Neutral Citation Number: **[2025] EWHC 440 (KB)**

Appeal Ref: KA-2024-000195
Case No. KB-2023-001038

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2025

Before :
Mr Justice Dexter Dias

- -

Between :

SHEIKH MOHAMMED OMAR KASSEM ALESAYI	**Claimant/ Respondent**
- and –	
BANK AUDI S.A.L.	**Defendant/ Appellant**

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- -

Bobby Friedman and Caspar Bartscherer (instructed by Bryan Cave Leighton Paisner LLP)
for the **Claimant/Respondent**
Ian Wilson KC and Rebecca Zaman (instructed by Dechert LLP)
for the **Defendant/Appellant**

Hearing dates: 27-29 January 2025
(*Judgment circulated in draft: 21 February 2025*
Final judgment circulated: 26 February 2025)

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JUDGMENT

Remote hand-down: this judgment was handed down remotely at 10.30 am on Friday 27 February 2025 by circulation to the parties or their representatives by e-mail and release to the National Archives.

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The Hon. Mr Justice Dexter Dias

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Mr Justice Dexter Dias :

1. This is the judgment of the court.

2. To assist the parties and the public to follow the main lines of the court's reasoning, the text is divided into eight sections, as set out in the table of contents above. The table is hyperlinked to aid swift navigation.

I. *Introduction*

3. This is an appeal of interlocutory case management orders in a jurisdiction challenge. The appealed orders are disclosure orders made under the Civil Procedure Rules 1998 ("**CPR**") Parts 31.12 and 31.14 on 29 July 2024 by Master McCloud (the "**Judge**" and the "**McCloud Order**").

4. The relevant facts can be stated succinctly. Equally, the underlying facts of the cited authorities need little amplification or exploration at this point. Given the urgency of the matter with the substantive jurisdiction challenge hearing listed for April, the court has decided to provide its analysis as soon as available to assist the parties.

5. The claimant in the main action and respondent in the appeal is a Saudi Arabian national who has become a British citizen having previously been

granted indefinite leave to remain in the UK (the "**respondent**"). The appellant/defendant (the **"appellant**" or the **"Bank**") is a joint stock company based in Beirut, Lebanon that provides banking services ("S.A.L." denoting "Societé Anonyme Libanaise", a recognised Lebanese corporate structure). The appellant is represented by Mr Wilson KC and Ms Zaman of counsel; the respondent by Mr Friedman and Mr Bartscherer of counsel. The court is indebted to all counsel for their evident industriousness and the high quality of their submissions which have greatly assisted.

6. The respondent holds 10 accounts (both US dollar ("USD") and Lebanese pounds ("LBP")) with the defendant Lebanese bank. By a letter dated 22 August 2022, the respondent asked the Bank to transfer certain of his funds to bank accounts at his nomination in Switzerland. By a letter dated 5 September 2022, the Bank refused to comply with the transfer request. The respondent states that he is a consumer domiciled in the UK and has a consumer contract for banking services with the appellant. As such, and because the appellant directed banking services to the UK, he maintains, he is entitled to serve the appellant out of the jurisdiction as of right. He seeks, as a matter of Lebanese law, a mandatory order (specific performance) from this court requiring the appellant to transfer the full USD balances from Lebanon to his nominated accounts in Geneva.

7. For its part, the appellant disputes the jurisdiction of the English court. It filed a jurisdiction challenge under CPR Part 11 on 25 July 2023. The Bank relies on the terms of the banking contract which contain, it is said, an exclusive jurisdiction agreement in favour of the Lebanese courts. The Bank maintains that the claim is in fundamental breach of contract. I note, as stated in the much-cited case of *Pammer v Reederei Karl Schluter GmbH & Co AG; Hotel Alpenhof GesmbH v Heller Joined cases* (C-585/08 & C-144/09) EU:C:2010:740 ("*Pammer*"), that to satisfy the directed activities test, there is no requirement for the trader (here the Bank) to direct the activities "in a substantial way" (para 82). The disclosure goes to this contested component of the jurisdiction question: whether the defendant directed activities to England and Wales. I add that a further dispute is whether the respondent is domiciled in this jurisdiction. The respondent served the Bank out of the jurisdiction under section 15B(2)(b) of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"). Fundamental to jurisdiction is the "Activities Requirement" under section 15E and in particular subsection (1)(c):

> **"15E Interpretation**
> (1) In sections 15A to 15D and this section—
>
> "consumer", in relation to a consumer contract, means a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession;
>
> "consumer contract" means—
>
> …
>
> (c)
>
> a contract which has been concluded with a person who—

> (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 other parts of the United Kingdom including that part,
> and which falls within the scope of such activities"

8. Therefore, in circumstances of directed activities, a consumer may bring proceedings against the other party to a consumer contract "in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract)" and thus here would, if established, grant this court jurisdiction to order the specific performance applied for.

9. Following the Part 11 challenge, the claimant filed an application for disclosure on 13 October 2023. Disclosure was granted in part by Master McCloud on 29 July 2024 and in part refused. On 11 October 2024, the defendant bank applied for permission to appeal.

10. Following leave granted by Cotter J (order 13 December; sealed 16 December 2024), the appellant/defendant appeals disclosure granted in two orders. The first is the McCloud Order; the second the Order of Master Armstrong dated 27 September 2024 (the "**Armstrong Order**"). Each order follows and is materially derivative of the judgment of the Judge handed down on 30 July 2024 (the "**Judgment**"). The McCloud Order ordered the Bank to disclose 16 classes (and/or sub-classes) of documents. The appellant submits that such an order is "extraordinary" and "the Bank is not aware of any other reported decision in which such extensive disclosure has been ordered in a jurisdiction challenge."

11. I add two initial contexts. First, this is one of several similar claims in which claimants with funds in Lebanese financial institutions have come to this court seeking various forms of relief, animated by the banking crisis in Lebanon (see jurisdiction challenges in *Khalifeh v Blom Bank SAL* [2021] EWHC 3399 (QB) ("*Khalifeh*"); *Bitar v Banque Libano-Francaise SAL* [2021] EWHC 2787 (QB); *Kalo v Bankmed SAL* [2024] EWHC 2606 (Comm) ("*Kalo*")). This extensively documented financial crisis came to a head in 2019 and resulted in de facto restrictions on the transfer of foreign currency out of Lebanon. The crisis, much commented on internationally, has been summarised by this court in several judgments. I gratefully adopt the account provided by Picken J as at March 2022 (*Manoukian v. Société Générale de Banque au Liban and Bank Audi SAL* [2022] EWHC 669 (QB)), proximate in time to the sealing of this appellant's claim form on 22 February 2023, and some five months prior to the claimant's transfer request to the Bank. Picken J said at paras 20-22:

> "20. The crisis's immediate catalyst was nationwide political unrest in the autumn of 2019, triggered by a proposal by the government to tax calls made by WhatsApp. Due to that unrest, which included protests, street riots and roadblocks, Lebanese

> banks were closed for two weeks between 18 October 2019 and 31 October 2019. ….. When the banks reopened on 1 November 2019, there was a run on all Lebanese banks, with large numbers of clients attempting to withdraw all their foreign currency or transfer it all abroad.
>
> 21. ….. At the time, the Banks thought that the crisis would be shortlived and that clients' loss of confidence resulting from the protests and the October 2019 bank closures would be restored. Instead, the crisis deepened, due to problems at a macro-economic level in Lebanon.
>
> 22. Systemic issues within Lebanon's banking sector mean that Lebanese banks are highly exposed to fiscal issues with the Lebanese state. This is because Lebanese banks rely heavily on the Banque du Liban ('BdL'), the central bank, for their foreign currency liquidity. As the crisis unfolded, however, it meant that BdL could in practice 'turn off the taps' by restricting Lebanese banks' access to their foreign currency deposits for international transfers. The net result is that the Banks (along with all other Lebanese banks) have been operating with severe foreign currency shortages since October 2019. Lebanon's economic turmoil and political unrest have worsened since then, the Lebanese pound (LBP) having lost 90% of its value amid dwindling confidence in the Lebanese economy, which has itself shrunk by 40% …"

12. This is what lies behind the claim. Indeed, like this respondent, many others share the desire as account-holders to transfer their funds stranded in Lebanese banks out of Lebanon. It is an important context.

13. Second, I am informed that there are still other claims sitting behind this one, and certainly one in which a stay has been granted pending this court's decision.

14. Two connected elements to this appeal arise: a challenge based on the correct legal test and challenges to the individual disclosure orders granted. I subdivide the judgment into those distinct components accordingly, determining first the applicable legal test (Part One) before turning to the individual disclosure orders (Part Two). To set the scene, I detail the grounds of appeal.

II. *Grounds of appeal*

15. The appellant pleads seven grounds of appeal:

> **Grounds 1-2**: The Judge erred in law in her identification and application of the test for specific disclosure under CPR r. 31.12 in the context of a jurisdiction application.
>
> **Ground 3**: The Judge erred in law in her identification and application of the test for disclosure under CPR r. 31.14 (generally and in the jurisdiction context).
>
> **Grounds 4-5**: The Judge failed to take into account relevant factors in exercising her discretion to order disclosure and the exercise of that discretion was perverse.
>
> **Ground 6**: There were serious procedural irregularities in the making of the Judgment and McCloud Order which render them unjust.
>
> **Ground 7**: There are other compelling reasons for this appeal to be heard. [Essentially, a permission argument.]

16. The appeal is brought under CPR Part 52. This provides, as relevant:

> **"Hearing of appeals**
> **52.21**
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
> (a) a practice direction makes different provision for a particular category of appeal; or
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
> (2) Unless it orders otherwise, the appeal court will not receive—
> (a) oral evidence; or
> (b) evidence which was not before the lower court.
> (3) The appeal court will allow an appeal where the decision of the lower court was—
> (a) wrong; or
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

17. This appeal proceeded by way of review and not re-hearing. No fresh or further evidence was provided.

PART ONE: Legal test

III. *Legal test: rival arguments*

18. **Appellant**. The two-stage disclosure test proposed by the claimant is "wrong" and "is not the test". The "central test in jurisdiction cases" is "exceptional circumstances" (also styled as "exceptionality"), as stated by the Supreme Court in *Lungowe v Vedanta Resources Plc* [2020] A.C. 1045 ("*Vedanta*"),

citing *Rome and another v Punjab National Bank* [1989] 2 All ER 136 ("*Rome*"), and was also used in *Vava v AASA* [2012] 2 CLC 684 ("*Vava*"). It is submitted that "The central and critical flaw in the reasoning in the Judgment is that there were no 'exceptional circumstances' justifying disclosure" and "The Judgment does not even purport to identify any." The appellant submits that there is a clear and unsalvageable legal error by the Judge. The McCloud Order must be set aside. The Armstrong Order, founded on the erroneous legal analysis in the Judgment, must be similarly reversed.

19. **Respondent**. The Judge set out the correct legal position. The appellant misconstrues the test in *Rome*, which is a simple two-stage test and does not require exceptional circumstances. Instead, the appellant seeks to "tie up in knots" what is a clear test, correctly identified by the Judge, confounding the issue with stark warnings about "floodgates". The decisions of the Judge and her exercise of discretion are unassailable. The Armstrong Order should also remain intact. The appeal must be dismissed in its entirety.

IV. *Legal test: discussion*

20. My point of departure is to note what the Judge said about the rival conceptions of the governing test. She states at para 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."

21. I cannot agree. The formulations advanced by the parties are fundamentally and irreconcilably different not only in expression but content. Either the test is a unitary one of exceptionality (appellant's submission), wherein the Judge should identify the circumstances of exceptionality, or it is the two-stage test in *Rome*, where once there is a prima facie (if partially evidenced) case on jurisdiction (on "partially evidenced" see *Four Seasons v Brownlie* [2017] UKSC 80 ("*Brownlie*") at para 7 and below), the remaining disclosure condition is whether the material sought is reasonably necessary for the just disposal of the jurisdiction application (respondent's submission).

22. I find it necessary to trace the evolution of the test (or tests) applied in the cited cases to understand the proper content of the applicable test in law. The survey begins in 1989 in the Queen's Bench Division and culminates in a Supreme Court decision in 2020, followed by a further decision of this court in 2023, an analysis ranging therefore over 30 years. I further subdivide the discussion into two parts (A) the evolution of the applicable test; (B) the court's analysis of the referenced cases, resulting in identification of the correct legal test.

A. Evolution of the test

23. The starting-point is the formulation of the disclosure test for jurisdiction challenges set out in *Rome*. There the claimant (then plaintiff) applied for an order for disclosure ("discovery") of documents in an action against Punjab National Bank ("PNB") for repayment of monies paid under insurance contracts. PNB contended that it had no place of business in Great Britain when the writ was served and disputed the court's jurisdiction. The court dismissed the disclosure application. Where the question of proper service is raised, the plaintiff had to establish it had been properly effected as a prerequisite to provide the court with the necessary jurisdiction. While the court had jurisdiction to make the disclosure order sought, it would only exercise such power rarely and required the clearest possible demonstration that discovery was necessary for fair disposal of the application. The court was inherently reluctant to place such a burden on a defendant which disputed jurisdiction. Further, applications for discovery, if commonly pursued, were likely to lead to delay and expense. The applicant/plaintiff failed to show that the order was necessary for the fair disposal of the application.

24. The respondent here submits that "irrespective of the genesis of the two-stage test", it has been applied in "case after case". However, it seems to me that the legal origins of the test enunciated by Hirst J in *Rome* are of significance. Hirst J states (8j-9a):

> "I wish to stress that, as counsel for the plaintiffs himself accepts, the court will only exercise its powers under this heading 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. I say this for two reasons. In the first place, the court is naturally reluctant to place such a burden on a defendant who disputes the basic jurisdiction of the court, for the reasons put forward by counsel for the defendant. Secondly, applications under Ord 12, r 8 are a fairly common feature of court business, most particularly in the Commercial Court when dealing with applications to set aside leave granted ex parte under Ord 11 for service out of the jurisdiction, and they are normally dealt with by a hearing on affidavit evidence (see The Supreme Court Practice 1988 vol 1, para 12/7–8/5). It would be most undesirable, and productive of extra delay and unnecessary expense, if applications for discovery were to become a common feature in such cases."

25. Order 12, rule 8 provides:

> "Discovery to be ordered only if necessary
> 8. On hearing of an application for an order under rule 3, 7 or 7A the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make an order if and so far it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

26. One sees here where the terms used by Hirst J came from and how the necessity test is grounded in the explicit wording of the relevant pre-CPR order. The next case the parties placed before the court is *Vava.* At para 63, Silber J sets out the test in *Rome,* prefacing it by saying:

> "**IV. Second limb – Are the orders sought in the Part 18 Request and for disclosure reasonably necessary for the fair disposal of the jurisdiction issue?**
>
> 63. I have already set out the appropriate rules in paragraphs 8 and 12 above and the threshold for making orders at this stage is a high one. Indeed Hirst J explained in the pre-CPR case of *Rome* [et cetera]."

27. Silber J said of applications under CPR 31.12:

> "13. Such an application under this rule may be made at any stage of the proceedings: see White Book, paragraph 31.12.1.1. The court will take account of all the circumstances of the case and the overriding objective in CPR Part 1, which of course require that cases be dealt with justly and, among other things, in a way that ensures that the parties are on an equal footing: PD 31A, paragraph 5.4."

28. I add the relevant passages from the Practice Direction:

> "PD31A:
>
> Specific disclosure
> **5.1** If a party believes that the disclosure of documents given by a disclosing party is inadequate he may make an application for an order for specific disclosure (see rule 31.12).
> **5.2** The application notice must specify the order that the applicant intends to ask the court to make and must be supported by evidence (see rule 31.12(2) which describes the orders the court may make).
> **5.3** The grounds on which the order is sought may be set out in the application notice itself but if not there set out must be set out in the evidence filed in support of the application.
> **5.4** In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with.
> **5.5** An order for specific disclosure may in an appropriate case direct a party to –

> (1) carry out a search for any documents which it is reasonable to suppose may contain information which may–
> (a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or
> (b) lead to a train of enquiry which has either of those consequences; and
> (2) disclose any documents found as a result of that search."

29. Then Silber J states at para 14:

> "14. It is common ground that this application raises two issues which are:
> (a) Can the claimants show at this stage that their case on jurisdiction (viz. that they have a good arguable case that the defendant's central administration and/or its principal place of business is in England) is at least arguable?
>
> (b) If so, are the orders sought reasonably necessary for the fair disposal of the jurisdiction issues (as described at (a) above)? In particular:
>
> > (i) Are the Part 18 Requests reasonably necessary and proportionate to enable the claimants to prepare their own cases and understand the case they have to meet?; and
> >
> > (ii) Is the request for disclosure necessary and proportionate, in all the circumstances of the case, and having regard to the overriding objective, to assist the claimants in their case?"

30. The appellant emphasises that Silber J proceeded on the basis of the "common ground" between the parties without deciding the matter independently after argument. While in the cited statement of the test Silber J does not mention the source of the formulation, this is dealt with later in the judgment. He continues with his analysis, turning to what he calls the "Second Limb" of the test, at para 63 (as I cite at para 26 above).

31. Therefore, Silber J relied on *Rome*, but did not independently rule on the issue following dispute between the parties, and on that the appellant is correct. To underscore this point, I note that Silber J cites from the judgment of David Steel J in the post-CPR case of *Harris v Society of Lloyd's* [2008] EWHC 1433 (Comm) ("*Harris*"). Silber J continues at para 64:

> "64. David Steel J endorsed this approach after the CPR came into force, when he said in *Harris v Society of Lloyd's* [2008] EWHC 1433 (Comm) at paragraph 10 that:
>
> > 'It is well established under the previous procedural rules that the power to order disclosure for the purpose of interlocutory proceedings should be exercised

> sparingly and then only for such documents as can be shown to be necessary for the just disposal of the application: *Rome v Punjab National Bank* [1989] 2 All ER 136. There are good reasons for concluding that the same if not a stricter approach is appropriate under the provisions of CPR'."

32. For completeness, one might add that in *Harris*, David Steel J referenced at the end of his judgment a similar formulation by this court in an earlier case. He said at para 28, citing para 25 of *Fiona Trust Holding Corp. v Privalov* [2007] EWHC 39:

> " '25. It is of course open to the court to order disclosure at any stage of the proceedings, including for the purpose of interlocutory proceedings. But it is well established under the previous procedural rules that such a power should be exercised sparingly and only for such documents as can be shown to be necessary for the fair disposal of the application; see *Rome v. Punjab National Bank* [1989] 2 All England Reports 136. There are no reasons for concluding that any different approach is appropriate under the provisions of CPR: see *Disclosure, Matthews and Malek 2nd Edition Para 2.68.*': *Fiona Trust Holding Corp. v. Privalov* [2007] EWHC 39."

33. It should be noted that neither Silber J nor David Steel J held that the governing test was exceptionality. However, exceptional circumstances are later mentioned by the Supreme Court in *Vedanta*, a case we must come to. Following *Vava*, Andrew Baker J handed down a judgment in *Owners of the Al Khattiya v Owners of the Jag Laadki* [2017] EWHC 3271 (Admlty) ("*Al Khattiya*"). At para 5, Andrew Baker J said:

> "The defendants' stay application is due to be heard in February 2018. The defendants apply now for certain information and/or documentation readily available to the claimants, without which the defendants say they cannot begin a proper or informed scrutiny of the claimants' asserted losses. They say provision to them of the material sought is reasonably required for the fair disposal of their stay application. If and then to the extent that they are correct about that, I have no doubt that the material sought should be provided and that I would so order."

34. He continues at paras 7-8:

> "7. Of the authorities cited to me, the closest to the present facts is *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), in which early specific disclosure of certain documents by the defendants was ordered to ensure a fair resolution of the question as to forum that arose in that case. I agree with the approach adopted by Mr Justice Silber. That approach amply

> justifies an order in this case if the premise of the application is made out.
>
> 8. Similarly, I recognise that ordering the claimants to provide early information about their claim or documentation to support it, prior even to any statements of case, would be unusual. But if the premise of the application is made out, namely that the material sought is reasonably required for a fair consideration of venue, then the case is an unusual one, and that demand for fairness would outweigh any a priori reluctance to interfere at such an early stage."

35. Therefore, Andrew Baker J endorsed the approach of Silber J, which in turn followed the approach of Hirst J and David Steel J. In 2020, the Supreme Court entertained an appeal in *Vedanta*, a case where no order for disclosure in a jurisdiction challenge was either "sought or made" (per Lord Briggs at para 43). However, in his speech Lord Briggs, without the court having to decide the matter, touched on when disclosure may be ordered in a jurisdiction challenge (ibid.):

> "43. Summary judgment disputes arise typically, and real triable issue jurisdiction disputes arise invariably, at a very early stage in the proceedings. In the context of a jurisdiction challenge the court will, typically, have only the claimant's pleadings. Proportionality effectively prohibits cross-examination and neither party will have had the benefit of disclosure of the opposing party's documents, albeit that in exceptional circumstances a direction for limited specific disclosure may be given: see *Rome v Punjab National Bank (No 1)* [1989] 2 All ER 136, 141, per Hirst J and *Vava v Anglo American South Africa Ltd* [2012] 2 CLC 684."

36. The appellant places great weight on this observation. It emanates from the highest source. Here, it is submitted, is the definitive exposition of the jurisdiction disclosure test – exceptionality ("exceptional circumstances").

37. Following *Vedanta*, in *Merrill Lynch v Citta Metropolitano di Milano* [2023] EWHC 1015 (Comm) ("*Merrill Lynch*"), Stephen Houseman KC, sitting as a Deputy of this court, made observations about disclosure in jurisdiction challenges. He said at para 40:

> "40. I take as the litmus test the need for an applicant to demonstrate "exceptional circumstances" to justify even "limited specific disclosure" within a pending jurisdiction challenge. This reflects the position summarised in *Lungowe v. Vedanta Resources plc* [2020] AC 1045; [2019] UKSC 20 at [43] by reference to *Rome v. Punjab National Bank* [1989] 2 All ER 136 and *Vava v. Anglo American South Africa Ltd.* [2012] 2 CLC 684; [2012] EWHC 969 (QB). This is not, however, confined to specific disclosure of a 'killer document' or 'smoking gun' as was

> suggested on behalf of MLI. It requires exceptional circumstances."

38. With this survey of the authorities relied on by each party, I turn to my analysis. For clarity, I divide it into nine principal points.

B. Analysis

39. **First**, the legal test to be applied is a hard-edged question. It is not a question of reasonableness of the Judge's interpretation. This court's task is to determine the applicable test in law, not review the plausibility or reasonableness of the Judge's legal analysis.

40. **Second**, the rationale for the second "stage" of the two-stage test in *Rome* makes sense. A necessity test makes plain that disclosure should only be ordered where it is reasonably necessary for the just disposal of the case. This is why it found its way into the pre-CPR Order 12. Put the other way: without such necessary disclosure, the case would not be dealt with justly ("fairly") and thus not in accordance with the overriding objective under CPR Part 1.1.

41. **Third**, no authority has been put before me where the two-stage test is reversed; there is no authority where the two-stage test is doubted; there is no authority where a pure exceptionality test has been applied to order or refuse disclosure in a jurisdiction challenge over and above the two-stage test. Instead, the two-stage test has been consistently applied or approved (*Rome, Vava, Al Khattiya*).

42. **Fourth**, one cannot avoid engaging fully with the powerful observation of Lord Briggs in *Vedanta*. However, it is necessary to examine what was decided by the Supreme Court. It was not a determination of the applicable test for disclosure in a jurisdiction challenge. *Vedanta* was about a quite different issue: the application of article 4 of Parliament and Council Regulation (EU) No 1215/2012, and whether it conferred a right on any claimant, regardless of their domicile, to sue an English domiciled defendant in England free from jurisdictional challenge upon forum non conveniens grounds, even where the competing candidate for jurisdiction was a non-member state. There the rival candidate forum was Zambia, where the alleged tort exclusively occurred and all the claimants resided. The issue is strikingly different to what I am considering. Further, as noted, Lord Briggs made clear (para 43) that no order for disclosure was asked for or granted. How then should this court understand the references to exceptional circumstances? The case of *Athena Capital Fund SICAW-FIS SCA and others v Secretariat of the State for the Holy See* [2022] 1 WLR 4570 ("*Athena*") was put before me. It is not a disclosure case, but about a stay of proceedings under the court's inherent jurisdiction, recognised by section 49(3) of the Senior Courts Act 1981. I make three observations about it.

43. First, and if I may, it is factually a very interesting case granting glimpsed insight into the operation of the governmental unit of the Holy See, which is the jurisdiction of the Pope, head of the Roman Catholic Church, and the Office of the Promoter of Justice, an emanation of the Holy See charged with investigating and prosecuting crimes on behalf of the Vatican state (see paras 2-3 and Vatican "criminal proceedings" at paras 15-19). Second, the case is not about disclosure, let alone in a jurisdictional context, and thus of limited value. Third, I had arrived at my prime conclusion about the correct legal test without it, but the reasoning in *Athena* confirms some of my concerns and is consistent with my overall thinking reached independently - a valuable sense-check.

44. In *Athena*, the Court of Appeal considered whether the judge was wrong to impose a case management stay of the appellants' claims for wide-ranging negative declarations, essentially to the effect that they have no liability to the respondent in connection with the sale to the respondent of an expensive property in London. Males LJ, delivering the judgment of the court (Peter Jackson and Birss LJJ concurring), noted that the court has power to stay proceedings as part of its inherent jurisdiction. He said at paras 48-49:

> "48. The court has power to stay proceedings "where it thinks fit to do so". This is part of its inherent jurisdiction, recognised by section 49(3) of the Senior Courts Act 1981. The statute imposes no other express requirement which must be satisfied. This is a wide discretion. The test is simply what is required by the interests of justice in the particular case.
>
> 49. Such a stay may be permanent or temporary and may be imposed in a very wide variety of circumstances. Obvious examples include that proceedings may be stayed in order to await the decision of an appellate court in another case; or until a party complies with an order to provide security for costs; or to enable mediation to take place. Cases which speak of "rare and compelling circumstances" (or similar phrases) being necessary have nothing to do with these kinds of commonplace example. They have generally been concerned with stays which have been imposed in order to allow actions in other jurisdictions to proceed, the usual assumption being that the outcome of the foreign proceedings will or may render the proceedings here unnecessary."

45. He noted that in *Reichold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173, Lord Bingham of Cornhill CJ observed at 186:

> "It will very soon become clear that stays are only granted in cases of this kind **in rare and compelling circumstances**. Should the upholding of the judge's order lead to the making of unmeritorious applications, then I am confident the judges will know how to react." (emphasis provided)

46. Males LJ proceeds to comment at para 53 that:

> "The expression "rare and compelling circumstances" has been taken up in later cases and sometimes treated as if it were in itself the applicable test in such cases: e.g. *Konkola Copper Mines Plc v Coromin* [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437 at [63] …"

47. He cites further examples where Lord Bingham's phrase was construed (or misconstrued) as the test. The Court of Appeal provides its conclusion at paras 57-59:

> "57. Finally, the expectation that it will only be in "rare and compelling circumstances" that such a stay will be granted was reiterated by this court in two very recent cases: see *Municipio de Mariana v BHP Group (UK) Ltd* [2022] EWCA Civ 951 at [373]; and *Nokia Technologies OY v Oneplus Technology (Shenzhen) Co Ltd* [2022] EWCA Civ 947 at [67].
>
> 58. It is interesting to see how an observation by Lord Bingham that there was no need to be concerned about a "floodgates" argument because *in fact* it would only be in rare cases, where there was a compelling reason to do so, that a stay of English proceedings would be granted in order to await the outcome of proceedings abroad has been elevated almost into a legal test that "rare and compelling circumstances" must exist before the apparently unfettered jurisdiction to grant such a stay can be exercised.
>
> 59. There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases …"

48. One sees in the *Athena* examination of the stay test, a process materially comparable to the analytical misstep advanced on behalf of the appellant/defendant here. As indicated, the direct assistance I derive from *Athena* is "very much at the margins of being helpful", as Foxton J said in an entirely different context in *Kalo* at para 12, not because of the authoritative and powerful analysis of the Court of Appeal in *Athena*, but simply because - and I emphasise - it is not a jurisdiction disclosure case and does not deal with the disputed governing test. However, the analogy is a formidable one:

warning against the dangers of promoting comments by the court made by an eminent jurist in an earlier case into the applicable test. Observations about unusualness, exceptionality or rarity without more should not be substituted for the applicable test, accurate though they may be about the black swan occurrence of cases that in fact meet the test. In *Athena*, and for stay applications, the test remains "the interests of justice", the "single test", as Males LJ terms it at para 59.

49. **Fifth**, and as a result of the preceding analysis, I find that "exceptional circumstances" or "exceptionality" amount to descriptors of the prevalence of qualifying factual circumstances, their likely occurrence within the population group of claims that in fact meet the two-stage test rather than constituting the definitive test itself. Satisfying the two-stage test is "out of the norm" because the two-stage test is hard to meet. The decided cases show this. In *Rome*, Hirst J refused disclosure because the applicant failed on the stage one prima facie element. Andrew Baker J observed in *Al Khattiya* that demonstrating whether the circumstances meet the stage two requirement will only arise in "unusual" circumstances. Silber J said in *Vava* at para 63 that "the threshold for making orders at this stage is a high one." So it is that the observation of Lord Briggs in his speech in *Vedanta* can be best understood. He explicitly referenced Hirst J in *Rome* and did not doubt the *Rome* test. Instead, Lord Briggs noted that "limited disclosure" may be ordered "in exceptional circumstances". I cannot find that this is a determination by the Supreme Court that the test is one of exceptionality, a matter that was not in dispute nor decided. It is a comment on the nature of the factual circumstances in which the two-stage test in *Rome* is likely to be met.

50. **Sixth**, turning to *Merrill Lynch*, that was not a case in which the court had to decide the applicable test for disclosure in a jurisdiction challenge. Therefore, the observation of the Deputy in *Merrill Lynch* was not part of the ratio of the case. Further, at para 38, the judge cited *Al Khattiya*:

> "38. It is and should be an unusual thing for the Court to order specific disclosure in the context of a jurisdiction challenge: see e.g. *The Owners of "Al Khattiya" v. The Owners and/or Demise Charters of "Jag Laadki"* [2017] EWHC 3271 (Admlty). Such applications are intended to be determined without extensive factual investigation. This is reflected in the relatively low gateway threshold, vis. a plausible evidential basis, as well as vocal discouragement of jurisdictional appeals. There are frequent observations as to the scale of material and number of authorities cited by parties on challenges of this kind. (As an aside, I note that 26 authorities, plus procedural and statutory provisions, were cited by counsel for this hearing listed for two hours, which estimate is required to include giving of judgment and dealing with consequential matters.)"

51. I cannot find that *Merrill Lynch* decides that the applicable test is exceptionality over the two-stage test. Therefore, it does not materially assist

the appellant. Indeed, it again references the nature of the circumstances in which the test is met: it is and "should be an unusual thing" – only arising exceptionally.

52. **Seventh**, I concur with the appellant that disclosure in a jurisdiction challenge should in general be limited and is likely to arise only rarely or exceptionally. I recognise that there must be the "clearest possible demonstration" that the disclosure sought is necessary for the just disposal of the application. If this arduous element, which is materially equivalent to the reasonable necessity test, is not met, there should not be disclosure. Necessity is a hard test to meet. It is not met by evidence that may assist or support the party's case generally. The test is far more demanding. The court's intrusive and coercive power can only be exercised if disclosure is necessary rather than desirable. This feeds into the "pragmatism" the appellant justifiably proposes: this is an interlocutory application and is invariably determined on the written evidence. This is why in *Spiliada* [1987] AC 460, 465, Lord Templeman hoped that submissions on forum would be "measured in hours and not days". This is also consistent with the Supreme Court's deprecating of attempts by parties to convert jurisdiction applications into "mini-trials" (*VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337 ("*VTB*")). In *VTB*, Lord Neuberger firmly makes this point at paras 82-83:

> "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."

53. The appellant submits that the exceptionality requirement is animated by an acknowledgement of the status of the party contesting jurisdiction. As Hirst J (at para 8j) explains, the court has a "natural reluctance" to impose burdens on a party not yet explicitly subject to its jurisdiction and there are associated

concerns about "forum shopping". But the preventing of the court exercising an "exorbitant" jurisdiction, as the appellant pithily styles it, finds effective restraint by the demanding threshold of the two-stage test.

54. **Eighth**, while I agree that the governing test is "well established", as it is put on behalf of the appellant (no doubt borrowing from David Steel J), what has been established - and consistently applied by this court, to my mind correctly - is the two-stage test. It originated in the precise formulation of the court's pre-CPR disclosure powers and has never been overturned. I find that references to exceptional circumstances underline, with indubitable factual accuracy, the difficulty of meeting the legal requirements for disclosure in a jurisdiction challenge. Exceptionality is descriptive, not definitional; predictive of frequency, not the definitive test. Instead, the legal requirements are the two-stage test enunciated in *Rome* by Hirst J and applied by this court thereafter from the late 1980s until the 2020s without once being doubted or reversed. In fairness to the Judge, she recognised the difficulties and high hurdles confronting a party seeking disclosure in a jurisdiction challenge:

> "33. It is in my judgment clear that specific disclosure in a jurisdiction dispute is not the norm and is in that sense exceptional."

55. This observation cannot be faulted and understands the true significance of exceptionality, its description of prevalence or rarity rather than the threshold requirement for disclosure. The Judge further stated, once more correctly, that disclosure should only be ordered where it is "necessary to do justice between the parties", a materially equivalent reformulation of the second stage of the *Rome* test, the necessity requirement.

56. **Nineth**, it has been repeatedly emphasised by appellate courts that a judgment may almost always find clearer or more helpful expression. As Lord Hoffmann famously said in *Piglowska v Piglowski* [1999] 1WLR 1360 ("*Piglowska*") at 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."

57. An appeal court looks at the substance of the criticised text rather than performing an artificially micro-textual analysis, lifting out for examination phrases or words and construing them as proxy statutory provisions. They are not. The Judge stated the reasonable necessity test at para 39:

> "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." (emphasis provided)

C. Conclusion

58. I find that the Judge correctly identified the governing two-stage test. She did not make a finding of exceptionality. She did not have to. While it might have been better to rehearse the rival arguments for and against the primacy of an exceptionality test, the Judge undoubtedly identified the correct and cardinal two-stage test. There is no special doctrine of exceptionality. Therefore, the challenges to the twin orders below (McCloud and Armstrong), to the extent that they are based on the alleged misidentification of the legal test governing CPR 31.12, fail.

PART TWO: Disclosure orders

V. *Introduction*

59. However, that is not the end of the matter. Having satisfied myself that the Judge identified the correct legal test, the court moves on to consider the Judge's decisions on disclosure. I make five initial remarks.

60. **First**, I received no argument that the stage 1 test in *Rome* was not met. The Judge proceeded on the basis that the claimant had presented a prima facie case on jurisdiction. Indeed, the respondent states that there is a prima facie case in this way, as set out in the statement of Mr Shear (B1487, para 60) that "there is *prima facie* evidence that the Bank deliberately concealed certain of its activities directed to the United Kingdom." In the respondent's appeal skeleton argument (para 24), it is submitted that he "does not say that his position on jurisdiction will necessarily fail absent these documents".

61. From there, I concur with the claimant that meeting the prima facie condition does not disqualify disclosure but is a prerequisite for it, provided the reasonable necessity test in stage 2 is met. In making disclosure decisions, the court must "seek to give effect to" the overriding objective (CPR Part 1.2). This is made plain, if it was not clear enough, by PD 31A which states:

> "[i]n deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective."

62. **Second**, it is important to constantly refocus on this court's appellate powers and the tight limits imposed on them. *Global Torch Ltd v Apex Global Management Ltd* (No. 2) [2014] 1 W.L.R. 4495 was an appeal from a discretionary case management decision about a disclosure statement. Lord Neuberger said at para 13 that "it would be inappropriate for an appellate court to reverse or otherwise interfere with [a case management decision]", unless it was "plainly wrong in the sense of being outside the generous ambit

where reasonable decision makers may disagree." Lord Neuberger emphasised that whether or not a judge at first instance had erroneously taken into account a factor was "not… the essential question". Instead, the question was whether the decision was outside the generous ambit allowed to the Judge. Therefore, an appeal court should interfere where the Judge exceeded the generous ambit within which reasonable disagreement is possible (*Manning v Stylianou* [2006] EWCA Civ 1655) at para 19). This court's approach is not substitutionary (*Piglowska*) and the high threshold before appellate interference acts as an essential self-denying ordinance.

63. **Third**, and equally, it is vital to retain tight focus on the nature of the issue the intended disclosure goes to. The substantive test on a Part 11 jurisdiction challenge is clear. The test in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 ("*Kaefer*") was summarised in *Kalo* at para 6:

> "This involves applying the three-part test summarised by Green LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] EWCA Civ 10, [73]-[80]:
>
> > 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 which 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."

64. I would add that the notion of plausibility was addressed by the Supreme Court in the well-known *Brownlie* case, where Lord Sumption JSC gave the lead judgment (with which Lord Hughes agreed). Lord Sumption notably said at para 7:

> "The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice.* What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

65. It is sensible to add the cautionary note from the speech of Lady Hale at para 33:

> "As we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution. For what it is worth, I agree (1) that the correct test is "a good arguable case" and glosses should be avoided; I do not read Lord Sumption's explication in para 7 as glossing the test …"

66. The good arguability test remains the test. It is clear, however, that it is a low threshold.

67. **Fourth**, one might add two things. First, the reminder in *Pammer* that the trader (here the Bank) need not direct activities in a "substantial way", and second, the observations of the Supreme Court in *VTB Capital* at paras 82-83.

68. **Fifth**, I ground my treatment of the Judge's orders by noting what she says at para 39 (see above). That is the essential framework of her approach. I examine each disclosure decision (order) in turn on the understanding that the judge identified the correct disclosure test in *Rome*. I consider each distinct disclosure decision on its own terms. They do not stand or fall together.

VI. ***Order-by-order analysis***

69. I note that the disclosure under 1c and 1j of the McCloud Order is conceded by the appellant.

Order 1a

70. The Judge framed her order under CPR 31.14 as:

> "1a. The records of Audi Private Bank SAL (the "**Private Bank**") in relation to the UK-resident customers mentioned in paragraphs 17 and 18 of the first witness statement of Mr Najm."

71. The Judge says at para 64:

> "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 activities directed to the UK, then the document has indeed been 'mentioned'."

72. At para 17.1.2.4 of his statement, Mr Najm mentions that of Bank Saradar's 102,663 customers as at 1994, 0.12 per cent were resident in the United Kingdom. That is 122 customers. Mr Najm states at para 17.1:

> "As this was almost 30 years ago and Lebanese banks are only required to maintain customer records for 10 years, the data available is not as detailed and complete as it would be for more recent years. However, the available records show that only 3 of the 122 customers resident in the UK gave their nationality as British."

73. At para 18, he tabulates the data, before providing his conclusion at para 20:

> "20. I believe that these statistics reflect the fact that UK resident individuals who opened accounts with Bank Saradar typically did so because of their existing connections with Lebanon or other places where Bank Saradar had clients and not because of any steps Bank Saradar was taking to direct business to the UK."

74. I begin by recognising the proposition that "the expression 'mentioned' is as general as could be [and] is not […] intended to be a difficult test" (*Expandable Ltd v Rubin* [2008] 1 WLR 1099 per Rix LJ at para 24). Further, that as the Court of Appeal stated in *NCA v Abacha* [2016] 1 WLR 4375, "a 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". Next, the general rule is to order disclosure of the mentioned documents. Finally, I further agree with the respondent's submission that on a jurisdiction challenge, the test under CPR 31.14 does not "dissolve" into the 31.12 test. They remain distinct.

75. The respondent's argument in submitting that the court should uphold (not interfere with) the decision is that "Having considered at Jmt ¶64 **[5/75]** the distinction between a direct allusion and something which merely gives rise

to an inference that the document in question exists from the *Taylor Wessing* case, the Judge rightly concluded that Mr Najm was 'referring to actual records and hence to documents'." I accept the submission that the focus should be on whether objectively the documents were mentioned, irrespective of the witness's subjective intention.

76. Mr Najm expressly mentioned "statistics" not the customer files themselves, and the "data available" as opposed to the customers' personal records. He provides data following a "readout" from the Bank's "systems" and "Bank Saradar's records". At no stage does he state that he personally went through the customer files or records himself or any of them. The respondent submits that the Judge was correct in finding that Mr Najm's statement amounts to the customer files being "mentioned". To the appellant's riposte that the Najm references are merely and only to "summary data", the respondent replies that such characterisation is simply "not credible". To resolve this important dispute, I judge that one must carefully revisit the nature of the material.

77. At para 18, Mr Najm tabulates the data. About this, the Judge concludes, "64 … In this instance there is no doubt that the witness is referring to actual records and hence to documents." She continues at para 65:

> "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."

78. I find that the Judge has fallen into error here. It is evident that all the witness did was collate and tabulate the "readout" from the Bank's systems. For CPR 31.14 purposes, I do not consider him to have directly or indirectly "mentioned" (or alluded to) the customer files themselves. I find that the Judge materially erred in her application of CPR 31.14. If the reference to "records" in the Judge's order at 1a is to the data, that has been disclosed. If it is a reference to the underlying customer files, which appears to be the thrust of para 64, that is plainly wrong. The underlying customer files are not "mentioned" for CPR 31.14 purposes. That was neither an accurate nor reasonable conclusion. The Judge continued at para 65:

> "it is proportionate and necessary that they [the customer files] be disclosed so as to ensure a level playing field."

79. However, the Judge fails to explain how anything in the records is relevant to the directed activities issue, since the relevant "playing field", to use the Judge's term, must be the relevant contested issue. As the respondent accepts, a customer may be a United Kingdom resident and/or citizen, without the Bank directing activities to the UK. Nevertheless, the basis for the disclosure order was CPR 31.14. I find that the Judge was "wrong" in appellate terms in concluding that the test was met. This is due to a fundamental misunderstanding of what the evidence reveals; this is not a difference of discretion, but a plain error. The appeal is allowed under this head.

80. Exercising the court's appellate discretion, disclosure is refused since neither the CPR 31.14 nor 31.12 tests are met. On the latter, I cannot find that the disclosure of the underlying records meets the reasonable necessity test. There is nothing provided to me to indicate that they have relevant information or evidence to the directed activities issue. Therefore, beyond speculation, it remains unclear what the records would or may relevantly supply about the disputed question.

Order 1b

81. The terms of the order are:

> "1b. The customer facing materials which were in use by the Private Bank in the period from 22 June 1994 to 22 June 1995 inclusive and which refer to the United Kingdom, London or any part of the United Kingdom."

82. To use a neutral term, Mr Najm refers to these documents in this way:

> *"Bank Saradar's marketing activities*
> 30 Bank Saradar did not have a formally constituted marketing department at the Relevant Time.
>
> 31 Bank Saradar's marketing activities were not formally organised and were focused principally on increasing Bank Saradar's position and customer base within Lebanon, including wealthy Arab clients from other parts of the wider region, who were resident in Lebanon. There were no general marketing initiatives aimed at those outside of Lebanon.
>
> 32 Accordingly, Bank Saradar's marketing activities would mainly have taken the form of informal approaches within the remit of Mr Jeffy and his team towards the clients and prospective clients in Lebanon and the Gulf. This would usually have entailed meeting clients at home or in their place of business, or taking them for dinner.
>
> 33 The languages of Bank Saradar's customer-facing materials were French and Arabic. English was used far less frequently at the Relevant Time although the use of English steadily increased thereafter with the expansion of the private banking business from the late 1990s onwards. The choice of language reflected the reality that many of Bank Saradar's local target clientele were French speakers, this being a common language of choice among the more educated strata of Lebanese society who were likely to be potential clients of Bank Saradar, and Arabic on the basis that this is the official language of Lebanon, and appropriate for clients from the Gulf. Later, English was also used increasingly to target customers in the Gulf."

83. I agree that this was a reference to a "class of documents" materially akin to *Dubai Bank Ltd v Galadari (No 3)* [1990] 1 WLR 731 at 738. It was a compendious reference for *Smith v Harris* (1883) 48 L.T. 869 purposes. Further, I reject the appellant's submission of term-imprecision. It was Mr Najm who used the formulation and, as seen in the extracted evidence, spoke to it without difficulty. The purpose of his mentioning the "materials" was to support the Bank's case that the UK was not "targeted" (subject of directed activities). This is why he emphasises that English was used "far less frequently" and used increasingly to "target" English-speaking customers in "the Gulf" as opposed to UK. The Judge was careful to limit the time period to 12 months and in the order confined the disclosable documents to those referring to London or the UK. I cannot detect any legal error in this part of the order. The documents sought were "mentioned" for CPR 31.14 purposes.

84. Therefore, I find no basis to disturb this order for disclosure. The appeal under this head is dismissed.

Order 1d

85. A similar order under CPR 31.14 was made by the Judge as follows:

> "1d. Records of: (1) Bank Audi in 2020-2021; and (2) the Private Bank in 2016-2019, concerning accounts opened by UK-resident customers other than the onboarding documentation to be disclosed pursuant to paragraphs 1h) and 1i) of this order."

86. At paras 71-72 of the Judgment, the Judge understandably deals with both the records of customer accounts and the onboarding documentation since the application combined the two. The McCloud Order helpfully parses out the distinct elements. I examine the onboarding below. That leaves the account records for the two identified periods. The Judge found that the documents were "sufficiency mentioned" in the statement of Mr Ghazaleh at paras 111 and "119" [sic. I take this to be a typographical error, the intended paragraph being 109 - para 119 deals with the group website and not customer records and is not relevant to this order]. The relevant paragraphs, as I have interpreted them to be, read:

> "109. The fact that the Bank was not, and is not, directing its business activities to the UK is also demonstrated by considering the number of accounts opened by UK residents in 2020 onwards. Having examined the Bank's records, I can confirm that in recent years, the number of UK residents who opened accounts with the Bank (and the total number of account openings) were as follows: [the data are then presented in tabulated form]
>
> …
>
> 111. Generally speaking, almost all of the Bank's clients who were UK residents would have had some strong connection with Lebanon, whether that be Lebanese citizenship, heritage, or

> business and property interests in Lebanon. These customers were often introduced to the Bank by family members, employees of the Bank or the Group or existing clients. Having examined the Bank's records, I can also confirm that the vast majority of the Bank's UK-resident customers recorded in the information held by the Bank that they have (or had) other nationalities/residences, principally Lebanon or other Middle Eastern countries." [The witness then presents the data in tabular form.]

87. I note that the appellant submits that these individuals are not party to the proceedings. However, this is a CPR 31.14 challenge. While there may ultimately be a discretionary refusal of inspection if the test is made out and that factor may feed into it for proportionality considerations, I must first consider the Judge's decision on the test. For the reasons given in respect of para 1a, it is plain that just as Mr Najm was speaking of system data, so is Mr Ghazaleh. Therefore, for the same reasons, I find that the Judge has fallen into error in her application of CPR 31.14. The customer records, as opposed to existing system data about their nationality and/or residence, have not been or not sufficiently "mentioned". The decision is "wrong" in an appeal sense. I must disturb the Judge's order and the appeal under this head is allowed.

88. Examining the matter in the round, disclosure under this head is refused since neither of the CPR 31.12 or 31.14 bases are established.

Order 1e

89. Order 1e. is framed as follows:

> "1e. Bank Audi's customer-facing marketing materials in Arabic, French and English for the periods from 25 May 2016 to 25 May 2017, from 1 January 2019 to 1 January 2020, and from 24 June 2020 to 24 June 2021 and which refer to the United Kingdom, London or any part of the United Kingdom."

90. In the Judgment at para 73, the Judge references para 122 of Mr Ghazaleh's first statement. To understand its significance, it needs to be viewed in context, starting at para 120:

> *"The Bank's marketing activities*
> 120. The Bank carries out various marketing activities in order to increase its customer-base, keep in contact with existing customers, increase profitability and ensure revenue growth.
>
> 121. The Bank's marketing activities were and are focused principally on increasing the Bank's position and customer base within Lebanon. The Bank has never pursued any marketing initiatives or offered any products targeted solely at either expatriates or overseas potential customers.

> 122. The languages of the Bank's customer-facing marketing materials are Arabic, French and English. Marketing materials are prepared in these three languages because:
>
> > 122.1 as per paragraph 83 above, the official language of Lebanon is Arabic;
> >
> > 122.2 French is spoken by around half of the Lebanese population – this is a legacy of France's mandate of the country; and
> >
> > 122.3 English is widely used also, particularly by younger generations. As with the rationale behind using English on the Bank Audi Website, it is sensible for the Bank to prepare marketing materials in English: English is the most widely spoken language in the world and accordingly, it is frequently used as a common language between non-native English speakers who do not share another common language [**TMG1/260-268**]."

121 This wider citation makes plain that the purpose of the witness's mentioning of the documents is to dispel the suggestion that although English was used in marketing materials, it was not used because the Bank was directing activities to the UK. Instead, the use of the language is attributed to the prevalence of the use of the English language. Three time periods are specified by the Judge. These relate to periods of 6 months before and after the three relevant dates. There is a clear evidential basis to make such an order.

122 For reasons comparable to 1b, I find no basis to interfere with the Judge's order under CPR 31.14. The materials are plainly mentioned by the witness on behalf of the Bank and to support the jurisdiction challenge. I do not interfere with the Judge's order that they are disclosable and cannot think that declining to refuse disclosure on discretionary grounds was outside the generous ambit.

123 The appeal under this head is dismissed.

Order 1f

124 At para 1f of the McCloud Order, the Judge ordered:

> "1f Bank Audi's standard terms and conditions for accounts of the type held by the Claimant as at 24 December 2020."

125 The Judge was plainly correct to refuse to order disclosure under CPR 31.14. The mention of the document or documents by Mr Silver was a reference to a citation by the claimant's solicitors. However, the Judge proceeded to order disclosure under CPR 31.12. Her reasoning is set out at para 76:

> "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."

126 She continues at para 77:

> "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."

127 I must first observe that the appellant's skeleton incorrectly asserts that the claimant only sought disclosure under CPR 31.14. That is not the case. The claimant sought disclosure on the alternative basis of CPR 31.12 ("Regardless, they should be disclosed under CPR 31.12".) There can be no procedural impropriety in the Judge considering the alternative basis. However, on this part of the application, I find that the Judge has not or not properly applied the applicable *Rome* stage 2 reasonable necessity. There is the need for an evidential foundation beyond mere conjecture to infer that the disclosure is relevant to the directed activities issue. However, there is no evidence that on merger there was a change of terms. Such information as exists points in the opposite direction. In its response to a CPR Part 18 request, the Bank stated:

> "On the merger between Audi Private Bank and the Bank, the Bank replaced Audi Private Bank as party to the *existing* contract between Audi Private Bank the Claimant by operation of Lebanese law, and accordingly the contract continued on its existing terms. There was therefore no need for the Bank to enter into a new contract with the Claimant and there is accordingly no such document. In these circumstances, your request for copies of the 'Merger Terms and Conditions' (whatever precisely that may mean) is equally devoid of merit. We reiterate that the Bank has provided you with copies of all relevant contractual documentation."

128 As the appellant put it in submissions, "no one ever said that new terms have been provided" at merger. Therefore, there is no evidential foundation that the document is relevant beyond speculation. Disclosure is not to satisfy curiosity; it is not about what might be of some use or desirable. The test is reasonable necessity. Nothing less. By not applying that required stricture, I find that the Judge has fallen into error in an appellate sense and the court has the required basis to disturb the order. Further, there is no evidence to begin to suggest that the terms include material about directing activities to the UK. Information asymmetry is not the test, although a relevant factor. What is

essential is some identifiable evidential foundation to indicate or reasonably infer that the disclosed material is relevant to the disputed issue. Instead, there is no evidence to suggest that the terms and conditions speak to the directed activities question at all. The appeal is allowed under this head.

129 Having reconsidered the matter, I find that disclosure of the 2020 terms and conditions is not reasonably necessary to deal with the case justly. Disclosure is refused.

Order 1g

130 At para 1g of the McCloud Order, the Judge ordered disclosure in respect of Crossbridge Capital:

> "As to Crossbridge Capital, in the period 1 January 2014 to an end date to be determined by the Court at the hearing listed pursuant to paragraph 4 below
>
> (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."

131 At para 40, the Judge identifies the nature of the disclosure sought by the claimant about Crossbridge:

> "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."

132 To explain her reasoning, the Judge says at para 40:

> "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."

133 She continues at para 42:

> "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."

134 The Judge fleshed out her thinking at para 44:

> "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'."

135 I am bound to say that I find it difficult to see how the second issue that the Judge identifies is relevant to establishing direct activities. What is of note is the way the Judge phrases her first issue. She does not clearly specify which "activities" may meet "the CCJA gateway", that is, under section 15B et cetera of the 1982 Act. It should be recollected that under section 15E(1)(c) two possible routes exist to a "consumer contract": both directed activities (limb (ii)) or "pursuing professional or commercial activities" (limb (i)). The Judge references Mr Shear's statements in this way (in this order): statement 3, para 31 and statement 2, para 60.

136 I deal with statement 2 first. Mr Shear says at para 60:

> "Meetings with prospective clients and investors in the UK

> 60 There is further information obtained by the Claimant's representatives that indicates that the Jurisdiction Witness Statements are highly misleading and that it is necessary for disclosure to be given so that the true position can be properly interrogated. A knowledgeable source based in Lebanon has stated that employees of the Defendant undertook business trips to the UK in order to deal with high-net-worth clients of the Defendant resident in the UK. Specifically, that the Defendant asked carefully selected employees to arrange this travel privately and to cover their own expenses for the trips using personal accounts, and then reimbursed the employees in cash. I understand that at least three such trips occurred between 2012 and 2016, with further trips thereafter. The aim of these trips was to meet with high-net-worth clients and target new clients, and included discussing real estate investments in London. On at least one trip to London, employees of the Defendant also held meetings with Crossbridge Capital. The source said that they believed that the Defendant deliberately restricted knowledge of this activity to a very small number of people. Of course, the Claimant is not at this stage aware of the full details of such activities."

137 Mr Shear's evidence, to the extent it is based on a "knowledgeable source", seems to me to have limited weight. While I recognise that the source has provided information that on at least one trip there was a meeting between representatives of the Bank and Crossbridge, no indication is provided about when or what it was about or what the outcome was. Nothing is imparted about the reliability of the source, or how they came into the information, whether it is direct knowledge, or first-, second- or third-hand hearsay (or more), whether it is documentary or parole evidence, or how contemporaneous it is.

138 Turning to the next passage that the Judge referred to, I put the extract from Mr Shear's third statement in context by adding para 30 to 31. Mr Shear writes:

> "30 The work undertaken included speaking to (1) an executive at a foreign bank's Lebanese branch; (2) a former employee of the Bank who took trips to London on its behalf; (3) a high- net-worth client of the Bank; (4) a former employee of another Lebanese bank; (5) a Lebanese businessperson and potential client of the Bank; and (6) a former Middle East Airlines employee. The matters set out in Shear 2 all reflect direct conversations with the sources on the part of the global intelligence company or its specialist investigator.
>
> 31 The work undertaken has all had to be carried out under the guarantee of anonymity, because, I am informed by the global intelligence company, there is a grave potential danger to sources that, if identified, their and their families' livelihood

> and/or safety will be at risk. The sources fear that they will face severe physical, financial and/or professional retaliation. I have been informed that those who have previously been found to have provided such information have been the subject of reprisals. These fears are well-founded, given that the Lebanese banking sector is politically well-connected, and that journalists and even political actors and bankers have been murdered in unexplained circumstances that have been the subject of international humanitarian concern …"

139 What has struck me as being of significance is reading on in Mr Shear's evidence at paras 33-36:

> "33 Rather than providing the disclosure that would show one way or another whether the Bank's assertions are right, Mr Silver states (at paragraph 60) that "the proposed partnership was not anything like setting up a branch or directing activities to the UK" and suggests that the setting up of the partnership in London was intended to support future expansion to Sub- Saharan Africa and Latin America and (by reference to Crossbridge's website) that Crossbridge is focused on emerging markets and "had nothing to do with directing business to the UK". Again these are assertions that would be tested by disclosure. But they are also inherently implausible. The idea that the Bank entered into a partnership in London and did not then either pursue or direct activities in the UK is nonsensical. That the Bank suggests that this would be the case only shows the lack of inherent credibility to its account and reiterates the need for disclosure. Moreover, more fundamentally, the Bank's position is wrong as a matter of law: the Bank would still be pursuing activities in England even if it operated in London but targeted customers outside of the UK (this, again, being a matter for the substantive Jurisdiction Application).
>
> 34 I note in any event that Crossbridge Capital's website shows that Mr Silver's assertions in Silver 2 are wrong and misleading. Far from Crossbridge Capital not directing business to the UK (as Mr Silver asserts), its "How Can We Help?" page on its present website states, "We have tiered our offering into a Core and Premium service to meet the bespoke needs of our clients in Malta or London" (emphasis added) **[GJS3/20]**. The wording relating to offering its services specifically in London has been included on Crossbridge's website since at least 2016 **[GJS3/22]**, and shows that UK customers were one of Crossbridge's primary focuses throughout.
>
> 35 Moreover, far from the "partnership" not going ahead, the historical snapshot of Crossbridge's website from 2016 states that, "Crossbridge Capital is backed by a group of strategic investors dedicated to preserving and growing their wealth using the best available independent investment advice and expertise". Only

> two such investors are named, and one of them is BAS **[GJS3/23]**.
>
> 36 Crossbridge's website also includes details of extensive teams in London **[GJS3/24]**, with 10 members of the team said to be in London. That reflects the position historically, too: in 2016, there were six members of staff listed in the investment management team in London alone **[GJS3/25]**, two in investment services **[GJS3/26]**, one in merchant banking **[GJS3/27]** and two in business development **[GJS3/28]**."

140 In the Judgment, the Judge does not spell out as clearly as she might have done which route or routes in section 15E she determined that the disclosure might go to, although the detail of the disclosure ordered indicates a directed activities route. But I note in the first paragraph of the Judgment that the Judge notes that the Bank's position is that it does not "pursue commercial activities here". I bear in mind the *Piglowska* precepts and look at the substance of the decision and see whether it sits within the generous ambit of reasonableness. I am bound to say that I have found it helpful to review carefully the frequently cited principles enunciated in *Pammer* to trace through what the relevant activities may be in this case. At para 75 the court held that what is required is that "the trader must have manifested its intention to establish commercial relations with consumers from one or more other member states, including that of the consumer's domicile." The court continues at para 76:

> "It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other member states, including the member state of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers."

141 I have also reviewed the breadth of possible manifestations of the requisite trader intention at paras 81-83 of *Pammer* and note in para 84 that the use of particular languages or currency could amount to a relevant factor. I also observe, as Foxton J did in *Khalifeh* (para 77) that

> "In the jurisdictional context, it has also been noted that the mere fact that the primary focus of the professional's business lies outside the state of the consumer's habitual residence does not preclude a finding that its activities are directed there: Oak Leaf Conservatories Ltd v Weir [2013] EWHC 3197 (TCC), [17]."

142 This means, and evidently, that even if the prime focus of the Bank's activities is directed to Lebanon, it can also and simultaneously direct qualifying activities to the UK and/or pursue relevant commercial or professional activities there, alone or in conjunction with partner organisations. All this appears to me to be significant. Considering everything, I find a sufficient basis to suggest that disclosure of Crossbridge material may contain material,

possibly important material, to support the establishing of a consumer contract by either "directed activities" (subsection (c)(ii)) or "pursuing commercial or professional activities" (subsection (c)(i)). Whether what is consequently revealed is of the high degree of "conclusiveness" the Judge mentions, I cannot accurately predict. But I do not need to. The *Rome* stage 2 disclosure test is different (reasonable necessity) and it is here plainly met. On route (i), I note that it is submitted in the respondent's skeleton argument at paras 14-15:

> "14 … One fundamental issue between the parties – which has been the focus of almost all of the Bank's evidence so far on the Jurisdiction Application – is whether the Bank (and the Private Bank) were pursuing or directing activities ("**Activity**") in or to the UK at the relevant times (the "**Activities Issue**").
>
> 15 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 "**Relevant Dates**"), as these are dates on which the Claimant entered into relevant contracts for the purposes of the CJJA." (original emphases)

143 Therefore, the claimant has been suggesting that jurisdiction is established on either of the section 15E bases. The Judge says at para 43:

> "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."

144 At para 44, the Judge continues:

> "44. … I accept … 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."

145 I can entirely see how the Judge concluded that there should in principle be Crossbridge disclosure. It seems to me that there is certainly sufficient evidence on the pursuing basis to order disclosure, although I recognise that the Judge did not spell this out or not sufficiently in *Piglowska* terms. In any event, and on the hypothetical that the order had to be reversed, I would reach the conclusion that there is sufficient evidence for Crossbridge disclosure on the pursuing basis. There is no doubt, to my mind, that there is evidence

suggestive of Crossbridge pursuing commercial or professional activities in the UK (or for the section 15E test, "in the part of the United Kingdom in which the consumer [claimant] is domiciled"). The next question is whether there is enough to suggest that through its investment in Crossbridge in 2015 (19 per cent share capital) and 2016 (9.89 per cent), the appellant bank was also engaged in this relevant activity. I note that the mechanism was via the Bank's subsidiary and Crossbridge's holding company. This is not the place to adjudicate definitively on such questions. This is a disclosure appeal. However, I am persuaded that there is enough before me, when viewed as a whole, not to disturb the Judge's overall conclusion that there should be in principle Crossbridge disclosure due to the "strategic investor" role of the appellant bank and the stated intention to establish a "partnership" and a "footprint" in the UK which would "support the Private Bank development strategy". One must be careful not to artificially view the evidence in silos. There is a clear and reasonable inference at this point of a close tie between the appellant, or relevant corporate emanations of it, and Crossbridge. It is not clear – and it is unlikely to be at this interlocutory stage before standard disclosure –what the extent of the "partnership" between the appellant and Crossbridge was and the extent to which it involved the appellant in relevant commercial or professional activities in the UK through its planned "footprint". While acknowledging that the Annual Report speaks of expansion in Sub-Saharan Africa and Latin America, a significant word in the sentence is "and". The relevant extract from the joint statement of Bank Audi's Chairman and Chief Executive Officer repays quoting in full:

> *"*At the level of Private Banking, the recent restructuring of the business line is likely to improve intergroup synergies and efficiencies. The partnership with Crossbridge Capital based in London would create a centralised and specialised wealth management platform. The plan to establish a footprint in the United Kingdom would support the Private Banking development strategy and future expansion to Sub-Saharan Africa and Latin America where Audi Private Bank sal already holds AuMs of USD 588 million and USD 745 million respectively through dedicated desks and RMs.*"*

146 It is noticeable that there is explicit reference to "intergroup synergies" and the "partnership" with Crossbridge is highlighted, all under the paragraph dealing with "at the level of Private Banking". It is interesting to note that the wealth management platform it was intended that the Crossbridge partnership would establish would be a "centralised" function. This immediately raises the question of centralised to what. Here one can reasonably infer Crossbridge being used to supplement the appellant's Private Banking offering by providing wealth management services centrally to the Bank's clients, wherever they may be. This makes sense alongside establishing the Private Bank's London footprint as part of the "Private Banking development strategy." At this point, of the parties only the appellant knows what happened. But once more, eschewing fragmented evidential analysis, one can reasonably read across from the evidence about the London Desk being used to service the group's UK-based customers and see how it lends plausible

support to the likely existence of relevant evidence in the Crossbridge disclosure. The point of disclosure is to enable the court to deal with this issue justly. It is here that the information asymmetry that the Judge mentioned has relevance. The entity that knows the definitive truth about these questions is the appellant. I step back and view the evidence base before the Judge as a whole. It amply justifies her conclusion on Crossbridge on the principle of disclosure and I cannot disturb it.

147 However, that is not the end of the question. I next consider the reasonableness of the scope of the disclosure granted. I do not consider the six-year timeframe to be excessive given the indications in the Annual Reports beginning in 2015. That said, in material respects, the extent of the Crossbridge disclosure granted by the Judge is in my judgment unreasonably wide, and sufficiently so to justify this court interfering with that part of the order that exceeds the generous ambit recognised by authority. In 1g (i)-(v) of the McCloud Order, a potentially extensive number of documents are ordered to be disclosed. It is essential to keep the disclosure within proportionate and manageable bounds. I examine the orders in reverse order.

148 On subparagraph (v), I remain unpersuaded that details about the Crossbridge investment not proceeding meet the reasonable necessity test. In this, I find that the Judge was wrong. The documents are not disclosable.

149 On subparagraph (iv), I entertain great doubt that the disclosure test has been properly applied. The Judge's formulation of "the plans" must mean all the plans for the entirety of "the planning phase" of the Crossbridge investment and by any entity within the appellant's group structure. This is obviously too wide. In appeal terms, it exceeds the generous ambit of reasonableness.

150 On subparagraph (iii), I have concerns that the disclosure of the entirety of any minutes of any board meetings of any group entities is proportionate. There is likely to be commercially sensitive material within them that is completely irrelevant to this issue. However, I recognise – and this may be the thrust of the Judge's decision given that this is about disclosure not inspection – that there may be elements within the minutes that address or speak to the Crossbridge investment. If so, those components should be identified and there should be disclosure on that more attenuated (reasonable and proportionate) basis.

151 As to subparagraph (ii), the minutes of meetings between group entities and Crossbridge, I judge these to be disclosable for the same reasons as the Judge and do not interfere with her order. The disclosure meets the *Rome* reasonable necessity test and is plainly within the bounds of reasonableness.

152 Equally, for subparagraph (i), and for the same reasons, I find that the Judge was correct that the documents are directly and obviously relevant to sections 15E and 15B and not disproportionate.

153 I judge this more limited disclosure to be what is reasonably necessary in respect of Crossbridge Capital. I therefore dismiss the appeal on the principle

of Crossbridge disclosure, but allow it on subparagraphs (iv) and (v), and in part on subparagraph (iii), where I make a narrower and proportionate order.

Order 1h

154 As for para 1h of the McCloud Order, it mandates disclosure of:

> "1h. The onboarding documentation for the 14 UK-resident customers who opened accounts with the Private Bank between 2016 and 2019 inclusive."

155 The respondent relies on the Judge's comments at para 55, that "The onboarding documentation could show that customers were contacted in the UK, which would dispose of the Activities Issue" and further that "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." However, the claimant's own onboarding documentation provides no credible basis to suggest that such documents contain relevant evidence for the directed activities issue. In his evidence, Mr Silver (B1873, para 78) makes the point:

> "The customer onboarding documentation shows basic information such as the customer's address and date of birth and records the customer's agreement to the Bank's terms and fees plus relevant KYC information. It does not include information about how the customer came to open the account and there is no reason why it would. This is clear from the documentation which the Bank has already provided to the Claimant related to the opening of his own account: nothing in those documents reveals how the account first came to be opened with Banque Saradar S.A.L. in 1994 whilst the Claimant resided in Saudi Arabia."

156 To explore the position, counsel was asked how the onboarding documentation may support the contested issue. The most that could be said was that the documents "may contain" an endorsement that they were signed in the Crossbridge offices in London. This is obvious speculation and unconvincing. No criticism is made of counsel; the weakness of the suggestion is a function of the nature of the document. Here the claimant's own documentation is available as a reality-check and reveals the unlikelihood of relevant evidence being obtained through such disclosure.

157 I find that the Judge did not apply the reasonable necessity test correctly. It was an unreasonable exercise of the Judge's discretion and exceeded the generous ambit granted to the Judge. The appellate court may therefore interfere with the order. The appeal under this head is allowed. Since there is an insufficient basis to indicate that the documents contain or may contain relevant evidence, disclosure is refused.

Order 1i

158 In similar vein, the McCloud Order states at 1i:

> "1i. The onboarding documentation for the 85 UK-resident customers who opened accounts with Bank Audi in 2020 and 2021."

159 This can be dealt with in short order. This court's reasoning is the same as for 1h. The appeal is allowed. For the same reasons, disclosure is refused.

Order 1k

160 Finally, one arrives at the disclosure ordered by the Judge in respect of the London Desk. The order states at para 1k:

> "The following documents in a period to be determined by the Court at the hearing listed pursuant to paragraph 4 below:
>
> i. Any document which relates to:
>
> 1. The creation of the "London Desk" being a desk or department within Banque Audi SAL to coordinate the activities of the Defendant in relation to the UK and to serve as a contact base for its UK-based clients.
>
> 2. Any decision not to create the London Desk.
>
> 3. Any decision to close the London Desk; and
>
> ii. The minutes or notes of any board or committee which contain the expression "London Desk"."

161 The Judge makes a general point at para 46:

> "46. The London Desk referred to in 2000 on behalf of "*the Banque Audi Group*" in Trade Mark proceedings:
>
> *"*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 [by the Judge]) (third affidavit of Dr Debbanné)"

162 I do not consider that the fact the trademark proceedings involved a subsidiary or associated corporate entity to be fatal. The evidence points to a credible evidential basis that the London Desk played a role in directing activities to the United Kingdom ("serve as a contact base for the UK based clients"). However, I am mindful that a "contact base" is not necessarily the same as directing activities to the UK. Therefore, I consider the matter further. The Judge continues at para 47:

> "47 … 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."

163 I do not understand the significance of the "risk" the Judge mentions. It appears that she accepts that what the claimant/respondent possesses already may satisfy the "plausible evidential basis test" for the substantive jurisdiction (arguability) hearing. If the defendant/appellant chooses not to "rebut" that evidence, that is a matter for the Bank. I cannot see that disclosure is then required to deal with the issue "justly". I turn to the three components of subparagraph (i). I deal with 1. further below.

164 On 2., a decision not to create a London Desk is not clearly supportive of directed activities or the pursuing limb and does not meet the reasonable necessity test.

165 On 3., I am not satisfied that a document speaking to a decision to close the London Desk assists with whether the Bank directed banking activities to the UK or the alternative pursuing route. It is entirely possible to make such a decision without the Desk ever having been implicated in directed activities or UK-based commercial or professional activities.

166 On subparagraph (ii), I regard the order to disclose (what is effectively) "any document" containing the expression "London Desk" as unfocused and disproportionate and thus unreasonable. At para 49, the Judge says:

> "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."

167 That limit in the Judgment is found in subparagraph (i). The Judge explained at para 48:

> "48 … I am minded to direct that disclosure be given of any documents which relate: (i) to the creation of the London Desk."

168 Therefore, the Judge was minded to order disclosure of any documents about the London Desk's creation, irrespective of whether they contained evidence about the Bank directing banking activities to the United Kingdom or pursing relevant commercial or professional activities. I cannot think the order as made by the Judge is proportionate. However, any document that contains material evidence that the Bank was directing activities to the United Kingdom or intended to do so through the London Desk seems to me

disclosable. I remind myself that evidence is placed before the court from former employees in respect of a subsidiary. As the Judge notes at footnote 2 at para 46, "The London Desk was also mentioned in the Bank's website and reflected in a business card in evidence." The putative date range in the Judgment is September 2000 (coinciding with the trademark proceedings that mentioned the London Desk) and December 2020, the last of the three relevant dates proposed by the respondent. If the London Desk ceased to operate before 2020, then that would be naturally self-limiting – one cannot disclose what does not exist. Therefore, while in part the order under this head must be reversed, it appears to me that there is a valid basis to conclude that the reasonable necessity test in *Rome* is met. Having reversed the disproportionate part of the London Desk order, I judge, with closer focus, that the proper terms should be:

> Any document from September 2000 to September 2020 (or earlier date if the London Desk ceased operation) containing evidence that the Bank was:
>
> (a) directing banking activities or intended to direct such activities to the United Kingdom; or
>
> (b) was pursuing UK-based commercial or professional activities
>
> through or in association with the London Desk."

169 Naturally, if no such documents exist, no documents can be disclosed. But the Bank knows whether it was directing activities to the United Kingdom through the London Desk or with the Desk's assistance, or was pursuing section 15-relevant activities. It may or may not have been doing so. If it was, the documents containing evidence supporting that proposition must be disclosed.

VII. *Disclosure orders: conclusion*

170 I have been astute to constantly remind myself of the impermissibility of appellate overreach. As is evident, I judge that in several instances the appellant has failed to reach the high appeal threshold required to interfere with judicial discretionary decisions. In those cases, the court has not substituted its view, whether or not it would have exercised a discretion within the permitted range in the same way as the Judge, about which I say nothing.

171 Where the appellate test has been met, it has generally been because the Judge lost sight of the reasonable necessity test by placing undue emphasis on her "level playing field" and "information asymmetry" criteria. I can agree with her that informational asymmetry is a relevant factor, but the quest for a perfectly mirroring evidential equality should not obscure the need for proper restraint, parsimony and proportionality in disclosure. It is likely that the departure from proportionate disclosure stems from the breadth of

information sought by the claimant. It was put by Mr Shear of his solicitors (B1474) in this way:

> "the Claimant seeks an order that the Defendant provide specific disclosure of documents that are highly relevant to the issues on the Jurisdiction Application, which are required to fully understand and interrogate the Defendant's position, and which are required for the fair resolution of the Jurisdiction application."

172 This theme was taken up by the claimant's counsel at the hearing below in their skeleton (para 22):

> "However, in order for Sheikh Alesayi to be able to interrogate fully the Bank's blanket denials, he needs to be provided with the documents that go to those issues. It is for this reason that disclosure is required under CPR 31.12."

173 I accept the appellant's submission that this approach went too far and the Judge in part acceded to it erroneously. To restate: at the next turn lies a jurisdiction challenge hearing, not a "mini-trial" (in *VTB Capital* terms), let alone a full one (if happens at all, about which I also refrain from commenting on). That hearing will be determined using a modestly low threshold, as the Judge recognised. But words are insufficient. The acid test is the disclosure she ordered. I judge that she failed at times to give sufficient weight to the legally confined nature of the issue that had to be decided. The "equal footing" factor in the overriding objective is not unqualified. It is vitally tempered by the words "as far as is practicable". It must be given effect to in the context of the need to deal with the matter at "proportionate cost" and in light of the "complexity of the issues" (CPR Part 1). I am bound to say that from everything I have seen, the gateway jurisdiction question is unlikely to be complex. It is important not to overcomplicate it.

174 Yet I am informed by the appellant's counsel that the "combined costs" of the disclosure proceedings alone already approach £750,000. While the defendant bank challenges jurisdiction as is its right, it is in no one's interests to be mired in protracted Byzantine interlocutory skirmishes. I remind myself of the salutary words of Lord Neuberger in *VTB Capital* that it is "simply disproportionate" for parties to incur costs "running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing." This was the Supreme Court's cautionary statement about the substantive jurisdiction hearing. The deprecated level of costs has now been reached on just the disclosure proceedings ancillary to such a hearing. It is of note that the Judge ordered a "disclosure statement". The parties were unable to find a single decided case where the court had ordered a disclosure statement in such circumstances. As the appellant submits, it indicates that "something has gone wrong". In similar vein, the Judge spoke of costs budgets for the process, once more a step that appears unprecedented. These innovations are suggestive of a loss of tight control on what should be a circumspect and controlled process. Lord Neuberger's speech in *VTB Capital* was cited by Lord Briggs in *Vedanta* (para 7). Lord Briggs went

on (para 8) to cite Waller LJ's judgment in *Cherney v Deripaska (No 2)* [2010] 2 All ER (Comm) 456. Waller LJ said at para 7 that it

> "would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim."

175 Such warnings and deprecations have been repeated by the senior courts, Lord Briggs observes, "in numerous subsequent cases" (para 7). Lord Briggs's speech in *Vedanta* was agreed by Baroness Hale PSC and Lord Wilson, Lord Hodge and Lady Black JJSC.

176 The consequence of this court's appellate decisions is that the disclosure as now ordered will not result in a "mini-trial". The disclosure mandated will be manageable administratively and proportionate in extent; it can comfortably be considered within the strict (and already generous) perimeters of the time allocated to the substantive jurisdiction hearing listed in April. I sense-check my decisions with a return to *Rome* (and *Vedanta*): ordering such disclosure, I remain acutely aware, is out of the norm for a jurisdiction challenge and "exceptional" – a description, not the test. I am satisfied that the disclosure orders, as refined, will permit the court to determine the jurisdiction question proportionately as envisaged by Lord Neuberger and Lord Briggs, not hamstring or prejudice the claimant/respondent in meeting the Bank's forum challenge, and in this way enable the court to deal with the case justly and "in particular" (PD 31A) give effect to the overriding objective in doing so.

VIII. *Disposal*

177 To assist the parties, I gather in one place the court's prime conclusions:

Part One

- The applicable test is the *Rome* two-stage test, not exceptionality.

Part Two

- 1a. Appeal allowed. Order set aside. Disclosure refused.
- 1b. Appeal dismissed.
- 1d. Appeal allowed. Order set aside. Disclosure refused.
- 1e. Appeal dismissed.
- 1f. Appeal allowed. Order set aside. Disclosure refused.
- 1g. Appeal allowed in part. Order set aside in part. Disclosure ordered in part.
- 1h. Appeal allowed. Order set aside. Disclosure refused.
- 1i. Appeal allowed. Order set aside. Disclosure refused.
- 1k. Appeal allowed in part. Order set aside in part. Disclosure ordered in part.

178 I direct that counsel draw up an order to reflect the terms of this judgment.