IN THE HIGH COURT OF JUSTICE

[2024] EWHC 1975 (KB)

KB-2023-001038

KING'S BENCH DIVISION

MASTER MCCLOUD

Handed down 30th July 2024

BETWEEN

SHEIKH MOHAMMED OMAR KASSEM ALESAYI

Claimant

And

BANK AUDI S.A.L.

Defendant

Representation:

MR B FRIEDMAN and MR C BARTSCHERER (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimant/Applicant.

MR I WILSON KC and MR R FERRO (instructed by Dechert LLP) appeared on behalf of the Defendant/Respondent.

List of cited authorities and statutory material referred to in argument whether or not cited in judgment:

Legislation

1. The Civil Jurisdiction and Judgments Act 1982, s. 15B and 15E

<u>*Cases*</u>

2. *Vitkovice v Korner* [1951] AC 869, 869-881 (selected extracts)
3. *Wenlock v Moloney* [1965] 1 WLR 1238
4. *Format Communications MFG Ltd v ITT* [1983] FSR 473
5. *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, 460-465 (selected extracts)
6. *Rome v Punjab National Bank (No 1)* [1989] 2 All ER 136
7. *Dubai Bank Limited v Galadari* [1990] 1 WLR 731
8. *Marlton v Tectronix UK Holding* [2003] EWHC 383 (Ch)
9. *Riggs v Associated Newspapers Ltd* [2004] EMLR 4
10. *Engler v Janus Versand GmbH* [2005] I.L.Pr. 8
11. *Expandable Ltd v Rubin* [2008] 1 W.L.R. 1099
12. *Pammer v Reederei Karl Schlüter GmbH* [2012] Bus LR 972
13. *Vava v Anglo African South Africa* [2012] 2 C.L.C. 684
14. *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337, 337-9; 374-8 (selected extracts)
15. *Emrek v Sabranovic* [2014] Bus. L.R. 104
16. *Hobohm v Benedikt Kampik Ltd & Co KG* [2016] QB 616
17. *Heraeus Medical GmbH v Biomet UK Healthcare Ltd* [2016] EWHC 1369 (Ch)
18. *NCA v Abacha* [2016] 1 W.L.R. 4375
19. *Owners of the Al Khattiya v Owners of the Jag Laadki* [2017] EWHC 3271 (Admlty)
20. *Re Guardian Care Homes (West)* Limited [2018] EWHC 2664 (Ch)
21. *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] 1 WLR 3514, 3514-5; 3530-9 (selected extracts)
22. *mBank SA v PA* [2020] I.L.Pr. 37
23. *Lungowe v Vedanta* [2020] AC 1045
24. *Okpabi v Royal Dutch Shell Plc* [2021] 1 WLR 1294, 1294-1300; 1315-26 (selected extracts)
25. *Bitar v Banque Libano-Francaise SAL* [2021] EWHC 2787 (QB)
26. *Khalifeh v Blom Bank SAL* [2021] EWHC 3399 (QB)
27. *Chelfat v Hutchinson 3G UK Ltd* [2022] 1 WLR 3613
28. *FCA v Papadimitrakopoulos* [2022] EWHC 2061 (Ch)
29. *Manoukian v Societe Generale de Banque au Liban and Bank Audi* [2022] EWHC 669 (QB)
30. *Balfour Beatty v Broadway Malyan* [2022] EWHC 2022 (TCC)
31. *Bitar v Bank of Beirut SAL* [2022] EWHC 2163 (QB)
32. *Chechetkin v Payward Ltd* [2022] EWHC 3057 (Ch)
33. *Hoegh v Taylor Wessing* [2022] EWHC 856 (Ch)
34. *Hart v RBKC* [2022] EWHC 1090 (QB)
35. *PIFSS v Banque Pictet* [2022] 1 WLR 4193, 4193-5; 4203-4 (selected extracts)
36. *Merrill Lynch v Citta Metropolitano Di Milano* [2023] EWHC 1015 (Comm)
37. *Bitar v Banque Libano-Francaise SAL* [2023] EWHC 17 (KB)
38. *Hadi Kalo v Bankmed SAL* [2024] I.L.Pr 7

JUDGMENT

The facts

1. The Defendant (the Bank) is a Lebanese bank with, it says, no presence in England and which does not "direct business" here or pursue commercial activities here. That is relevant in the context of the Civil Jurisdiction and Judgments Act 1982 as will become clear.
2. The Claimant is a wealthy Saudi Arabian national and a customer of the Bank. The Claimant's contractual relationship with the Bank is said to be governed by Lebanese law and subject to a jurisdiction agreement in favour of the Lebanese Courts. The Claimant has commenced these proceedings seeking a mandatory order from the English Court that the Bank transfer his funds out of Lebanon into accounts in Switzerland. The Defendant says that the Claimant is in breach of the terms of the banking contract because there is an exclusive jurisdiction clause in the banking contract upon which it relies which provides for the courts of Lebanon to have jurisdiction (and the Claimant in turn says that this only serves to highlight that the contract terms as they were (says the Claimant) from time to time during the Claimant's time as a customer since 1994 and later years are relevant and should be disclosed).
3. This is an application dated 13 October 2023 for disclosure made by the Claimant against the Defendant in circumstances where the Defendant disputes the jurisdiction of the English Court under CPR Part 11. The draft order lists a number of documents or categories which I have set out in the Annex to this judgment. The application relies on CPR 31.14 and/or CPR 31.12 and/or the overriding objective.

The rules

4. As a reminder, CPR 31.12 states:

31.12

(1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2).

And CPR 31.14 states:

31.14

(1) A party may inspect a document mentioned in –

(a) a statement of case;

(b) a witness statement;

(c) a witness summary; or

(d) an affidavit.

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

5. As far as the Defendant is concerned this application is wide-ranging and goes well beyond what a court ought to order in circumstances where the very issue of whether the court has jurisdiction at all is a live one. Says the Defendant, a Claimant who chooses to commence in a foreign jurisdiction (England in this case) should do so on the basis of sufficient material and that to order disclosure to enable the issue to be determined should be reserved for exceptional cases. To so order here, from the Defendant's perspective, would 'set a dangerous precedent'.

6. To put that in my own words: the question arises as to how far a court ought to go in coercively making orders for access to documents where the court may actually later decide it either has no jurisdiction to hear the case or will not accept jurisdiction to do so. That is an important question and one which no doubt is one which raises common issues in other common law jurisdictions such as the USA: can (or when should) a party be given disclosure so as to gather information where there may ultimately be no jurisdiction to try the case at all?

The applicable law

7. The Civil Jurisdiction and Judgments Act 1982 s.15B(2) states that where a party to a 'consumer contract' is domiciled in this jurisdiction they may bring a claim as a consumer against a business where the Defendant is a party who meets the 'Activities Requirement' (as set out in s. 15E(1)(c)) i.e. that it:

> *"(i) pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled, or*
>
> *(ii) by any means, directs such activities to that part or to the other parts of the United Kingdom including that part, and which falls within the scope of such activities"*

8. When the claim was served, the Defendant sought to clarify on what basis the Claimant alleged that the courts of England and Wales have jurisdiction. The dispute here arises from the fact that the Claimant's position is that it cannot provide a full pleading on the jurisdiction point until the Defendant provides disclosure of various documents. On 11 July 2023 it did indicate in response to a Part 18 request that it relied on the ability to serve out of the jurisdiction under the consumer contract route under the CJJA 1982, relying on the "Activities Requirement" being made out. That position was put forward based on publicly available documents.

9. On 25 July 2023 the Defendant issued a jurisdiction application and an application to set aside service. The Claimant issued this application for disclosure, which reflects documents or classes of document which go beyond the level of disclosure given voluntarily. In particular the Defendant points out that it has disclosed for example the Claimant's entire client file on its records (though the

Claimant would point out that for CJJA purposes the question of directing activities to the UK is not dependant on particular activity directed at the Claimant himself in the UK so that the file in itself would not be 'the answer' from the Claimant's perspective). In this judgment I have focussed on the draft order as originally attached to the application. The application is of high value and will be of interest to other court users.

Outline of Defendant's overarching opposition to jurisdiction

10. It is for the Claimant to make out its application but it is convenient for ease of exposition if I set out the core points of the Defendant's opposition. The Defendant's position (with my bold emphasis) is that there is no right to 'interrogate' a party in relation to documents which may establish jurisdiction. Rather the Defendant relies on Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others [2019] 1 WLR 3514, and in particular that case as summarised in Kalo v Bankmed SAL [2024] I.L.Pr 7 para. 6. *Kalo* in particular concerned the question of whether a business directed activities to the UK, for the purposes of the same provisions of the CJJA 1982 as are in play here. Quoting from the Judgment at para. 6:

> *"a. Limb (i) of the Kaefer formulation requires the court to ask* ***if there is an evidential basis showing that the claimant has the better argument as to the application of the gateway, the burden of proof lying on the claimant*** *as the party seeking to invoke the court's jurisdiction. However the test is "context-specific and 'flexible'".*
>
> *b. Limb (ii) explains how the court is to approach that task, in a context in evidence may well be incomplete, there has been no disclosure, and witness evidence has not been tested by cross-examination.* ***Those forensic limitations do not of themselves prevent the court reaching a view on the relative merits. The judge is required to approach the task pragmatically and by applying common sense*** *– for example an evidential dispute may not affect the conclusion, however decided, and it will often be possible to reach a view on the basis of the documentary record, even if there is conflicting evidence.*

c. Limb (iii) addresses the position where ***"the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument", in which context it suffices that there is a "plausible (albeit contested) evidential basis"*** *for the application of the gateway."* (emphasis added)

11. I summarise the above quotation as understood by the Defendant in effect as amounting to saying that the court's task on a jurisdiction question is to ask whether the Claimant has the better argument based on the material before the court, that forensic (evidential) limitations may well not prevent the court performing that task where the court using common sense can reach a view even if there is conflicting evidence, and lastly that if the court is simply unable to decide who has the better argument it is sufficient to find that "*there is a 'plausible (albeit contested) evidential basis' for the application of the gateway*."

12. The Defendant points out that if the court were to require the Defendant to provide disclosure then in reality the Defendant is at a disadvantage and ought in turn to have disclosure from the Claimant as to his affairs in relation to the capacity in which he used the bank (such as whether he is indeed domiciled here). That, says the Defendant would lead to more witness statements, more time passing and effectively an abusive mini trial where the authority cited above on the contrary stresses the 'common sense' approach and that it ultimately suffices to make the decision on the basis of a 'plausible (albeit contested) evidential basis' if the material before the court allows no better than that.

13. In terms of the correct approach (said to be to avoid a 'mini trial') the Defendant cites the practice under the former Rule 11 of the Rules of the Supreme Court and how a similar approach is appropriate under what is now the equivalent rule, CPR Part 11. Under the CPR as under the RSC, a jurisdiction dispute was an interlocutory matter typically determined on documentary evidence. Under the old RSC there was a presumption against permission to serve out, which was to be refused unless it was sufficiently shown that the case was a proper one for service out of the jurisdiction. In Vitkovice v Korner [1951] AC 869, 879 Lord Simonds expressed approval of the 'good arguable case' test. A higher test was rejected because it would amount to a trial of the action or a premature expression of opinion

on its merits. Extensive argument was heartily disapproved of: the well-known *Spiliada* case [1987] AC 460, 465 expressed the view that jurisdiction arguments should be "*measured in hours and not days*".

14. The Defendant in relation to the CPR cited cases which it says establish that a 'mini trial' is deprecated: VTB Capital Plc v Nutritek International Corp [2013] 2 AC 337 at 82-84, Lungowe v Vedanta Resources Plc [2020] AC 1045 at [6]-[14], Okpabi v Royal Dutch Shell Plc [2021] 1 WLR 1294 at [103]ff and PIFSS v Banque Pictet [2022] 1 WLR 4193 at [10]-[14].

15. In particular it cited the decision in Lungowe v Vedanta, where Lord Briggs referred to "condign costs consequences" for litigants and their advisors who continued to ignore the requirements of proportionality in relation to jurisdiction hearings and Lord Neuberger described the reasons at 82-83 thus:

> *"82. The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.*
>
> *83. Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial*".

When should disclosure be ordered in a jurisdiction issue application?

16. The Defendant argued that the general rule is that a disclosure order should not be made in the context of a Part 11 challenge and that such an order required genuinely "exceptional circumstances": (citing *Vedanta* at [43], in turn referring to Rome v Punjab National Bank [1989] 2 Lloyd's Rep 424 and Vava v AASA [2012] 2 CLC 684.

17. In *Rome*, the Court said (at 429) that disclosure would be ordered "*very rarely, and will require the clearest possible demonstration from the party seeking discovery that it is necessary for the fair disposal of the application*". The court should be reluctant to exercise intrusive powers over parties before its jurisdiction is established, particularly against those who may rightly dispute its jurisdiction and jurisdiction applications are usually dealt with by witness evidence only, and it would be "*most undesirable, and productive of extra delay and unnecessary expense, if applications for discovery were to become a common feature*".

18. The Defendant cited indications from the Claimant that he already accepts he has material which passes the threshold of a 'plausible (if disputed) evidential basis' for jurisdiction. The examples come from the evidence filed for the Claimant in relation to both (a) "Crossbridge" which is said to be an entity invested in by the Bank to enable business to be done relating to the UK (thus suggesting that the Activities Requirement may be met), and in relation to (b) "the London Desk" referred to by current or former employees in their social media profiles, also as indicative of the Bank having directed or carried out commercial activities in this jurisdiction for the purposes of the CJJA gateway. To summarise the key evidential points on Crossbridge and the London Desk:

- The 2nd witness statement of Mr Shear at para.37 states that Mr Silver's evidence (for the Bank) in relation to Crossbridge Capital (an entity which is alleged to have been invested in for the purpose of UK activities by the Bank) is "*simply unsupportable*" and that "*Crossbridge Capital's website shows that Mr Silver's assertions … are wrong and misleading*."

- The same statement gives evidence that *"[i]t is readily apparent that there are substantial problems with the Defendant's evidence in relation to the Activities Issue*" and that "*the Claimant has been able to satisfy himself that the CJJA applies based on inferences that he has properly drawn*". *"[i]t cannot be disputed that there is documentary evidence showing that the Defendant was intending to establish a branch and/or direct activities in the UK. There is then clear evidence that the Defendant made the investment in question, and indeed still holds the shares*" (w/s para. 55).

- *"[i]t is therefore readily apparent that the version of events given by Mr Ghazaleh is subject to serious challenge*." (w/s para. 59)

- The Claimant exhibited a decision on behalf of the Registrar of the UK Intellectual Property Office (dated 26 September 2001) in trademark proceedings which refers to the "London Desk" and produced a new exhibit with affidavits made on behalf of Banque Audi (Suisse) SA which related to registration of the "Audi" trademark in the UK[1], the second of which refers to a "London desk".

19. Hence says the Defendant: If the Claimant already has sufficient evidence such that Mr Shear feels able to say that "it cannot be disputed" at least that that there is evidence contradicting the Bank's case, that Mr Ghazaleh's evidence is "subject to serious challenge" and that the Bank's assertions are "implausible and unsubstantiated" and "unsupportable" and "wrong and misleading", then he cannot surely at the same time say that he needs further disclosure in order fairly to argue his position, given the rather modest level of the limbs in *Kaefer.*

20. In a second limb of argument the Defendant in any event argues that many of the documents sought are not actually within the scope of disclosure CPR 31.12 since they are merely 'potentially' relevant and that under the provisions of CPR 31.14 none of the documents listed in the draft order are in reality actually referred to in pleadings or statements, etc sufficiently specifically to give rise to a right to

[1] The well-known car manufacturer objected to the use of "Audi".

disclosure and that in any event proportionality has to be applied in any disclosure exercise including under CPR 31.14.

Claimant's case

21. The Claimant's case is that whilst there is no dispute that the Claimant is a customer, the contractual history of his relationship with the Bank has meant that various sets of contractual terms have been signed at various times. He became a customer of Audi Private Bank SAL in 1994 (the Private Bank), but the Private Bank was (or had become) part of the Defendant's group from no later than 2005. Thereafter he says that in November 2016, he entered into a number of further contracts with the Private Bank. Specifically, he signed various contractual documents, including General Account Terms and Conditions, and an "Application Form to Open Account for Individual". On 1 July 2019, he opened a fiduciary deposit account with the Private Bank and on 24 December 2020, the Private Bank and the Defendant merged, making the Claimant a customer of the Bank directly, rather than of the Private Bank.

22. The Claimant holds a significant sum of money with the Defendant. On 22 August 2022, he requested that the Bank perform a transfer of 24m USD to his account with UBP in Geneva. The Defendant has refused to comply, and the Claimant accordingly seeks the specific performance, and payment of loss and damage. The context is that the Lebanese banking crisis, which commenced in late 2019, has meant that banks in Lebanon have been refusing to make international transfers of sums held by their customers. During the crisis the Defendant says that "*virtually all Lebanese banks have had limited access to foreign currency which has significantly curtailed their normal operations*". However the Claimant relies on decisions of the High Court in England to the effect that customers of the Lebanese banks are entitled, under the law of Lebanon, to international transfers provided there is a sufficient balance and AML checks are complied with (Manoukian v Societe Generale de Banque au Liban and Bank Audi [2022] EWHC 669 (QB), Bitar v Bank of Beirut SAL [2022] EWHC 2163 (QB), Bitar v Banque Libano-Francaise SAL [2023] EWHC 17 (KB)).

23. The Court in *Manoukian* made its decision by reference to this very Defendant's standard terms and conditions, though it should be noted that jurisdiction was accepted in that case. It is therefore clear says the Claimant that in reality if jurisdiction is established in this case then the remainder of the claim will simply proceed to follow the established line of authorities as to the right to international transfer given the court's past interpretation of Lebanese law (I note that there is also a dispute between the parties as to the point in time at which the CJJA's requirement for the customer to be domiciled here applies on the proper construction of the Act). The Claimant says he moved to London on 28 October 2017. However, whilst there is a dispute over that, the issue does not affect this Disclosure Application which concerns disclosure said to be needed to go to the resolution of the question of whether the Activities Requirement is satisfied.

24. In that context the Claimant and the Defendant disagree as to the relevant dates for contractual purposes. The Claimant says that the relevant times for the purposes of the CJJA are 25 November 2016, 1 July 2019 and/or 24 December 2020. The Bank's case is that the only date on which the Private Bank contracted with the Claimant was in December 1994 but in any event the Bank denies that it or the Private Bank undertook relevant activity in this jurisdiction at any date whether 1994 or the dates referred to by the Claimant as contractually relevant.

25. A number of legal propositions relevant to the Jurisdiction application are referred to by the Claimant not because they must be determined in this disclosure application but because they are said to illustrate why the disclosure is relevant to issues which need to be determined in due course when the jurisdiction issue is decided. I do not need to determine them but I shall briefly set them out:

(1) the question of whether a consumer contract has been concluded is a question to be determined by reference to whether there was an assumption of reciprocal obligations. That is not the same as the question whether the transaction would be a contract by the proper law (Lebanese law). (Engler v Janus Versand GmbH [2005]I.L.Pr. 8). In this instance the Defendant and the Claimant disagree as to the law: the Defendant's position is that the Lebanese law position would make the 1994 terms applicable whereas the Claimant says that for the purposes of the CJJA what matters legally is the assumption

of obligations rather than the formal contract law position under Lebanese law.

(2) a professional can direct his activities to the consumer's country through another entity (Pammer v Reederei Karl Schlüter GmbH [2012] Bus LR 972 at [89]) (cf the requests for disclosure sought in relation to "Crossbridge Capital" and "the London Desk").

(3) the activity need not be directed towards the individual consumer in question.

(4) there is no need for a causal connection between the directing activity and the conclusion of the individual consumer's contract (Emrek v Sabranovic [2014] Bus. L.R. 104).

(5) whether or not someone is a consumer is an independent question of law dependent on whether they were contracting outside of their professional field (Chechetkin v Payward Ltd [2022] EWHC 3057 (Ch) at [42]-[43]).

(6) a contract can be a consumer contract solely by virtue of arising out of an earlier contract which was a consumer contract (Hobohm v Benedikt Kampik Ltd & Co KG [2016] QB 616 at [32]).

(7) it is not necessary for the claimant to be domiciled in the country at the time of the consumer contract, as long as he is domiciled there at the time of the Claim (mBank SA v PA [2020] I.L.Pr.37).

"Crossbridge Capital"

26. The Claimant seeks various documents in relation to Crossbridge Capital. He cites the Bank's 2015 Annual Report where it said that *"[a]t the level of Private Banking*" it was establishing a "*partnership with Crossbridge Capital based in London*" and thereby intended to "*establish a footprint in the United Kingdom which would support the Private Banking Development Strategy and future expansion to Sub-Saharan Africa and Latin America*"**.** He relies on the fact that the anticipated investment was indeed made in September 2015 and 2016 based on public material so that the Bank gained an interest in Crossbridge. Having set that out, he contrasts

his position with what he characterises as a blanket denial that activity took place and the partnership did not proceed.

"The London Desk"

27. The Claimant's evidence is that employees of the Bank's group gave sworn evidence in other proceedings confirming that the Bank set up a "*London Desk"* from 1994 to service its group's UK-based customers. He contrasts this with the Bank's position which in effect he regards as a blanket denial namely that its witness does not recall the London Desk. The Desk appears to have been in Lebanon. It is alleged not to have been registered with the Bank of England or to have contact with correspondent banks. Its task was said to be as a contact point for UK based clients. The Claimant says that this point especially shows information asymmetry between the Claimant and the Defendant when one considers that what matters for CJJA purposes is that the Bank's activity was directed to this jurisdiction rather than that activity was directed at the Claimant specifically. The Bank is in a far superior position in terms of documents which relate to those areas of alleged activity and the Claimant criticises the Defendant for its blanket denial of ever having heard of the London Desk.

28. The Claimant seeks disclosure of classes of documents appearing in the Annex to this judgment under CPR 31.12 (1)(c), (f), and (g)-(n) and under CPR 31.14 in the cases of those in paras. 1(a)-(f). Some of those relate to Crossbridge and the London Desk and others more broadly to contract terms and banking activities, and I shall deal with those item by item.

The law on specific disclosure orders under CPR 31.12 in jurisdiction disputes: Claimant's position.

29. The Claimant accepts that orders for specific disclosure are unusual in a case such as this and that there is a 'high threshold' but nonetheless (citing *Vedanta* as does the Defendant) it will be ordered in "exceptional circumstances" in limited terms. In particular (1) the applicant has to show at least an arguable case on the issue on which he seeks disclosure; and (2) the disclosure must be reasonably necessary for the just disposal of that issue on the jurisdiction issue (*Vava v Anglo African South Africa* [2012] 2 C.L.C. 684 at [14]; and *Rome v Punjab National Bank*

(No 1) [1989] 2 All ER 136 at 142B, *Owners of the Al Khattiya v Owners of the Jag Laadki* [2017] EWHC 3271 (Admlty) at [7].

30. In *Vava*, in particular a factor of significance was said by the Claimant to be that the respondent "*alone ha[d] access to the material relevant to determining [that issue]*" (the issue whether the Respondent's central administration was in England). The Court said at [69] that, "*At present, if no orders are to be made requiring AASA to produce documents or further information, there is a very great risk that the claimants will be contesting the jurisdiction issue at an unfair disadvantage and that must be addressed*".

31. In the cases in which disclosure has not been ordered (*Khattiya*, and *Punjab National Bank*) the essential approach was confirmed but the Claimant argues that the material sought in those cases was simply not reasonably necessary to determine the application before the court (*Khattiya*) or that the applicant had set out no evidence at all to show even an arguable case that the Defendant business had not ceased operation in the jurisdiction(*Punjab National Bank*).

The law on CPR 31.14: Claimant's position

32. It will be recalled that the Defendant's position in relation to those documents sought under CPR 31.14 as having been referred to in other material such as pleadings or evidence is simply that the documents in question cannot properly be said to have been mentioned in the manner anticipated by the rule. On this the Claimant's argument as to the expression "*mentioned in*" was that it "*is as general as could be [and is not] intended to be a difficult test."* (*Expandable Ltd v Rubin* [2008] 1 W.L.R. 1099 at [24]). Mentioning a document encompasses, says the Claimant, a direct allusion to that document or to a class of documents encompassing that document, such as to the Claimant's "*letters and bill heads*" (see *Dubai Bank Limited v Galadari* [1990] 1 WLR 731 per Slade LJ at 738C). Whilst there is a discretion to refuse inspection: *NCA v Abacha* [2016] 1 W.L.R. 4375 per Gross LJ at [30], the general rule is that ordinarily the other party will have a right to inspect the document [para 29]:

> "*The party who refers to the documents does so by choice, usually because they are either an essential part of his cause of action or defence or of*

significant probative value to him … the material provisions were evidently intended to give the other party the same advantage as if the documents referred to had been fully set out in the pleadings", and hence CPR r.31.14 "*reflects basic fairness and principle in an adversarial system; in accordance with the overriding objective, the parties are to be on an equal footing*".

Decision

General position in a jurisdiction dispute

33. It is in my judgment clear that specific disclosure in a jurisdiction dispute is not the norm and is in that sense exceptional. It should however be ordered when necessary to do justice between the parties but even then should be limited to that which is proportionate given the approach set out in *Kaefer* and discussed in *Kalo,* and the Overriding Objective itself.

34. The relatively 'broad brush' outlook of Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA [2019] 1 WLR 3514, summarised in Kalo v Bankmed SAL [2024] I.L.Pr 7 and which was quoted in the summary of the Defendant's position has much to recommend it as limiting disclosure. I shall repeat my own 'nutshell' summary of the approach there based on the longer quotation from *Kalo* (where disclosure was not sought and the court proceeded on the material it had):

> "the court's task on a jurisdiction question is to ask whether the Claimant has the better argument based on the material before the court, that forensic (evidential) limitations may well not prevent the court performing that task where the court using common sense can reach a view even if there is conflicting evidence, and lastly that if the court is simply unable to decide who has the better argument it is sufficient to find that "*there is a 'plausible (albeit contested) evidential basis' for the application of the gateway*.""

35. That I think must be the starting point, along with the exhortations of past courts that jurisdictional disputes should be as brief as the circumstances allow (optimistically perhaps, measured in hours) and that one must not have a 'mini trial'. One is aware of the dangers of excessive disclosure where the very question of jurisdiction to make orders at all or at least to determine merits is in itself in issue. If

courts in the common law world allowed wide documentary disclosure (or 'discovery' in other jurisdictions) before determining jurisdiction then there would be risks connected with forum shopping merely to obtain documents.

36. My judgment is that the case law and approach relied on by the Defendant can be reconciled with the Claimant's position fairly straightforwardly, however. Disclosure is indeed exceptional in a jurisdiction case, but the very fact that *Kaefer* and *Kalo* do place emphasis on evidence even whilst appearing to set a relatively low bar of 'plausibility' at the end of the process shows that this is still a matter where the court must consider at least adequate material for it to fairly apply the approach (relatively light touch though it may be) to the jurisdiction question.

37. To put it another way, the court should manage a jurisdiction disclosure question so as to balance the need for proportionality, swiftness and the light touch approach in *Kalo* (more or less being '*get on with it'*) with the need to have at the forefront of its mind the requirement of the Overriding Objective (relied upon by the Claimant but dismissed by the Defendant as not giving rise to a separate right of disclosure) that the court must deal with cases justly.

38. A classic case is the situation which we see here where the issue of jurisdiction relates to matters very much within the Bank's knowledge alone namely whether it directed activity to the UK, not specifically related to the Claimant's own relationship with the Bank (the Crossbridge and London Desk issues), or where the Bank holds the best evidence of the contractual terms applicable to the Claimant's banking relationship with it, as (it is said) varied from time to time. This was termed I think fairly as 'information asymmetry' by the Claimant.

39. The Claimant in my judgment has a prima facie, partially evidenced case for jurisdiction given what appears to be in the public domain as to "Crossbridge" and "the London Desk" and so one must ask whether disclosure is reasonably necessary to reach a just determination of a jurisdiction issue beyond the material already in hand. In my judgment it would also be unjust to require a claimant in a highly asymmetric evidential position as we see here to proceed without a level playing field in this instance. As long as it is proportionate to do so, in such a situation disclosure should be ordered sufficient to enable the issue to be decided justly. I therefore reject

the general submission that any disclosure should be refused, and will consider the various aspects of the draft order separately in relation to the court's powers under CPR 31.12, and 31.14. The Defendant is correct to say that the Overriding Objective does not in itself provide some additional power to order disclosure but I accept that it comes into play as part of the application of those and indeed all rules. It would not be 'overriding' if it did not, after all.

Specific parts of the order sought (including consideration of objections by the Defendant)

Crossbridge Capital (paragraph 1(g) of draft order, sought under CPR 31.12)

40. In my judgment the Crossbridge Capital issue is so clearly one which may determine the jurisdiction question, that disclosure is necessary for the just disposal of the application. The Claimant seeks copies of any agreements between the Bank, the Private Bank, any holding company or subsidiaries, and Crossbridge Capital, minutes of any meetings between the above and Crossbridge, minutes of board meetings at which investment in Crossbridge (which appears to be known to have taken place) was discussed, plans produced by any of the above as to the Crossbridge investment, and any minutes which show that a decision was made that the Crossbridge venture did not proceed. Archived web pages point to Crossbridge having been promoted in relation to activity in London including the presence of 10 employees.

41. Mr Shear's statements for the Claimant provides information from an investigator who has contacted a high net worth client and an employee of the Bank. At para. 31 (of his third statement) he explains that the individuals have remained anonymous due to safety issues in the Lebanon and reports of murder of people involved in the banking sector. His evidence (para. 60 of his second statement) is that those sources confirm that employees undertook business trips to the UK to meet high net worth clients resident in the UK and that the visits were required by the Bank to be paid for personally by the employees who were then reimbursed in cash. At least 3 such trips took place and clients met with representatives of Crossbridge.

42. On any basis considerably more than preparatory steps were taken by the Bank in relation to Crossbridge given the investments made and the stated purpose

of the proposed partnership, including the existence of Crossbridge's archived website promotional material referring to London, as well as the Annual Report of 2015, but there is as yet no more than a denial on the part of the Defendant which surely has access to any material relating to the project whilst the Claimant is in that respect in a grossly asymmetric position. I accept that there is some merit in the Defendant's position that the Claimant actually already has the material which he has found and can argue his case, but notwithstanding that point dealing with the case justly does in my judgment necessitate disclosure from the Defendant given its superior position in terms of information asymmetry.

43. It was said also that some of the requests relate to investment in Crossbridge and that there is no necessary nexus between an investment and the directing of a banking activity to the UK. Whilst that may be the case one must recall that the Bank's 2015 Annual Report stated that it was establishing a "*partnership with Crossbridge Capital based in London*" and thereby intended to "*establish a footprint in the United Kingdom which would support the Private Banking Development Strategy and future expansion to Sub-Saharan Africa and Latin America*" and so the likelihood that investment decisions were directly connected to establishing that London/UK 'footprint' and so very much relevant.

44. I accept the point made by the Claimant that those categories of documents do specifically and proportionately go to two sets of issues and that disclosure is necessary given the high degree of likely conclusiveness of the material and the significant information asymmetry between the Bank and the Claimant. The issues are (1) the extent to which Crossbridge Capital carried out activities which would meet the CJJA gateway and (2) the extent to which there is any substance in the Defendant's assertion that Crossbridge never 'got off the ground'. I have carefully considered the objection made also by the Defendant that the date range sought is some six years but given that the Annual Report of 2015 states that the Bank was establishing the partnership with Crossbridge at that point, any period less than that between 2014-2020 would be insufficient.

45. If on any return date the Defendant is able with particularity to state when the Crossbridge plan was abandoned then it may be possible to limit the date range if that falls within the period 2014-2020 and in a sense the Defendant has not helped

itself by failing to be clear as to what it means by the plan never having proceeded, if it would be in a position to say when that plan was abandoned.

I will accede to paragraph 1(g) of the draft order.

The London Desk (para 1(n) of draft order, sought under CPR r. 31.12)

46. The London Desk referred to in 2000 on behalf of "*the Banque Audi Group*" in Trade Mark proceedings[2]:

> "*The London Desk is based in Beirut as part of [the Bank's] business operations. It engages solely in private banking activities. […] The London Desk's task is to co-ordinate the activities of Banque Audi S.A.L. [i.e. the Bank] and to serve as a contact base for the UK based clients*" (emphasis added) (third affidavit of Dr Debbanné)

47. I accept that this evidence points to the possibility that activity was being directed to the UK. Here again we see significant information asymmetry such that it is the Bank which can, if it be the case, establish that there never was a "London Desk" or that if there was, it was not directing activity to the UK: the Claimant has a prima facie case. There is some risk that the material from the Claimant if unrebutted might even in its limited form on this point satisfy a judge that there is "a plausible evidential basis" for the CJJA gateway being met but nonetheless I consider that the value of the claim, the significance of any likely disclosure material and the imbalance of access to material between these parties makes it necessary to order disclosure of documents relating to the London Desk, so as to dispose of this application justly. The issues the material goes to are (1) the extent to which there was indeed a "London Desk", (2) the extent to which as its name arguably suggests it directed activity to or in London within the scope of the CJJA gateway.

[2] The London Desk was also mentioned in the Bank's website and reflected in a business card in evidence.

48. The scope of the order sought at para 1(n) of the draft is in my view too broad ("All documents referring to Bank Audi's London Desk.") and subject to any persuasive argument to the contrary over the ultimate form of the consequential order I am minded to direct that disclosure be given of any documents which relate: (i) to the creation of the London Desk; (ii) any decision not to create it; (iii) any decision to close it; and (iv) Board or committee minutes or notes which contain the expression "London Desk". A specific date range should be included and I or the Judge taking over this case following my retirement will hear any points on that. The date range of September 2000 to December 2020 was proposed at the 9 April 2024 hearing by the Claimant to limit the otherwise very broad scope of the draft.

49. I consider that my limitations as to the documents in relation to the London Desk (points (i)-(ii) above) suffice to make the scope proportionate but if the Defendant is able on any consequential hearing to be more specific as to the London Desk and when it was created or when it closed, rather than essentially limiting its position to saying its witness has no knowledge of it then it may be possible to limit the date range further.

Other documents sought under CPR 31.12 (draft order para 1(h) –(m))

50. Since the primary basis for disclosure of documents listed in paras 1(a)-(f) of the draft is CPR 31.14 I shall return to those below. In this section I deal with items 1(h)-(m) which are sought under CPR 31.12 alone.

51. The Bank maintains that the only relevant contractual date in this case is in 1994 when the Claimant first banked with them. There is an issue over that because the Claimant maintains that for the purposes of the CJJA test the court will need to look at three "relevant" dates. On his case these are that in November 2016, he entered into a number of contracts with the Private Bank, signing various contractual documents, including General Account Terms and Conditions, an "Application Form to Open Account for Individual", that thereafter on 1 July 2019, he opened a fiduciary deposit account with the Private Bank and lastly that on 24 December 2020, the Private Bank and the Defendant merged such that the Claimant became a customer of the Defendant directly.

52. Sub-paragraph (h) seeks disclosure of the Private Bank's marketing policies in place as at 25 November 2016, 1 July 2019 (the first and second of the periods above); and sub-paragraph (i) requests the Private Bank's marketing committee minutes for the periods 1 July 2016 to 30 June 2017 and 1 January 2019 to 31 December 2020 (the period of all three dates). The relevance says the Claimant is that marketing materials will or may provide evidence about how the Bank marketed itself to customers and whether that points to their being activity directed to the UK at any of the dates said to be contractually relevant. The Defendant's position is that there were no such materials.

53. In my judgment these requests are too close to a 'fishing' expedition, given the narrow focus one should have when ordering disclosure in a Jurisdiction dispute. The Bank has specifically given evidence that it "*did not have any policy or strategy to market or advertise its services to attract customers from the UK and did not carry out any marketing or advertising for that purpose*". I agree that if this were a trial then standard disclosure might encompass a search for any documents conflicting with the Bank's sworn denial but for the purposes of this application and given the prima facie strength of the points under *Crossbridge* and *London Desk* my judgment is that to order such a 'marketing material' search is not appropriate in the light of clear cautions in the case law as to conducting a mini trial and the relatively generous test in *Kaefer* where evidence is limited.

Draft Order sub-paragraphs (l) and (j)

54. In evidence for the Bank (Mr Ghazaleh (first w/s) para 69 and 109) it is said that in 2016 and 2019 the Private Bank opened 14 accounts where the customer had a UK address and the Defendant, in 2020 and 2021 some 85 such accounts. It is important to stress that merely having customers who happen to give an address in the UK is not automatically sufficient to show that the Bank directed activity to those customers within this jurisdiction: it could be for example that those customers were dealt with and 'onboarded' in Lebanon and that UK addresses were logged for other reasons. Nonetheless the evidence is consistent with activity directed to the UK and I do not regard the request as akin to 'fishing': it does not emerge out of thin air but

from the admission by the Bank that both it and the Private Bank opened accounts with UK addresses.

55. Given this evidence of the opening of accounts for customers giving UK addresses, disclosure should be made of the limited scope of material sought in 1(j) and (l) which may be redacted to cypher actual client names and addresses, whilst retaining an indication as to which addresses in any given document are UK or non-UK. The Claimant makes the strong point that if even one such customer was contacted in the UK for marketing and onboarding then the jurisdiction application may well be capable of being determined even on that basis.

Draft order sub-paragraph (k)

56. Sub-paragraph (k) requests the minutes of the Bank's Board of Directors; Board Group Risk Committee; Executive Committee; Asset Liability Committee; and Risk Management Committee from 1 September 2019 to 31 December 2020 inclusive.

57. The basis on which these are said to be within CPR 31.12 is that the Bank's evidence at para. 104 of Mr Ghazaleh's first w/s asserts that the Bank did not direct activity to the UK, in the light of a changed policy due to the Lebanese banking crisis.

58. In particular the Bank's Annual Report of 2020 which refers to the banking crisis stresses that effort was going to be made to seek 'fresh funds' – impliedly money which was from outside Lebanon. The Report says "*In addition and in common with other Lebanese banks, we introduced several measures to attract foreign liquidity or fresh funds*" and a further quotation in evidence from the Report states the banks aims as including "*Strengthening the foreign currency liquidity– To create an important buffer allowing to absorb turbulences*"; "*maximis[ing] the generation of net profits from outside Lebanon, further reinforcing the Bank's financial standing*" and "*To maintain and ensure a qualitative growth of the customer franchise outside Lebanon"*.

59. One can see that such material might well undermine the Defendant or assist the Claimant if it either showed there was no such change of strategy or if it contained the proverbial smoking gun as to what the Bank's strategy was and if that true strategy did include relevantly directed activity to the UK. It could go therefore both to credibility and substance. However I consider that this is, again, too close to a 'fishing expedition' It is no surprise that a Bank would seek external liquidity in a banking crisis confined to the Lebanon but at best that is consistent with directing activity to that end overseas generally and not necessarily to the UK. I will decline to make an order in the terms of 1(k).

Draft Order Sub-paragraph (m)

60. This request arises from references in "LinkedIn" profiles of (now) just two individuals who mention in their career history that they lived in London and worked for the Bank or related group entities. It seems to me that this is prima facie evidence which makes it proportionate and necessary for the Bank, which can surely readily and at minimal expense find out the relevant information, to disclose job descriptions of those two employees. (Ms Akkawi and Mr Tawfik, the former of whom has been registered to vote in London since 2014 lending credibility to the apparent accuracy of her profile). The Bank denies that Mr Tawfik ever worked for the Bank but accepts that he worked for a subsidiary of the Bank. Ms Akkawi it is accepted did work for the Bank but it is objected that employment files would contain confidential information.

61. Having relevant staff working in London is potentially determinative. Truly confidential information can if appropriate be the subject of redaction. If it be the case that Mr Tawfik worked for an Egyptian subsidiary and if that fact precludes the Defendant having power and control over the relevant material then it can say so and explain why in its disclosure statement (and the Claimant can consider whether to seek that material from the relevant subsidiary instead). I shall allow this part of the draft order, which involves modest expense and time.

Disclosure sought under CPR 31.14

Draft Order Sub-paragraph (a)

62. Sub-paragraph (a) is a request for "*the records of Audi Private Bank SAL (the "Private Bank") in relation to the customers mentioned in paragraphs 17 and 18 of the first witness statement of Mr Najm*". Mr Najm's first witness statement discusses the Bank's customer records in terms of broad references such as "*the data available*", "*the available records*" and "*Bank Saradar's records*". This is done so as to assert that the Private Bank was not directing any activity to the UK as at the 1994 Date.

63. It will be recalled that I have acceded to the request to disclose onboarding documentation in relation to the small number of customers for whom the Bank's records reveal UK addresses at the time periods relied on by the Claimant. The references in Najm 1 relate instead to records as at the 1994 date which the Bank maintains is the relevant date.

64. Whereas I consider that a generic reference to "the data available" would not amount to mentioning a document, I do consider that where a party purports to have checked records at a certain time and relies on that check for the purposes of asserting an absence of relevant activity directed to the UK, then the document has indeed been 'mentioned'. In *Hoegh & Anor v Taylor Wessing Llp &* Anor [2022] EWHC 856 (Ch) for example the case of *Galadari* relied on here by the Claimant was referred to and whilst nothing new legally arises from *Hoegh*, it is an example of application of a test which looks to the 'real' question whether a reference in evidence or a pleading is a reference to documents or classes thereof, or whether instead it is merely a reference to something which gives rise to an inference there are documents in which case it does not suffice. In this instance there is no doubt that the witness is referring to actual records and hence to documents.

65. It seems to me that this is sufficient reference to fall within CPR 31.14 and I shall not exercise my discretion to refuse because the documents referred to are specifically mentioned by the Bank in support of its position. The Defendant's position is that it does not have more than summary records so that such an order will lead to a null disclosure statement in relation to anything else and that in any event 1994 is not a date relied on by the Claimant but rather it is a date which it (the

Bank) relies on. Whether or not that is the case, such a disclosure statement is only signed after a proper search, and that is not a requirement where a witness statement is made, so whether or not this leads to a null return, disclosure should be given in the usual way of the 1994 client records which relate to only a handful of clients based on Mr Najm's evidence (or if not in existence, their disposal or other fate). I do not think that the fact that the Bank rather than the Claimant asserts that 1994 is the relevant date makes any difference to the principle that these documents have been referred to and relied on and that it is proportionate and necessary that they be disclosed so as to ensure a level playing field.

66. Equality of arms and fairness demands that disclosure be given. I accede to para 1(a) of the draft order. Redactions may be made to conceal names and addresses but cyphers should be used so as to ensure that it is clear where a reference is made to a UK or non-UK location.

Draft Order Sub-paragraph (b)

67. Sub-paragraph (b) is a request for "*The customer facing materials produced by the Private Bank as at 22 December 1994*". The existence of such materials are mentioned in w/s Najm 1 where he observes that they were not published in English. This in my judgment amounts to a compendious reference as part of the Defendant's rebuttal of the application and hence one which does fall within rule 31.14 (*Smith v Harris*). The Defendant objects that this is not in reality a reference to specific material intended to be disclosed by the Defendant and that it would be a substantial quantity of material. But in my judgment these materials are plainly relied on by the Defendant and equally should be disclosed, and are necessary so as to do justice between the parties but in the interests of proportionality I shall direct that such documents be disclosed as were in use 6 months before and up to six months after 22 December 1994 and which refer to the United Kingdom, London, or any part of the UK. The Defendant asserts that it actually has no such materials any longer: if that be the case then no doubt after a proper search that can be confirmed if true, with a statement of truth in the usual way on a disclosure statement with the basis of belief as to what became of them. Further the Defendant objects that the expression 'customer-facing materials' is not clear: but with respect that is the expression used by it in evidence.

Draft Order Sub-paragraph (c)

68. Sub-paragraph (c) requests "*[a]n unsigned copy of the Private Bank's Fiduciary Management Agreement as at 1 July 2019*". This document is mentioned in footnote 3 of Ghazaleh 1:

> "*I note that the Fiduciary Deposit Letter refers to a Fiduciary Management Agreement. However, the Bank has not been able to locate a copy of any such agreement signed by Claimant.*"
>
> The Bank has also stated that it has not identified "*any unsigned versions or drafts of the Fiduciary Management Agreement that were ever negotiated, agreed, or exchanged between the parties"*.

69. In my judgment this does fall within both CPR 31.14 as a document or class of document and CPR 31.12. The asserted fact that the Bank has not located a specific signed or unsigned version relating to the Claimant is only part of the point: to be directing activity to the UK the Bank need only be shown to have done so for other customers. It is appropriate for the Bank to be ordered to disclose the form(s) of Fiduciary Management Agreement in use by it at the relevant date (1 July 2019). Such documents can, based on the Bank's evidence that such was referred to in the Fiduciary Deposit Letter be expected both to exist and to be directly relevant to the direction or non-direction of activity to the UK and necessary for the fair determination of this case.

70. The reference in evidence is, albeit carefully confined, to an agreement between the parties, but the reference in my judgment is sufficient to be a reference that such terms did exist and were entered into in documentary form in the course of the Bank's client relationships. I would also allow this part of the order under CPR 31.12 in any event, but the order should be made clear that it refers to any standard form agreements in use at that time and not merely to one which specifically related to the Claimant. This again reflects the fact that the CJJA gateway is not specifically aimed at activity towards the Claimant but to the activity of the bank generally.

Draft Order Sub-paragraph (d)

71. Sub-paragraph (d) requests "*[t]he records of: (1) Bank Audi in 2020-2023; and (2) the Private Bank in 2016-2019, concerning accounts opened by UK-resident customers, specifically the on-boarding documentation of UK-resident customers and files referencing the manner of the UK resident customers' on-boarding.*"

72. The Defendant objects that this is not intended to be a reference to all records of the Bank but I accept that a subset of the Bank's records are sufficiently mentioned in the first w/s of Mr Ghazaleh at 119 and 111 as part of the Bank's assertion that no relevant activities were directed to the UK based on its examination of the records, such as they are, of customers who had UK addresses in particular. I have already above acceded to draft order 1(l) and (j) and will accede also to this request insofar as it extends to the records of the UK-addressed customers other than 'onboarding' documents which I have allowed under 31.12 for those customers. I accept the point that simply having a UK address is not automatically indicative that the customer is domiciled or resident in the UK but it is nonetheless the case that any domiciled UK customers would probably have such UK addresses. Redaction subject to cyphering is appropriate provided the relevant country information is preserved.

Draft Order Sub-paragraph (e)

73. This request concerns "*Bank Audi's customer-facing marketing materials in Arabic, French and English*", which are said to be mentioned at para 122 of Ghazaleh statement number 1. The Defendant says this is a very, very broad request. The Claimant offers to restrict this request to such of the Bank's customer-facing marketing materials as were published in the periods of 6 months before and after each of the Relevant Dates. I agree that the reference is a compendious one akin to that in *Smith v Harris* and that the mere fact that it is compendious does not prevent it from being a reference. Taking into account the proposed narrowing of scope to maintain proportionality I shall allow this part of the order as reasonably necessary but it shall be confined to disclosure of any such materials which refer to the United Kingdom, London, or any part of the UK.

Draft Order Sub-paragraph (f)

74. This request concerns "*Bank Audi's standard terms and conditions as at 24 December 2020*", which are mentioned in the first witness statement of Adam Silver at para. 28. Silver 1 states "*BCLP also stated that the Bank had 'failed to provide the Bank's terms and conditions as at the merger of the Bank with Audi* Private Bank SAL', the so-called 'Merger Terms and Conditions'." In effect Mr Silver for the Bank is merely using an expression used by the Claimant's lawyers and mentioning their assertion that his client had failed to provide disclosure. It is the Claimant's term, not the Bank's.

75. I regard a reference of this sort (which is simply a reference to an assertion by the Claimant's side about a class of documents) as not being a reference by the Defendant to that class for the purposes of rule 31.14. If such a reference (adopting an expression used by an opponent) were to be sufficient for CPR 31.14 then more or less any discussion in evidence of a document or class asserted by an opponent to exist would bring in CPR 31.14. Even perhaps a simple denial that a class of documents exists, in reply to an assertion by an opponent, would amount to a mention of that class, which is a paradoxical effect not in my judgment intended by the rule. I refuse disclosure under rule 31.14.

76. I do however consider that the request should be granted under CPR 31.12. The Claimant's case is that the standard terms and conditions in force at 24 December 2020 have clear relevance to the Claimant's wider case on jurisdiction since that was the point at which the Private Bank and the Bank merged.

77. I accept that it is necessary and proportionate to allow disclosure under 1(f) and indeed since the Claimant was a customer of the Bank at the time one would have expected in the furtherance of the Overriding Objective for there to be little opposition to the Bank disclosing standard terms on offer to customers at that date even if it contends that in the case of this customer only a much earlier set of terms is relevant. The terms are required to ensure a level playing field given the information asymmetry in play here and the cost and trouble of disclosing such material is minimal set against the large value of this claim. The Defendant alleges there were no such new terms and conditions in 2020 (impliedly even as to new

customers) when the merger of the Private Bank and the Defendant took place. If so, then no doubt it will after a proper search set out that position in its disclosure statement. If the standard terms in use in 2020 were the same as those in 2016 then no doubt that will be said.

Conclusions

78. If the parties can agree a consequential order then there need be no attendance at handing down. I am conscious that for some of the terms of the draft order which I have allowed, there is a question as to exact phrasing and date ranges which I consider needs to be addressed. For example 1(a) directs disclosure of the records of Audi Private Bank SAL in relation to the customers mentioned in paragraphs 17 and 18 of the first witness statement of Mr Najm. Those customers may well be longstanding and it would be appropriate to limit disclosure so as to cover only material relevant to the question of direction of activity towards them and not, simply, to all documents relating to them whenever generated.

79. Either I or such judge as replaces me in this case will hear submissions as to the exact form of order in terms of date ranges or more precise description. I have of course already given an initial view in relation to the unacceptable breadth of the request in relation to the London Desk and a proposed approach to that aspect.

80. For that purpose and to ensure proportionate cost, the Parties shall liaise over producing costs budgets for the disclosure process based on proposals by the Claimant and the Defendant as to the form of order if the two sides produce different forms of proposed words at any handing down, since whilst this is a large case the court must still consider the costs implications of any disclosure exercise.

Victoria McCloud

ANNEX – order sought for disclosure (per Claimant's application notice 13 October 2023 before any modifications proposed later)

1. Bank Audi shall, by 4pm on [21 days from the date of the hearing], provide to the Claimant disclosure and inspection of the following documents in its possession or control:

    a. The records of Audi Private Bank SAL (the "**Private Bank**") in relation to the customers mentioned in paragraphs 17 and 18 of the first witness statement of Mr Najm.

    b. The customer facing materials produced by the Private Bank as at 22 December 1994.

    c. An unsigned copy of the Private Bank's Fiduciary Management Agreement as at 1 July 2019.

    d. The records of: (1) Bank Audi in 2020-2023; and (2) the Private Bank in 2016-2019, concerning accounts opened by UK-resident customers, specifically the on-boarding documentation of UK-resident customers and files referencing the manner of the UK resident customers' on-boarding.

    e. Bank Audi's customer-facing marketing materials in Arabic, French and English.

    f. Bank Audi's standard terms and conditions as at 24 December 2020.

    g. As to Crossbridge Capital, in the period 1 January 2014 to 31 December 2020:

        i. Any agreement signed with Crossbridge Capital (whether by the Defendant, the Private Bank or BAPB Holding Limited ("**BAPB**") or other subsidiary of the Defendant), including any partnership agreement.

ii. Any minutes of meetings between any of the Defendant, the Private Bank or BAPB (or other subsidiary of the Defendant) with Crossbridge Capital.

iii. The minutes of the Defendant's and/or the Private Bank's and/or BAPB's (or other subsidiary of the Defendant's) board meetings at which the investment (or potential investment) in Crossbridge Capital was discussed.

iv. The plans produced by any of the Defendant, the Private Bank or BAPB (or other subsidiary of the Defendant) for the planning phase of the investment in Crossbridge Capital.

v. The minutes of the meetings of the Defendant, the Private Bank or BAPB (or other subsidiary of the Defendant), if any, at which it was decided that an investment in Crossbridge Capital should not proceed.

h. The Private Bank's marketing policies in place as at 25 November 2016 and 1 July 2019.

i. The Private Bank's marketing committee minutes for the periods 1 July 2016 to 30 June 2017 and 1 January 2019 to 31 December 2020.

j. The onboarding documentation for the Private Bank's customers who were UK-resident in 2016 and 2019.

k. The minutes of Bank Audi's Board of Directors; Board Group Risk Committee; Executive Committee; Asset Liability Committee; and Risk Management Committee from 1 September 2019 to 31 December 2020 inclusive.

l. The onboarding documentation for Bank Audi's customers who were UK-resident in 2020 and 2021.

m. The job descriptions of the individuals referred to in the second witness statement of Mr Shear at paragraph 72.

n. All documents referring to Bank Audi's London Desk.