wants this information, amongst other matters, is to address any question of duplication and, as appears to be common ground between the parties, there have been a number of problems in other similar cases such as this in relation to the question of standing.

51. I was taken to the decision of Hildyard J in *SL Claimants v Tesco Plc* [2019] EWHC 2858 (Ch); [2020] Bus LR 250, in particular at [2]-[10] and [12]-[30], which established standing in relation to entities who have interests in the securities down the line, if I can put it like that. But there is no doubt that problems do arise.

52. It seems to me that there is potential validity in Mr Singla's point that ultimately it is the Claimants that bear the burden of proof of showing that they have standing.

53. The difficulty I have at the moment, particularly in relation to the second of Mr Onslow's points about how onerous it may or may not be, rather depends on what the position of the individual Claimants is. The submission in the Skeleton Argument and Mr Onslow's submissions -- and this is no criticism either of Mr Onslow or of the Skeleton -- is that none of that is backed up by any witness statement from any solicitor within his instructing solicitors.

54. Rather more fundamental than that point is the fact that I just do not know, because I have no evidence before me, as to what the position is in relation to individual Stewarts Claimants. Again, in fairness to him, Mr Onslow perfectly properly said he could not go beyond what was in his Skeleton Argument and, therefore, I think it is right to say that nor does Mr Onslow know the precise position in relation to each individual Claimant.

55. If the answer is that it is simply not possible to give an answer for a particular Claimant in relation to full particulars of every one of those matters there identified, then it would be, it seems to me, a perfectly proper answer to explain that in the response to that Claimant and Column N, but it has to be a proper response in relation to that Claimant because, of course, there will be a statement of truth attached to it. If that plea is properly made, then that is the best and only answer that the particular Claimant can give.

56. Really, that was Mr Douglas Paine's point on behalf of the Pallas Claimants, which is that they can only give those particulars that they are in a position to give. Mr Singla accepted that ultimately that is the position, but, as he submitted and as I agree, given that it is for the Claimants to prove standing, given that the Claimants bear the burden of proof in relation to that, they should be put on the spot to give the best particulars they can in relation to such matters.

57. That way, there is the greatest hope that Glencore will be able to respond in a positive and substantive way to the IRS Table, which is, after all, the whole purpose of the IRS Table in relation to standing, with a view to narrowing the issues as to standing. What I consider would be unsatisfactory would for there to be uncertainty in relation to this aspect of standing in circumstances where there have been problems in other similar cases in the past.

58. I do not consider, because it has not been evidenced, that it will necessarily be a very substantial task in relation to each of these Claimants. But ultimately, if it is a substantial task -- and by that I understand it to mean, therefore, that it is information which is properly available to a particular Claimant, but it will be a substantial task -- I still consider that it would be appropriate for them to provide the information because ultimately, it is a matter for the Claimant to discharge the burden of proof in relation to standing.

59. Of course, a particular point in time can come whereby they stand on their case, but it does seem to me that Glencore are entitled to require that the Claimants be flushed out in relation to this particular point by answering Column N, and I so order.

A.3 TABLE POPULATION

60. The next issue that arises in relation to standing is whether or not the Claimants should populate the table by a set date, which is the proposal of Glencore, or whether they should do it on a rolling basis, as particularly suggested by the Stewarts Claimants and the Pallas Claimants, ie Mr Onslow KC and Mr Paine. I will come on to the position of the BCLP Claimants and Mr Mumford KC, who are in a slightly different position, in due course.

61. It is said by the Stewarts and the Pallas Claimants)that there should be rolling completion by the Claimants by 7 June (that is within 14 days of now) to which the Defendants will respond, it is suggested, within 21 days. The rationale for such approach, it is said, is to see how it works, that the process be as efficient as possible with the parties co-operating, so that the Claimants will know the sort of points that the Defendants are taking and that for subsequent tranches, the relevant Claimants can, as it were, adapt their responses in a responsive manner to the sort of points being taken by the Defendants. It is said that that will save costs, it will save time and will allow things to be prepared in good time before the second CMC.

62. Mr Onslow, who has, I believe, 33 Claimants, says though that, in any event, his clients would be able to respond to the table by 26 July.

63. Mr Paine for the Pallas Claimants (and I should say there is no witness evidence on any of this from any of the Claimants or, for that matter, the Defendants), not foreshadowed earlier, I believe, now says that if ordered to populate the table for all his Claimants (he has 94 Claimants), he would need until 11 October.

64. I should say that Mr Singla for the Defendants, for Glencore, says that his clients have never bought into the suggestion of a response within 21 days to anything and that he would need eight weeks to respond to everybody, and he would need six weeks even if it was for a lesser number of Claimants.

65. Mr Singla says that these claims were brought as long ago as 2022. The Claimants bear the burden in terms of standing, title to sue, effectively, and they should all be in a position, having satisfied themselves already that they do have standing, to be able to respond within relatively short order and certainly by 26 July, which is the date by which he submits all Claimants should respond. He submits that the tranche idea has the potential to cause additional work for the Defendants, being fraught with danger at a time when there are many other tasks that both the Claimants and the Defendants will have to do in order to be match ready, as it were, for the second case management conference, which is likely to take place during the course of November.

66. For the purpose of the arguments before me, I am going to assume that the second CMC takes place no earlier than the week commencing 11 November 2024 with an estimate of three days.

67. I should add that Mr Paine says that he needs as long as he says he does, because there is a lot of collating and checking to be done, a lot of underlying documentation, because it is contemplated that the documents relied upon will also be supplied at the same time, and that there may also be issues of foreign law in relation to at least some

of his Claimants and providing an answer to each Column is going to take some considerable time.

68. I am not satisfied that the tranche approach is the appropriate approach. I do not consider that it will save time and costs. I consider that it has the potential to put the Defendants to additional work and expense and I also, consider that it has the potential to set additional hares running such that having responded to the initial tranche, the next tranche of Claimants may change tack, which may lead to the need for a further response from the Defendants, again changing tack, and so on and so on until all Claimants are exhausted which I do not consider to be a satisfactory approach.

69. I consider, in circumstances where these claims were brought as long ago as 2022, that the Claimants ought to know whether or not they have got standing. They have known since a period well before this CMC that their existing pleadings were not considered to be adequate. They made the initial proposals in relation to the table themselves in February. Admittedly, the table has expanded. They got the requests on 22 March. Everyone has bought into the idea of populating the table.

70. In circumstances in which the burden is on the Claimants to prove that they have got title to sue, I consider that, the most appropriate approach, in furtherance of the overriding objective, is that the Claimants populate the table by a set date, which I will come on to. I also consider it appropriate that the Claimants do that **by** a particular date and that the Defendants, Glencore, respond **by** a particular date within a period of time that I am going to set, as that will mean that if the Claimants do manage to get all their responses in prior to the "by" date, matters will be progressed even earlier.

71. In this regard I consider that the Claimants will have to cut their cloth by reference to the fact that the second CMC is going to take place not before the week of 11 November 2024.

72. I am somewhat sceptical that the Defendants, Glencore, will need eight weeks to respond, in circumstances where they had previously said that they needed eight weeks to response when that was the period from 26 July to 27 September, which included a period of time when experience shows various people may be taking leave. I consider that Glencore will need less than eight weeks and, in any event, I consider that they too as well, as the Pallas Claimants, will have to cut their cloth by reference to the time available before the second CMC takes place.

73. Accordingly, and doing the best I can to accommodate all those competing interests and the overriding objective in order that the matter is ready for the second CMC and all parties know where they stand and have a fair opportunity to complete the table and receive the responses thereto, I am going to order that all the Claimants (that is the QE Claimants, Stewarts Claimants, Pallas Claimants and BCLP Claimants) complete the table by 16 September and that by 28 October, Glencore respond, which should leave sufficient time for all the parties to take stock before a CMC taking place not before the week commencing Monday 11 November.

B. TRIAL STRUCTURE AND QUANTUM RFI

B.1 SPLIT TRIAL

74. So far as the trial structure is concerned, the next issue that arises is whether there should be a split trial or not.

75. The court may direct a separate trial of any issues (see CPR 3.1(2)(i)) and decide the order in which issues are to be tried (CPR 3.1(2)(i)) and/or exclude an issue from consideration (CPR 3.1(2)(k)). The rationale is that:

> "Particularly in long trials, it may be advantageous to exercise these powers so as to hear the evidence relevant to some issues, and also to decide those issues, before moving on to hear evidence relevant to others."
>
> (see Commercial Court Guide, 11th Ed 2022 at J.1.5.)

76. The applicable principles relevant to the exercise of the court's case management powers to order a split trial are well established. The decision whether to order a split trial and a precise definition of the split is an "essentially pragmatic" one based on "various (some competing) considerations", as identified by Hildyard J in *Electrical Waste Recycling Group v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch) at [5] to [9].

77. The question of a split trial has been considered in a number of cases where there are claims advanced under s.90 or s.90A of FSMA. It is clear that a split trial now represents the "normal way" of managing claims under s.90 or s.90A of FSMA and has been the approach adopted in *Persons Identified in Schedule 1 to* the *Particulars of Claim v RSA Insurance Group Plc* [2021] EWHC 570 (Ch) ("RSA"); *Various Claimants v G4S Limited* [2022] EWHC 1742 (Ch) ("G4S"); *Various Claimants v Serco Group* [2022] EWHC 2052 (Ch) ("Serco"); *Allianz Funds Multi-Strategy Trust v Barclays Bank PLC* [2024] EWHC 235 (Ch) ("Barclays"); and most recently *Persons Identified in Schedule 1 v Standard Chartered Plc* [2024] EWHC 1108 (Ch) ("Standard Chartered").

78. The key reasons in favour of this approach in security cases were identified by Falk J, in *G4S* at [53] to [67]. Citing *Philips Electronics*, Falk J held that a single trial was neither realistic nor necessarily possible (at [53]) and in any event, the preparation for it would be "extremely cumbersome" (at [62]). She recognised that multiple trials would not be inevitable (at [57]) and a split trial would lead to material savings if the later trial could be avoided (at [60]). It was also relevant that the split trial could be defined "fairly readily" (at [62]); that duplication or overlap of evidence could be avoided (at [64]) and that dealing with fact-heavy points at the first stage would reduce the prospect of appeals (at [61]). Any concerns about delay could be avoided by shortening the gap between the trials as far as possible (at [67]).

79. I am satisfied that it is appropriate that there be a split trial in principle in this case, the reasons being as follows.

80. As in *G4S*, it would not be realistic to try all the issues in the proceedings in a single trial, in particular to try the issues of causation and quantum together with issues of liability.

81. The applicable measure of loss for claims under s.90 and s.90A is not yet, it is said, the subject of settled authority and the Claimants' pleaded cases on causation and quantum are complex, involving multiple alternative approaches based on distinct counterfactuals (see Claimants' Consolidated Particulars of Claim ("CPOC") at [163] to [142], [172] to [177] and Schedules 1 to 4). Those issues would require evidence as to the losses suffered by the Claimants, including, in all likelihood, extensive expert evidence.

82. I am satisfied that the proposed agreed split will ensure that the preparatory work required for the first trial (which I will call "T1") is manageable and that the T1 issues can be determined within a trial of a reasonable length. I will come on to the trial duration later on in this CMC.

83. I am also satisfied that otherwise, it would be a very significant burden not only on the parties and their respective legal teams, but also upon the court itself to attempt to prepare for, and conduct, a single trial of all the issues in dispute.

84. I am also satisfied that there is minimal risk of duplicative witness evidence between trials 1 and 2 ("T1" and "T2"). The Defendants' side factual issues will be dealt with at T1, as the Defendants' side witnesses will all be dealt with at T1, and there will be no need for the Defendants' witness of fact to be recalled at T2.

85. I am also satisfied that the outcome of T1 is also likely to narrow and clarify the issues for T2. For example, T1 will determine whether the prospectuses for the s.90 claims and the published information for the s.90A claims contained any untrue or misleading statements or omissions. Such misstatements and omissions will inform the loss analysis and the reliance evidence in the claims under s.90A and the QE Claimant's common law claims.

86. It should mean that rather than addressing every possible outcome, for example, in quantum experts' reports, which I consider would be disproportionate and inefficient, it ought to be the case that the parties' preparation for T2 can be limited to those matters and valuations which are necessary in the light of the findings in T1.

87. It is also possible, of course, that the result of T1 could mean that T2 was unnecessary. That could also be the case given that there would be an increased prospect of settlement following the determination of the T1 issues.

88. I am satisfied that in those circumstances, the potential costs saving, which, on any view, is significant, justifies what will be increased costs associated with more than one trial. I am, accordingly, satisfied that a split trial in principle is appropriate.

89. I have had before me an agreed draft order from the parties in terms of what issues will be dealt with in T1. I am satisfied that that is an appropriate division of issues between T1 and T2.

B.2 QUANTUM RFI

90. The next point that arises between the parties in relation to the overall trial structure is the extent to which the Claimants should be required to take certain steps in relation to T2 in parallel with preparation for T1; in particular, in relation to the particularisation of their quantum claims, quantum being a matter for T2.

91. In each of *RSA*, *G4S, Serco, Barclays* and *Standard Chartered*, the Claimants were required to undertake substantial preparatory work in relation to the Claimants' side issues that were to be addressed in T2 in parallel with preparations for T1.

92. In this regard, in *RSA*, Miles J emphasised the need for pace in the determination of the individual issues (see at [53] and [55]) and balancing the litigation burden. He put it in the following way at [64]:

> "It seems to me that the Claimants, having brought the action, should be prepared to undertake substantial work in ensuring the expeditious progress of the proceedings to resolution. That includes giving disclosure, preparing witness statements, and being prepared to provide evidence at trial."

93. In *Standard Chartered*, Michael Green J described the importance of:

> "... the parties know[ing] what the other side's case is, and as to all its constituent elements, including quantum, so that decisions, including in relation to settlement, can be based on the fullest information."

94. The reasons that Michael Green J gave for requiring the Claimants to make progress on the individual reliance and limitation issues ahead of T1 are recorded at [69]-[76] of the judgment. They included (i) the need to ensure that the Defendant had "far fuller visibility of the case it is facing" and to "promote settlement both before and after T1" (at [72]); (ii) the fact that this would enable progress to be made by the Claimants "on vital issues" in a period where they would otherwise simply be "waiting for the Defendants' disclosure to come through" (at [73]); (iii) the need to ensure the Claimants' active engagement in the claims they have brought (at [74]); and (iv) this would enable the evidence on reliance limitation to be "nailed down earlier rather than later, and certainly before T1, because of fading memories and avoiding that evidence being over-influenced by the judgment on T1" (at [75]).

95. For present purposes, I am only concerned with quantum. Shortly before the hearing, the Defendants served a Part 18 request on "reliance, qualification and quantum" (the "Quantum RFI") on the evening of 10 May 2024, which is six working days before the CMC. The Quantum RFI comprises 17 individual requests with sub-requests and in some cases sub-sub-requests. The early low-numbered requests concern the detail of the reliance and the latter concern quantum. For present purposes, I am concerned with the quantum aspects of the Quantum RFI.

96. The Claimants, at the time of the Skeleton Arguments, opposed giving answers to those RFIs in advance of the second CMC or at all at this stage. As is often the case, matters have moved on somewhat during the course of oral argument.

97. The quantum case is pleaded, so far as the s.90 claim is concerned, at [140] of CPOC, which provides as follows:

> "The IPO Claimants claim, for each of the Shares acquired in the IPO or in the aftermarket, the price paid (£5.30 per share where acquired in the IPO) less a certain figure, depending upon the applicable measure of loss. The applicable deductions and measures of loss (not in any order of priority) are:
>
> 140.1. The sum actually received upon re-sale of the Shares, insofar as each individual IPO Claimant re-sold the Shares (the 'Actual Sale Measure');
>
> 140.2. Alternatively, the true value of the shares as at the date of acquisition, which is a matter for expert evidence at trial but is likely to be substantially less than the price paid for the Shares (the 'Loss on Acquisition Measure');
>
> 140.3. Alternatively, the market price of the shares at such date determined by the Court on which full information as to the true position became generally available and after which any retention of the shares can be deemed to be an independent decision of the shareholder (the 'Date of Discovery Measure');
>
> 140.4. Alternatively, such measure of loss as the Court shall find is applicable to a claim, the measure of loss under s90 of FSMA currently being free from binding authority."

98. There are also pleas in relation to the s.90A claim to which I have been taken. Mr Paine, who appears for the Pallas Claimants, began the attack on the request so far as the Claimants were concerned yesterday, in which he pointed out that the normal approach as identified in Practice Direction 18 "Further Information" (1.1) is that:

> "before an application is made to the court for an order under Part 18, the party seeking clarification or information should first serve on the party from whom it is sought a written request for that clarification, stating a date by which a response should be served and that date must allow the second party a reasonable time to respond."

99. It is then contemplated there will be a response "in writing dated and signed by the second party or his legal representative" (2.1). It is only following those stages that an application for an order under CPR Part 18 is then made.

100. It was submitted that that was the procedure that should have been adopted and not the making of a formal Part 18 request very shortly before the CMC.

101. Of course, on the CMC, the court is concerned with case management matters generally and it does not necessarily need to be the case that there is a formal application notice in relation to all matters raised on a case management conference.

102. In the course of exploring the arguments for and against the making of an order in relation to the Quantum RFI, I indicated that one solution could be that the Claimants would respond by letter, if necessary supported by a witness statement, setting out the Claimants' responses to the requests; in other words, a variation of Mr Paine's submissions to counteract the suggestion that the formal application had been made prematurely.

103. However, this morning, Mr Kramer KC on behalf of the QE Claimant made further submissions on behalf of all the Claimants and indicated, in light of the way matters had proceeded yesterday, that the Claimants were minded to agree or consent to an order that they respond to the Quantum RFI (and I am talking about the paragraphs of the quantum RFI which relate to quantum) by 2 September or, in his submission, by a later date of 30 September, supported by a statement of truth.

104. That does seem to me a pragmatic and sensible recognition of the fact that the court does expect to know, and a Defendant is entitled to know, the nature of the quantum claim that is being advanced. It will be seen that at present, the existing pleas at [40] in particular are at a very, very high level, which would not meet the reasons why a Defendant needs to know the quantum claim against him, including proper case management and also, of course, any possible settlement negotiations.

105. That then led to a concern on the part of the Claimants that if they responded to any of the requests in a way which was along the lines of "not entitled" or, "This will be a matter for expert evidence in due course", that it might be suggested that they had not complied with any order that I might make in relation to answering the RFI.

106. In that context, Mr Kramer KC took me again to those subparagraphs of [140] and also the s.90A plea so far as it concerned his clients to point out that inevitably some of those measures would call for expert evidence. He said a more appropriate time in relation to the detail of that expert evidence to provide those particulars would be after consideration at the second CMC when the very question of expert evidence, disciplines, etc will be under consideration.

107. But he reassured the court that the intention of the Claimants was to respond substantively and to give fully reasoned responses both in relation to the substantive responses, but also if there was an objection or a reason why certain information could not be supplied at this stage, it would be a fully reasoned objection and not simply a bare assertion such as "not entitled" or, "This is a matter for expert evidence".

108. For his part, Mr Singla KC for Glencore was then concerned that the responses that were provided might not be as fulsome in relation to quantum as had been hoped. He suggested that the matters made about expert evidence and about methodology were overplayed and it should be possible, as in other cases where it has occurred, for pleas to be made in relation to the methodology, if not the absolute detail of particular expert evidence.

109. I do consider that it is appropriate that there be a response to the Quantum RFI in circumstances where it is currently envisaged that the next case management conference will be as from the week commencing Monday 11 November and there should be a response to the quantum RFIs (that is those that relate to quantum within

the Quantum RFI definition) by 30 September, which will allow good time for the Defendants to consider the same in advance of the second case management conference.

110. I should make clear that I do expect the Claimants to respond substantively to the quantum aspects of the Quantum RFI, but that I also contemplate that in doing so there may be legitimate occasions on which they may have to make a fully reasoned objection to a particular aspect of the request. If they do so, I consider that that objection should be fully reasoned and not a bare denial of "not entitled" or "a matter for expert evidence".

111. Provided that they do tha,t and they respond substantively, I consider that their concerns that the Defendants may seek to allege later that they are in breach of a court order by not answering aspects of the RFIs is likely to be unfounded. That will be on the transcript and can be relied upon by the Claimants should the Defendants seek to make such a submission at the second CMC, or at any time hereafter.

112. To the extent that there will be any force in any submissions by the Defendants that will depend on how substantively, and how comprehensively, the Claimants have responded to the RFI, even if, in certain aspects, there has to be a fully reasoned reason why they have not answered a particular point. I hope that is clear enough to reassure the Claimants, but also to give reassurance to the Defendants that what I anticipate is a substantive and fully reasoned response even if, in some respects, that has to be a fully reasoned objection.

113. Accordingly and for those reasons, I order that the quantum paragraphs of the Quantum RFI be responded to by the Claimants in the usual way, i.e. response to the RFI, which is itself a statement of case, supported by a statement of truth, by 30 September 2024.

B.3 RELIANCE RFIs

114. So far as the reliance RFIs, which are requests 1 to 8, the Claimants other than the QE Claimants do not at this stage plead a positive case as to reliance. Glencore do not press those requests against the other Claimants other than the QE Claimants at this hearing, but reserve the right to revisit the matter at the second case management conference.

115. So far as the QE Claimants are concerned, they do plead a case of reliance and Mr Kramer KC has indicated that the QE Claimants are prepared to provide a response to requests 1, 2, 7 and 8 by 30 September 2024, and I so order.

C. COSTS MANAGEMENT

116. These claims are not claims to which costs management would automatically apply given they have a stated value in the claim form in excess of £10 million (see CPR 3.12(1)(a)). As per *CIP Properties v Galliford* [2015] EWHC 481 (TCC); [2015] 2 Costs LR 363 at [25]-[28], in such circumstances there is no presumption either way as to whether costs management should or should not apply. The discretion is unfettered.

117. It is the Claimants' position that some form of costs management is likely to be a useful tool in the present case. However, it is recognised that the first stage in considering that should be for all parties to at least provide costs budgets for costs incurred and costs up to T1. It is said that on consideration of those budgets, all parties and the court can then consider further whether to proceed to formal costs management or not.

118. It is said, and I agree, that such an exercise is likely to prove useful in its own right. It will encourage the parties to focus on the level of costs they anticipate incurring in particular phases, which will aid considerations of case management and proportionality. It will provide opposing parties with considered indications of their adverse costs exposure, which in turn will assist with any consideration of matters such as whether present levels of adverse costs protection are adequate. It will ensure that details of incurred and likely costs are available to assist any considerations of any settlement proposals. It will be necessary in any event, at least in relation to the Defendants, if the Defendants choose to make any applications for security for costs.

119. At the time of the Skeleton Arguments, it was the position of the Defendants that it was inappropriate for the parties to prepare and exchange costs budgets for T1 in the form of precedent H with a response in precedent R. However, during the course of the CMC itself, the Defendants have recognised that they are not opposed to consideration of the question of costs budgets and that their position was really more about the timing of when such costs budgets should be provided.

120. In this regard, Mr Singla KC identified that this was large scale high value litigation with numerous separate Claimants. It was felt that it might be considered premature to do so at this stage when there were a number of outstanding matters which will not be clear until the second CMC. One of those relates to the question of standing, which I have already addressed and made associated directions. Another is expert evidence in terms of disciplines and numbers of experts. These are all matters about which more will be known at the second CMC.

121. So the submission of the Defendants was that the appropriate time for an order in relation to the first stage of costs budgeting, if I can put it like that, of the provision of precedent H and a response in precedent R, would be after the second CMC. It was recognised on behalf of Glencore that that would inevitably mean that there would have to be a third CMC dealing with that.

122. Whilst there will no doubt be a need for a further CMC after the second CMC in the context of such complex litigation as the present litigation, if there was to be consideration of costs budgeting, that would be a substantial subsequent hearing, in my view, that it would be unlikely could be dealt with in less than a day.

123. However, I consider there is a more fundamental objection to any order in relation to costs budgeting only triggering in, in terms of timing, after the second CMC and that is really that it is too late at that stage. The appropriate time at which a consideration of whether formal costs budgeting should be ordered or not, as the case may be, in this case will undoubtedly be the second case management conference scheduled to take place as from 11 November 2024 for three days.

124. I consider that in order for the issue as to whether there should be formal costs budgeting or not to be determined by the judge at that second CMC, he or she will be greatly assisted by the provision of precedent H and precedent R in advance of that hearing.

125. It may be that in the light of precedent H and precedent R, the parties are reassured and they consider that there is no need for formal costs budgeting. Equally, it could be that as a result of that exercise, one or both parties, in the sense of Claimants versus Defendants, will consider that formal costs budgeting should be ordered by the court. Equally, the court itself will be best placed, when exercising its discretion and deciding whether or not to order formal costs budgeting, to have the benefit of precedent H and precedent R.

126. Ultimately, by the conclusion of his submissions in this area, Mr Singla KC realistically accepted the points that had been made in that regard.

127. I am satisfied that it is appropriate to make an order in the terms sought in relation to the provision of precedent H followed by a response in precedent R in advance of the second CMC.

128. In such circumstances the parties are now in agreement that the precedent H should be served by 18 July with precedent R responses by 19 September 2024, and I so order.

D. DISCLOSURE

D.1 DISCLOSURE ISSUES

129. There are various matters in relation to disclosure which have been the subject matter of discussion and agreement, some of them with the assistance of the court.

130. At this point, these include the following: that by 31 May 2024, the Claimants will provide their comments regarding the Defendants' proposal for custodians and date ranges for the disclosure issues in section 1A of the disclosure review document. By 28 June 2024, the Defendants shall propose keywords for the disclosure issues in section 1A of the Disclosure Review Document. By 19 July 2024, the Claimants will provide their comments regarding the keywords for the disclosure issues in section 1A of the Disclosure Review Document. If the parties cannot agree, the additional custodians/keywords, the court shall resolve the outstanding disagreements at the second CMC.

131. By 20 September 2024, the first Defendant shall provide disclosure of the following categories of documents/phase 1 documents, as defined in appendix 1 to this order, to the extent relevant to the issues in the list of disclosure: that is subparagraphs (b) to (g) as set out in the draft order.

132. By 25 October in relation to categories 2 and 11, and by 13 December 2024 in relation to categories 3 and 7, the first Defendant shall provide documents responsive to model C requests set out in section 1B in the list of issues for disclosure, as well as disclosure of the following categories of phase 1 documents as defined in appendix 1 to this order to the extent relevant to the issues in the list of issues for disclosure.

That is categories 2 and 11 by 25 October and categories 3 and 7 by 13 December 2024.

D.2 DISCLOSURE RE DIRECTOR DEFENDANTS

133. The next issue concerning disclosure is in relation to disclosure and the Director Defendants. There are various outstanding matters which are still the subject matter of discussion between the respective Director Defendants and the Claimants which it is hoped will resolve issue of disclosure in relation to the Director Defendants.

134. In overall summary, and looking at matters at a very high level, the essential position is that for differing reasons the various Director Defendants at various times say that they have provided their documentation to Glencore and that Glencore can give disclosure as part of their disclosure exercise, with the exception of specific categories of documents which only they have. That itself can be resolved in due course.

135. It is hoped that there will be no need for the Director Defendants to have to give any other disclosure. If there are any issues that remain in relation to Director Defendants, that will be dealt with at the second CMC, and, in the meantime, the parties are in agreement that the Director Defendants do not have to take any steps by way of disclosure.

D.3 DISCLOSURE: FURTHER ISSUES

136. I then heard argument in relation to a number of further disclosure issues. Many of them were centred on the issue of early disclosure prior to extended disclosure, which is going to take place by April 2025.

137. Constructively, the Defendants have indicated, as is apparent from earlier parts of this judgment, that they were prepared to give early disclosure in relation to appropriate categories where that was appropriate. One of the categories of disclosure is what has been defined as category 1 in appendix 1 to the draft order that is before me in terms of staged disclosure.

138. That provides as follows:

> "Documents disclosed by the Glencore Group to the relevant authorities in the:
>
> 1.1. DOJ Investigation;
>
> 1.2. Brazilian Investigation;
>
> 1.3. CFTC Investigation;
>
> 1.4. SFO Investigation;
>
> 1.5. Swiss Investigation;
>
> 1.6. OSC Investigation; and

1.7. Netherlands, with respect to the investigation conducted by the Dutch authorities (together the 'Investigations')."

139. The Claimants submit at a high level that all that material is what has been referred to by all parties as "oven-ready". What the parties mean by that is material which can be disclosed in its entirety. An issue arises between the parties as to whether category 1 documentation should be given at an early stage as part of the staged disclosure.

140. As part of that debate, Mr Tolaini, in his second witness statement on 9 May, opined in relation to this material, as well as the documentation that was collected in relation to the investigations. At [26] of his witness statement, he identified what he described as the document collection exercise conducted by Glencore in response to those various investigations and he set out his understanding from PwC that in total, over 46 million documents were collected as part of the investigations (which he defined as "the collected investigation documents"). Material was collected from over 200 custodians. The collected investigation documents were stored across four separate databases; the UK database, the US database, the Swiss database and the Indian database (collectively, "the investigation databases").

141. At [30] of his witness statement, he indicated that he had been informed by WilmerHale that in total since 2018 in response to the investigations, over 2.7 million documents had been reviewed. As at the date of his statement, Glencore had provided in total over 1.6 million unique documents to the law enforcement authorities in over 400 distinct productions. I interpose at this point that in relation to those 400 productions, it appears that they handed over 60 to 70 requests.

142. Mr Tolaini explains in his witness statement that the investigation has covered a wider landscape than the admitted conduct or alleged DRC corrupt arrangement, including other jurisdictions and entities, Glencore's position being that the Claimants are not entitled to documents which are beyond the scope of the issues in these proceedings, let alone the issues that are covered and defined as issues for disclosure in the draft DRD letter.

143. That led to correspondence, including a letter from Quinn Emanuel on 13 May 2024 which asked questions concerning category 1. The draft order contemplated that there would be a response to that, that the parties would subsequently have liberty to apply for disclosure guidance concerning the timing of disclosure for category 1 and there was contemplated the possibility of a further disclosure hearing either in July or at least subsequently to the current case management conference.

144. Whilst debating the appropriateness of category 1 for early stage disclosure and/or what information should be supplied in relation to category 1 by the Defendants, the disclosure issues expanded and the parties addressed me in a more wide-ranging fashion in relation to a number of disclosure issues which either related to category 1 or arose out of what had been said about category 1 during the course of oral argument or in correspondence, including what was said in Tolaini 2.

145. That, with some judicial engagement and encouragement, has led to further agreement between the parties in relation to aspects of disclosure.

146. The first development is that the Defendants have confirmed that in relation to disclosure, they will be considering against the test for disclosure the wide category of 46 million documents and not simply confining themselves to a consideration of the 1.6 million.

147. There was also an issue as to whether, in relation to particular categories where model D disclosure was agreed by both the Claimants and the Defendant, but the Claimants were proposing that it be model D with narrative documents, there was debated before me an issue as to whether there should also be narrative documents.

148. I can deal with this shortly. The parties were in agreement as to the applicable principles in relation to when narrative documents were appropriate, referring me to the principles as identified in the White Book at paragraph 2AA-63.2; the case of *Bouygues (UK) Ltd v Sharpfibre Ltd* [2020] EWHC 1309 (TCC) at [40]-[41], which identify the circumstances where narrative documents may be appropriate. A narrative document, of course, is "a document which is relevant only to the background or context of factual matters or events and not directly to the issues for disclosure". As is made clear, a document which is an adverse document is not to be treated as a narrative document.

149. In the event, and following oral submission, the Defendants agreed with the Claimants' proposal that where the Claimants have been proposing model D with narrative documents, they would agree to model D with narrative documents.

150. That addressed, at least to a substantial extent, a further debate between the parties about what the scope of disclosure should extend to. In this regard, Mr Singla KC identified that there are parallels between the claims in this litigation and what are known as follow-on claims in competition cases where there is admitted wrongdoing.

151. He rightly said that in this case, Glencore admits various forms of wrongdoing in the pleading. That being the case, it is neither an issue for disclosure nor, say the Defendants, is it a matter for disclosure under their disclosure obligations to produce documents in relation to that which is admitted and therefore common ground on the pleadings.

152. An issue arises, though, in relation to the knowledge of various individuals. Leaving aside the position in relation to the Democratic Republic of the Congo, which is different, in relation to other areas, and I pick by way of example West Africa and South Sudan, the relevant disclosure issue for that is defined as follows:

> "3.1. At the material times, what knowledge or suspicions, if any, did the following individuals have of the bribery and corruption alleged in Section B of the CPOC relating to West Africa and South Sudan, and/or were they reckless and/or did they turn a blind eye to the same, and if so, when:
>
> (a) the Director Defendants;
>
> (b) Mr Beard; and
>
> (c) Mr Gibson?"

153. That led to a lively debate before me as to what documentation would be relevant to that issue and the question of knowledge. In the event, as I have identified, it is now agreed that disclosure be model D with narrative documents. Whilst that does not guarantee that that will completely remove any issues about such disclosure, for present purposes, it is not necessary for the court to say anything further at this stage in relation to that, other than to confirm that the court agrees that in relation to the issues where the parties have now agreed model D with narrative documents, that is the appropriate way forward.

154. That then leaves, moving on from that which has been agreed to that which remains controversial, the extent to which, and in what form, the Claimants should be required to provide further information at this stage in relation to category 1 documentation with a view to considering whether there should be early disclosure in relation to category 1.

155. As I say, the essential thrust of the Claimants' submissions is that this is "oven-ready" material which should be readily available and should be disclosed. The concern of the Defendants is that the position is more complicated than that, as explained in Mr Tolaini's witness statement, because such material may contain both relevant and irrelevant material and, as Mr Singla KC rightly points out, there is no obligation to disclose irrelevant material.

156. But a second concern is that it appears from what I have been told that not only is there a potential issue as to whether there is privileged material (in an English law sense) within such category 1 documentation, but also it appears that at this stage, there has not been, at least in all cases, a comprehensive review for privilege.

157. Mr Singla rightly points out that it is important that the Defendants are not prejudiced by any inadvertent disclosure of privileged material, albeit, of course, that if there was to be any inadvertent disclosure of a privileged document, there are protections in place to ensure that such material is not used, i.e. upon receipt and upon recognition, that would no doubt be returned unread.

158. However, that leads Mr Singla, on behalf of Glencore, to say that what we are concerned with here is early disclosure and the provision of further information with a view to deciding whether or not there is material within category 1 which can be supplied as part of early disclosure at this stage.

159. In that regard, Mr Singla predicates what he says on certain general principles, the first one of which is that at the end of the day, extended disclosure is the norm. We are in a category where the Defendants are saying that there are categories where they are prepared to give early disclosure in the spirit of co-operation and to bring matters forward and to save costs. They have done so in other categories and he says there should be limits to which there needs to be further exploration as to whether category 1 is appropriate for disclosure at this stage.

160. Mr Kramer KC, who leads the submissions for the Claimants in this area, says that both his clients and the court, needs to know rather more about category 1 because, at first blush, we have here 60 to 70 requests for 400 categories which either are or ought, on a relatively straightforward and non-detailed review, to be capable of

identification as to which are "oven-ready" and there should be disclosure of those at this stage, as early disclosure is beneficial.

161. Secondly, there are likely to be cost savings, because in relation to each of these 400 categories, it is said there are up to 4,000 documents and, therefore, if it can be readily identified that these are relevant, subject to dealing with any privilege issues, that would save the costs of reviewing each of those 4,000 documents for every category that is regarded as relevant.

162. He also points out that there are advantages to such an approach because a search term approach, which would obviously be relevant for extended disclosure, is fallible. It all depends on the categories and the custodians and it is possible that relevant documents can be missed. That is part of the price to pay for a proportionate approach to disclosure when one is looking at a very large number of documents. That fallibility, he submits, will be avoided if there are categories of documents which are clearly relevant which can be disclosed in their entirety and without the need for such search terms.

163. He also suggests that the concerns about privilege, whilst recognising the legitimacy of those concerns, is perhaps overblown and that the position in relation to privilege can be protected by search terms run in short order, which would, he submits, pick up any privileged documentation.

164. The debate in relation to this, and the form of any further information, has taken a significant part of the CMC and, in fact, has probably ranged over the best part of more than half a day, approaching a day, of this CMC. I should make clear that I regard that as time well spent because in the course of it, and as I have indicated, a variety of issues in relation to disclosure have been flushed out and the parties have ultimately been able to reach agreement with the assistance of the court.

165. Returning to the category 1 documentation, and what further information should be supplied, overnight there has been a yet further flurry of proposals from both the Defendants and the Claimants.

166. So far as the Defendants are concerned, there is a letter of 23 May from Clifford Chance on behalf of the Glencore Defendants, which provides in these terms:

> “We refer to [the Judge’s], request at the conclusion of yesterday's hearing that the parties devise a form of words in respect of category 1. Glencore proposes the following:
>
> (a) Glencore will work with WilmerHale and PwC to identify any production in relation to which it is apparent, without reviewing the documents contained within that production, that the entirety of the documents in an individual production are relevant to the issues for disclosure.
>
> (b) Insofar as there are any such productions, Glencore will state its position as to the proportionality of providing any such production by way of early disclosure, taking into account the need to conduct a

> detailed review of documents within such production for privilege. This will be provided by 17 June 2024 ...”

167. The Claimants' primary proposal, made shortly before the resumption of the third day of the CMC, was as follows:

> “By 7 June 2024, the first Defendant (i) produce all requests whether for voluntary production or pursuant to statutory powers of compulsion made by the law enforcement authorities in response to which the 400 productions (as described in paragraph 30 of Tolaini 2) were disclosed; (ii) to the extent not specified in the request, confirm the list of keywords to which each of the productions was responsive; (iii) identify which of the productions made in response to these requests were reviewed for privilege under English law.”

168. It will immediately be seen that one difference between the Claimants and the Defendants is that the Claimants' latest proposal actually involves production of documents, i.e. disclosure, in terms of disclosure requests, which goes beyond what the parties were debating earlier in the hearing in relation to the supply of further information.

169. So far as those respective proposals are concerned, Mr Kramer KC, on behalf of the Claimants, says that whilst progress is being made in Clifford Chance's letter of 23 May 2024, paragraph 1(a) is very general and also the Claimants have concerns about the breadth of paragraph 1(b) and whether or not, in fact, a detailed review of documents is needed and whether or not, in fact, even if relevant documents are identified under paragraph 1(a), there will be a blanket response about the proportionality of undertaking the privilege review for the purpose of that being done to then give disclosure of that material.

170. He also said that on its face, paragraph 1(a) did not make clear as to whether or not the Defendants were going to do something which Mr Kramer proposed they should do, which was review, as in read, the 60 to 70 requests, because Mr Kramer's position was that it may be the case that by simply reading the 60 to 70, it may be apparent that some of those are relevant and do not contain irrelevant material.

171. In the course of further oral argument, I understood Mr Singla KC to be confirming that within the scope of what was being done in paragraph 1(a), someone would read those 60 to 70 documents. Whether I'm right or not that that has been agreed to be done, I consider that it would be both sensible, appropriate and proportionate in furtherance of the overriding objective that this be done because that has the potential to identify "oven-ready" documentation which it would be appropriate to provide disclosure for at this early stage in relation to category 1, for all the advantages that Mr Kramer identified and that I agree with, i.e. early disclosure carries advantages: there would be costs savings and it would avoid the fallibility of search terms and custodians.

172. Mr Kramer submits that I should prefer the Claimants' wording. He says it is not particularly onerous and would flush out further oven-ready material.

173. Standing back, and having had regard to all the submissions that have been made to me, I consider, in circumstances where the Defendants have bought into the idea of early disclosure in relation to appropriate categories in relation to category 1 and being prepared to provide further information, that they should do that which is set out in the Clifford Chance letter of 23 May, i.e. what is comprised within paragraphs 1(a) and 1(b).

174. I should make clear that I expect that 1(a) extends to a review of the 60 to 70 requests. In relation to 1(b), I was initially concerned as to whether or not what was perceived to be a detailed review of the documents that might result in the answer being it was not proportionate to undertake that review might be an unsatisfactory response in circumstances whereby the utility of the exercise itself could be trumped by simply saying it is disproportionate to do the privilege check.

175. However I envisage that, having put forward this proposal, Glencore will enter into the spirit of it and will consider whether or not it is possible to do a satisfactory privilege review without that being disproportionate. I do not make any order as to the form of that review that they must do. That is a matter for Glencore having received appropriate advice from their legal advisers.

176. The overall rationale of this approach is that it may satisfy the Claimants and the Claimants may obtain further oven-ready material at this stage. The other possibility is that the Claimants regard the responses to be unsatisfactory. At that stage, they will have to decide whether or not they wish to make an application to the court in relation to disclosure and category 1 at this stage, at which stage both they and Glencore will obviously be at risk of the costs of that exercise, which I would hope is an incentive to Glencore to conduct the exercise that they propose to undertake in a spirit of co-operation and, equally, will encourage the Claimants to take a proportionate and realistic approach to whatever response they receive.

177. The reason that I was not willing to go further, and adopt the alternative proposal of the Claimant is that it seemed to me that that was to go beyond the request for information and to amount to production of material, and the further stage of actual disclosure.

178. I also consider that it was a more time-consuming and, I consider likely to be more costly exercise that was being proposed. Also, I do not consider that it was appropriate to make such an order in circumstances where, to a large extent, what Glencore are doing is a voluntary exercise, because we are concerned with early disclosure rather than extended disclosure in due course. Therefore, any step that the court orders them to do at this stage must itself be proportionate and cost effective. I consider that the balance is struck by Glencore responding in terms of the Clifford Chance proposal, with the further observations that I have identified.

179. Accordingly and for those reasons, I have dealt with and/or approved the various points in relation to disclosure that have been debated before me, as addressed above.

E. PRIVILEGE

180. By a letter dated 8 April 2024, Glencore informed the Claimants it intended to seek a declaration in the following terms at the CMC:

> "It is declared that insofar as any documents that the First Defendant would otherwise be required to produce are privileged, the First Defendant shall be entitled to withhold production of such documents from each of the Claimants on the grounds of privilege (subject to it being determined or otherwise agreed that the First Defendant has waived privilege in such documents, or privilege otherwise being lost)."

181. The declaration was, it was said, intended to address the issue of whether a company is entitled to assert privilege against its own shareholders. That issue has been addressed in a number of recent decisions, including *Sharp v Blank* [2015] EWHC 2681 (Ch) and *Various Claimants v G4S PLC* [2023] EWHC 2863 (Ch).

182. In *Sharp v Blank*, Nugee J, as he then was, reviewed the case law on this issue and concluded that he was bound by Court of Appeal authority (see *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559). He drew the following "general rule" from the authorities (at [12]):

> "So far it seems to me that the authorities are all consistent. There is a general rule that no privilege can be asserted by the company against its shareholders. The general rule is subject to an exception where the advice taken by the company is in relation to litigation - that litigation being actual, threatened or in contemplation."

183. Nugee J described the basis for this general rule as follows (at [9]):

> "The foundation, as I understand it, of the general rule is the same as the foundation of the similar general rule that applies in the case of trustees and beneficiaries. Just as a trustee who takes advice as to his duties in relation to the running of a trust, and pays for it out of the trust assets cannot assert privilege against the beneficiaries who have, indirectly, paid for that advice, so too a company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert a privilege against the shareholders who, similarly, have indirectly paid for it."

184. In *G4S* (supra), the Claimants applied at a CMC shortly before trial to challenge the Defendants' claim to withhold certain documents on grounds of privilege. Michael Green J declined to depart from the general rule referred to *in Sharp v Blank* (at [30]). Nonetheless, in an extempore judgment after hearing "short argument" at the CMC, he held (at [30]) that the rule was confined to (i) shareholders with legal title in the shares and did not extend to ultimate beneficial owners of shares held pursuant to a custody chain (at [42]) and (ii) documents which came into existence at a time when the Claimants in question were shareholders of the defendants (at [47]).

185. More generally, Michael Green J observed at [46] and [56] that the parties' failure to raise this issue at an earlier stage in the proceedings gave rise to serious practical and case management issues which could not be addressed on the eve of the trial.

186. The Claimants do not agree that the declaration that is proposed by Glencore should be made, nor do they accept that Michael Green J was right to confine the general principle as he did. They refer, amongst other matters, to a decision of the Bermudian Court of Appeal (Christopher Clarke P, Bell JA and Kawaley JA) in *Oasis Investments II Master Fund Ltd v Jardine Strategic Holdings Ltd* [2024] CA (Bda) 7 Civ, where it was held that the general rule applies to beneficial owners of shares (see, eg, at [134]) and that it applies to documents which came into existence either before or during the period in which a Claimant was a shareholder (see, for example, at [186]).

187. The Claimants do agree, however, that there is an issue or, in reality, a group of issues as to the way in which the general rule in *Sharp v Blank* applies to Glencore's disclosure in these proceedings that will likely need to be resolved, and that this should be determined as quickly as possible, not least because of the potential for the outcome of that determination to have ramifications for how the trials in the action are managed.

188. During the course of the CMC the parties have reached agreement that it would further the overriding objective and be in the interests of all the parties for what I shall call the privilege issue, to be determined as soon as possible and well in advance of trial, not least because the issues of principle that arise may well be taken to an appellate level, including potentially the highest appellate level. It is accordingly in the interests of all the parties that that matter be resolved as soon as possible.

189. There has been placed before me a draft order with steps to be taken with a view to such a hearing taking place. I am satisfied that the proposals that have been made are appropriate and that it is also appropriate to order a two-day hearing with one day pre-reading in order that the privilege issue can be determined as soon as possible and definitively in good time so that the implications of that, either at that stage or thereafter, should there be any appeal therefrom, are made in good time before the trial. That is the initial stage 1 trial.

190. As I indicated to the parties, I consider it important to ensure that the privilege issue and the many sub-issues that arise are properly defined and agreed for two reasons.

191. First, it is important that the privilege issue and all the associated sub-issues are identified and agreed between the parties and, if not agreed between the parties, are then finalised by the court. The first reason for that is so that the parties, when preparing for that hearing and their Skeleton Arguments, know what issues are to be determined and addressed and, equally, so that the trial judge on that privilege issue trial is aware of what the issues are and what issues are to be addressed.

192. The second reason why it is important to agree and properly define the issues is to ensure that all potential issues in relation to privilege are addressed in that privilege issue trial, because it would defeat the object of the purpose of that trial and would be unsatisfactory if it were to transpire that not all associated issues were dealt with in that trial. Were that to happen, that could only increase costs and defeat the very purpose for holding what is essentially a preliminary issue trial in relation to that issue.

193. Accordingly, I have directed that there be a timetable put in place which will involve the Claimants setting out their proposals as to the issues following earlier stages, which I do not need to address in this judgment, by 12 July 2024. The Defendants will then respond by 19 July, stating whether they agree with those issues and/or proposing any variations to such issues and/or any additions to such issues. There will then be a one-hour hearing on 26 July 2024 to resolve any remaining issues in relation to such matters, with the parties to notify Commercial Court Listing by 4.00 pm on 23 July 2024 as to whether that hearing remains necessary or can be vacated.

194. Those stages are ordered set against the backdrop that I am satisfied that it ought to be possible, subject to final confirmation with Commercial Court Listing, to accommodate that two-day hearing with one day's pre-reading, within a window commencing 16 September 2024 and ending on 21 October 2024, those being start dates for that hearing. It will be for Commercial Court Listing to identify on what date or dates the court can accommodate such a hearing within that window, and that hearing will not be fixed by reference to counsel availability, although the parties can liaise with Commercial Court Listing as to availability of particular counsel.

195. Accordingly, and for those reasons, I order a trial of a preliminary issue in relation to the privilege issue as so defined and with the associated directions that I have identified.

F. LIST OF COMMON GROUND AND ISSUES

196. I have had put before me the finalised version of the list of common ground and issues in which previous disputes between the parties in relation to the wording of the common ground and issues have been resolved, and I am satisfied that it is appropriate to approve the list of common ground and issues in the version that is before the court.

G. THE CMC ORDER

197. The parties should liaise to agree an Order on the CMC addressing the matters addressed in this judgment, and the remaining case management matters ordered, for the Court's approval.