Neutral Citation Number: [2021] EWHC 342 (QB)

Case No: QB-2021-000211

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th February 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

WANGZHOU MENG	**Applicant**
- and -	
HSBC BANK PLC	
HSBC UK BANK PLC	
HSBC BANK USA NA, LONDON BRANCH	**Respondents**

- -
- -

James Lewis QC and Rachel Scott (instructed by Mishcon de Reya) for the **Applicant**
Rupert Allen (instructed by Latham & Watkins (London) LLP) for the **Respondents**

Hearing date: 12th February 2021

Final Judgment

MR JUSTICE FORDHAM :

Introduction

1. This case is about whether to order access to bank documents for use in extradition proceedings abroad. The case came before me as an application pursuant to section 7 of the Bankers' Books Evidence Act 1879 ("the 1879 Act"), issued on 19 January 2021. The applicant is the Chief Financial Officer of Huawei Technologies Co Ltd ("Huawei TCL"), the world's largest telecommunications equipment company. The respondents are UK-based subsidiaries of the HSBC Group, a multinational financial institution. There are criminal proceedings on foot in the United States ("the US Criminal Proceedings"), brought by US prosecutors ("the US Prosecuting Authorities") against Huawei TCL and Huawei Device USA Inc ("Huawei DUI"). In those proceedings, a Protective Order ("the PO") dated 31 May 2019 and Supplemental Protective Order ("the SPO") dated 10 March 2020 make provision about what can and cannot be done with prosecution disclosure materials made available to Huawei TCL and Huawei DUI, their US lawyers and others. The applicant was detained by the Canadian Authorities at Vancouver International Airport on 1 December 2018. The United States ("the Requesting State Authority") seeks her extradition from Canada, so that she can be prosecuted for fraud as a co-defendant in the US Criminal Proceedings. Extradition proceedings ("the Canadian Extradition Proceedings") are on foot in the Supreme Court of British Columbia ("the Canadian Court"). In those proceedings, on 28 January 2019, the Requesting State Authority certified that the evidence summarised in a Record of the Case for Prosecution ("the ROC") was *"available for trial"* and *"sufficient under the laws of the United States to justify prosecution"*. The Requesting State Authority subsequently issued a Supplemental Record of the Case ("SROC") on 28 February 2019 and Second Supplemental Record of the Case ("SSROC") on 14 December 2020. On 28 October 2020, Associate Chief Justice Holmes ("the Canadian Judge") issued a ruling – *United States v Meng* 2020 BCSC 1607 ("the Canadian Ruling") – following a hearing on 28-30 September 2020. The next hearing before the Canadian Court is fixed for 1 March 2021 with an abuse of process argument (§4 below) being heard on 26 April 2021.

Mode of Hearing and Open Justice

2. The mode of hearing in this Court was a remote hearing by Microsoft Teams. Counsel were satisfied, as was I, that this mode involved no prejudice to the interests of their clients. A remote hearing eliminated any risk to any person from having to travel to, or be present in, a court room. I am satisfied that a remote hearing was necessary and proportionate in the context of the national Covid-19 lockdown. The open justice principle was secured through the publication of the case and its start time on the Cause List, together with an email address usable by any member of the press or public who wished to observe the hearing, as many did. Open justice was also promoted by arrangements made with the parties prior to the hearing and embodied in an Order which I made at the start of the hearing, under which the skeleton arguments (and the Order) were obtainable immediately by any member of the press or public sending an email to my clerk (whose email address I gave in open Court), as many did. By the same Order, I directed (CPR 5.4C(4)(d)) that access to those skeleton arguments and to documents from the Court file be restricted to versions of documents from which two names had been redacted, but with liberty to any person to apply to the Court on notice to vary or discharge that restriction. The reasons for that restriction were set out in a

recital to the Order and were as follows. (1) The Requesting State Authority in the Canadian Extradition Proceedings has sought and obtained from the Canadian Court an order that the names in question be redacted in any documents which are provided to the media, such order having been made because the Canadian Court was satisfied that there was good reason for it. (2) Those Canadian Extradition Proceedings are the proceedings relied on by the Applicant as constituting the *"legal proceeding"* and *"proceedings"* for the purpose of which this application is made pursuant to section 7 of the 1879 Act. (3) There is no basis in the circumstances for declining to accept the Canadian Court's assessment of the need for and appropriateness of redaction. That order of the Canadian Court would be undermined and could be frustrated in the absence of this Order. It is necessary in the interests of justice, and in any event necessary in the interests of comity, that there be equivalent redaction. (4) The redaction of the two names does not interfere with the ability of any member of the press or public to follow and report on this hearing. Any member of the press or public who disagrees with this Order or wishes to challenge it is protected by being able to apply to vary or discharge it.

The Context

A Gist of the US Prosecuting Authorities' Case Against the Applicant

3. The essence of the case being made by the Requesting State Authority against the applicant is encapsulated thus, in her written submissions (17 July 2020) filed in the Canadian Extradition Proceedings: *"The Applicant's deceit placed HSBC at financial risk"* so that *"a fraud was committed"*. Key features of the Requesting State Authority's case against her include the following claims. HSBC Group was Huawei's most important international bank with relationships in over 40 countries. US-dollar denominated transactions are required to be processed through the US, whose laws and regulations contain certain prohibitions on banks providing such transactions if related to Iran. HSBC Group cleared US dollar transactions through its US-based subsidiary HSBC US. After Reuters news articles in December 2012 and January 2013 claimed Skycom Tech Co Ltd ("Skycom") was closely associated with Huawei TCL and had attempted to sell US-manufactured equipment to an Iran-based customer, some *"junior"* HSBC Group employees initiated the closure of Skycom's account. The applicant gave a PowerPoint Presentation ("the PPP") on 22 August 2013 in Hong Kong to HSBC Group's Head of Global Banking. The PPP involved untrue representations made by the applicant denying Huawei TCL's ownership and control of Skycom. In fact, Huawei TCL controlled Skycom's operations in Iran until at least 2014. HSBC Group relied on those and other misrepresentations in deciding to continue the banking relationship with Huawei TCL, action which it took believing the civil, criminal and reputational risks of banking Huawei TCL to be acceptable. Whether to continue the banking relationship was considered at a global risk committee meeting in London on 31 March 2014. HSBC Group and HSBC US cleared more than $100 million worth of transactions related to Skycom through the United States between 2010 and 2014, at least $7.5 million of which were payments by Skycom made to Networkers International UK Plc ("Networkers"), a staffing company in the United Kingdom providing contractors to work on Huawei TCL's telecommunications projects in Iran, contrary to US sanctions law.

A Gist of the Applicant's Position in the Extradition Proceedings

4. Key features of the applicant's case in the Canadian Extradition Proceedings include the following claims. The ROC is (i) manifestly unreliable such that the evidence is not sufficient and she should be discharged under section 29(1) of the Extradition Act and (ii) deliberately misleading by reason of evidence being deliberately withheld or misstated by the Requesting State Authority such that the extradition proceedings should be stayed as an abuse of process. Each of these arguments is supported by reliable and relevant evidence which the applicant seeks to adduce pursuant to section 32(1)(c) of the Extradition Act. The insufficient, unreliable and misleading nature of the case against the applicant can be seen by reference to points such as the following. There was no misrepresentation within the PPP, once the contents of the PPP are fairly considered. Relevant personnel within HSBC Group, moreover, were aware of the relationship between Huawei TCL and Skycom, not just at what has been portrayed as 'junior' level, HSBC Group having carried out other enquiries, and HSBC Group personnel were not therefore relying on the PPP. Furthermore, there was no link between (1) a post-PPP decision to continue the banking relationship with Huawei TCL and (2) actions to process US-dollar denominated transactions through the United States, even after August 2013 (still less before that date). Indeed, the logic of that case breaks down completely, given that: (a) those US-dollar denominated transactions were between Skycom and Networkers; (b) they were not processed by any HSBC Group entity as banker to Skycom (that relationship having ended in February 2013 with Skycom's account closure); (c) they were processed by HSBC Group entities (including the first respondent) as bankers to Networkers; and (d) none of this banking action was a function of continuing as Huawei TCL's banker.

The Reuters Report (26 February 2019)

5. A Reuters news report dated 26 February 2019, on which the applicant relies, refers to an *"HSBC probe of Huawei … in late 2016 and 2017"* which is said to have *"helped lead to US charges against [the applicant]"*. An HSBC spokesperson is quoted as saying: *"Information provided by HSBC to the [US] Justice Department was provided pursuant to formal demand, including grand jury subpoena or other obligation to provide information pursuant to a Deferred Prosecution Agreement or similar legal obligation"*. Reuters reports that: *"According to the HSBC documents, investigators conducted more than 100 interviews, reviewed more than 292,000 emails and analysed years of financial transactions"*.

The Canadian Ruling (28 October 2020)

6. The Canadian Ruling is *United States v Meng* 2020 BCSC 1607 (October 28, 2020). It is accessible in the public domain at www.bccourts.ca, which means it is unnecessary for me to describe it in detail. Key features of the Canadian Ruling include the following. There is a 'limited weighing of the evidence' which is appropriate within the 'screening function' performed at an extradition hearing. There are recognised rights for the applicant, as a requested person, to contend that the ROC is: (i) manifestly unreliable such that the evidence is not sufficient and she should be discharged under section 29(1) of the Extradition Act; and/or (ii) deliberately misleading by reason of evidence being deliberately withheld or misstated by the Requesting State Authority such that the extradition proceedings should be stayed as an abuse of process. The applicant succeeded to a limited extent in her application to adduce seven items of evidence pursuant to section 32(1)(c) of the Extradition Act, as being 'reliable' and 'relevant'. The abuse of process argument has an 'air of reality' which suffices for it to

be considered substantively and it is not possible without full argument to rule out its success.

The Sidley Letter (7 February 2021)

7. On 7 February 2021 a letter was written to the US Prosecuting Authorities by US lawyers (at the New York law firms Sidley Austin LLP and Jenner & Block LLP) acting for Huawei TCL and Huawei DUI, and two other corporate entities in the US Criminal Proceedings. A version of that letter has been produced, redacted for public filing ("the Sidley Letter"). In the Sidley Letter, on which the applicant relies, claims are made by the US lawyers, including that the disclosure made by the US Prosecuting Authorities in the US Criminal Proceedings (and covered by the PO and the SPO) undermines the prosecution case, and that further disclosure is in fairness required.

The Application to This Court

The Essence of the Application

8. Pursuant to section 7 of the 1879 Act (§10 below), the applicant seeks access to documents which she says: (i) are held by the Requesting State Authority; (ii) emanate from within the HSBC Group; (iii) are needed by her to support arguments in the Canadian Extradition Proceedings (which arguments the Canadian Ruling has held are open to her); and (iv) are not 'discoverable' (amenable to court ordered disclosure) in those proceedings nor through the US Criminal Proceedings. As Mr Lewis QC encapsulated it: *"It is clear beyond argument that the United States of America undoubtedly has the relevant documents but will not allow the applicant to have them notwithstanding she needs them for her defence in Canada"*. The application is made to this Court, supported by Huawei TCL, asking that I order the respondents to search for and gather materials for inspection and copying by the applicant's legal representatives for the purpose of using them in the Canadian Extradition Proceedings before the Canadian Court. The applicant accepts that, were the order granted, she should be ordered pursuant to section 8 of the 1879 Act (§10 below) to indemnify the respondents for all costs of compliance.

The 13 Categories of Document Sought

9. The application before me (with minor narrowing adjustments in the applicant's skeleton argument) seeks an Order requiring each of the respondents (referred to as *"the bank"*) to allow the applicant to inspect and take copies of the following 13 categories of documents. (References to HSBC mean HSBC Group and entities within it. References to Huawei mean Huawei TCL. Canicula is a reference to Canicula Holdings Ltd: a corporate entity to whom Huawei TCL was said to have sold its stake in Skycom in 2007 and which is said to have been and remained under Huawei TCL's control.)

> ***1. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank, created by HSBC Deputy Head of Global Banking, Alan Thomas and other HSBC personnel and referring to the PowerPoint presentation given by the applicant to Alan Thomas on or about 22 August 2013 in Hong Kong. This includes: (a) any entries or documents (between 23 August 2013 and 1 October 2017) used in the ordinary business of the bank sent by/to Alan Thomas to/by other HSBC personnel, including members of HSBC's risk committees; and (b) any entries or documents (between 30 December 2012 and 30 October 2014, but not outward-facing correspondence) used in the ordinary business of the bank related***

to enquiries from HSBC personnel to Huawei personnel regarding the allegations made in the articles about Huawei published by Reuters on 30 December 2012 and 31 January 2013.

2. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review, in relation to any transactions between Networkers and Skycom in the period September 2013 to October 2014.

3. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review, in relation to any transactions involving Skycom in the period 1 January 2010 to 31 December 2014.

4. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review, in relation to the closure in February 2013 of Skycom's account at HSBC, in the period 30 December 2012 to 1 November 2014.

5. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review, in relation to the closure in April 2014 of Canicula's account at HSBC, in the period 30 December 2012 to 1 November 2014.

6. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review, in relation to any transactions involving Canicula in the period 1 January 2010 to 30 April 2014.

7. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created pursuant to the bank's policies and/or programmes for compliance with anti- money laundering, anti-bribery and corruption and sanctions law and regulation, and any other ongoing transaction monitoring or compliance review in relation to Huawei in the period 1 January 2010 to 31 December 2015.

8. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created regarding 'Know Your Client' checks carried out on Skycom including, without limitation, in relation to Skycom's ultimate beneficial owner(s), for the period 1 January 1998 to 1 March 2013.

9. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank which show that Skycom's account at HSBC was linked to or associated with Huawei's accounts at HSBC, to include any entries which refer to the account(s) of Skycom and/or Canicula as part of the "Huawei Mastergroup".

10. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created regarding 'Know Your Client' checks carried out on Canicula, for the period 1 January 2007 to 31 December 2014.

11. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created concerning 'Know Your Client' checks carried out on Huawei for the periods 1 January 2007 to 11 August 2017.

> ***12. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created as a result of adverse information screening or negative news monitoring in respect of Huawei, Skycom or Canicula, for the period 1 October 2012 to 1 December 2014.***
>
> ***13. Entries in any ledger, book or record in written or electronic form used in the ordinary business of the bank created by or for any of the bank's risks committees for the period 1 January 2012 to 31 December 2017, in connection with: (a) any evaluation of a sanctions or compliance risk to the bank posed by Huawei, Skycom or Canicula; and/or (b) any evaluation by HSBC of whether to maintain Huawei, Skycom or Canicula as clients.***

The 1879 Act

10. The 1879 Act bears the long title: *"An Act to amend the Law of Evidence with respect to Bankers' Books"*. Section 1 provides for the short title (*"the Bankers' Books Evidence Act 1879"*), section 2 was repealed in 1894 and section 11 deals with computation of time. I will set out the other provisions here. Sections 3-6 of the 1879 Act are as follows:

> ***3. Mode of proof of entries in bankers' books.***
> ***Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded.***
>
> ***4. Proof that book is a banker's book.***
> ***Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.***
>
> ***5. Verification of copy.***
> ***A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.***
> ***Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.***
>
> ***6. Case in which banker, &c. not compellable to produce book, &c.***
> ***A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or under the Civil Evidence (Scotland)Act 1988 or Schedule 8 to the Criminal Procedure (Scotland) Act 1995 or Schedule 3 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.***

Section 7 of the 1879 Act is as follows:

> ***7. Court or judge may order inspection, &c.***
> ***On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.***

Sections 8-10 of the 1879 Act are as follows:

> ***8. Costs.***
> ***The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the***

> ***purposes of this Act shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.***
>
> ***9.— Interpretation of "bank" "banker", and "bankers' books".***
> ***(1) In this Act the expressions "bank" and "banker" mean —***
> ***(a) a deposit-taker;***
> ***(b) …***
> ***(c) the National Savings Bank;***
> ***(d) …***
> ***(1A) "Deposit taker" means—***
> ***(a) a person who has permission under Part 4A of the Financial Services and Markets Act 2000 to accept deposits; or***
> ***(b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits or other repayable funds from the public.***
> ***(1B) But a person is not a deposit-taker if he has permission to accept deposits only for the purpose of carrying on another regulated activity in accordance with that permission.***
> ***(1C) Subsections (1A) and (1B) must be read with—***
> ***(a) section 22 of the Financial Services and Markets Act 2000;***
> ***(b) any relevant order under that section; and***
> ***(c) Schedule 2 to that Act.***
> ***(2) Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.***
>
> ***10. Interpretation of "legal proceeding," "court," "judge."***
> ***In this Act—***
> ***The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes …***
> ***(a) an arbitration;***
> ***(b) an application to, or an inquiry or other proceeding before, the Solicitors Disciplinary Tribunal or any body exercising functions in relation to solicitors in Scotland or Northern Ireland corresponding to the functions of that Tribunal; and***
> ***(c) an investigation, consideration or determination of a complaint by a member of the panel of ombudsmen for the purposes of the ombudsman scheme within the meaning of the Financial Services and Markets Act 2000.***
> ***The expression "the court" means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken;***
> ***The expression "a judge" means with respect to England a judge of the High Court, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court in Northern Ireland;***
> ***A judge of the county court may with respect to any action in such court exercise the power of a judge under this Act.***

First Issue: Foreign Proceedings

11. The first issue is whether the words *"a legal proceeding"* in section 7 mean *"a legal proceeding in the United Kingdom"* (as the respondents submit) or *"a legal proceeding anywhere in the world"* (as the applicant submits). It is common ground that this is a question of interpretation of the 1879 Act.

12. Mr Lewis QC's submissions on this issue in essence, as I saw them, came to this. (1) In section 7 Parliament used the phrase *"<u>any</u> party to a legal proceeding"*. In section 10 Parliament then defined *"legal proceeding"* as *"<u>any</u> civil or criminal proceeding or*

inquiry in which evidence is to be given". Those words should be given their ordinary and natural meaning. Clear justification is needed to read-in words which are not present. It would have been easy for Parliament to introduce a restriction, and it did not do so. (2) Although it is obvious – and common sense – that the phrase *"a court"* in section 7 means a court in the United Kingdom, that is because the statutory power to make an *"order"* attracts the presumption against extra-territorial effect. On the other hand, the phrase *"any party to a legal proceeding"* in section 7 is a precondition for the exercise of the power. No question of extra-territoriality arises: the *"court"* or *"judge"* (defined in section 10) will be in the United Kingdom; and so will *"the bank"* served with the section 7 *"application"*. (3) The 'meaning' of *"legal proceeding"* is unchanged throughout the Act and means 'legal proceeding anywhere in the world'. Its 'scope' is contextually variable. That 'scope' is limited in sections 3-6, which deal with the receiving of evidence from a *"banker's book"* in proceedings in the United Kingdom, because of a necessary implication arising from the wording and function of those provisions. Section 7 has an independent function, as the 1879 Act's *"main operative provision"* (cf. Protasco: *Protasco Bhd v PT Anglo Slavic Utama* [2019] 9 MLJ 417 (High Court at Kuala Lumpur) at §21). (4) This interpretation of section 7 of the 1879 Act is consistent with Omar (*R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118 [2014] QB 112), a case which decided that no parallel common law remedy survived to fill a so-called 'justice gap' in the statutory framework for ordering the provision of evidence in aid of proceedings in foreign courts. The principle in Westinghouse (*In re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket (Nos.1 and 2)* [1978] AC 547, 632G-633A), cited in Omar at §22 is that: *"The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory"*. Section 7 of the 1879 Act falls within that *"exclusively statutory"* jurisdiction. (5) Although Schedule 1 paragraph 7 to the Crime (International Co-operation) Act 2003 provides that the 1879 Act *"applies to the proceedings"* by which a court nominated by the Secretary of State (section 15) receives evidence to give effect to a request for assistance from a foreign criminal court or prosecutor (section 13), there is a parallel direct route for a defendant in foreign criminal proceedings to invoke section 7 of the 1879 Act. In extradition cases, which are criminal proceedings in a requested state where no criminal offence is said to have been committed (section 14(2) of the 2003 Act), the 2003 Act would not be available even upon request for assistance by the Canadian Court, but section 7 of the 1879 Act is available to a party, which includes the requested person. The 2003 Act (for criminal cases) and the Evidence (Proceedings in Other Jurisdictions) Act 1975 (for civil cases) are not exclusive statutory jurisdictions for ordering the provision of evidence in aid of foreign proceedings: see eg. the Companies Act 1989 section 82 (requests by overseas regulatory authorities). (6) The application of section 7 to proceedings before a foreign court was recognised by Macpherson J in making the order in Bonalumi (*Bonalumi v Secretary of State for the Home Department* [1985] 1 QB 675). There, evidence was sought for use in criminal proceedings in Sweden and the section 7 order was made only after *"the Government of Sweden [was] joined as an applicant"*, as *"a party to the criminal proceedings in which it was sought to use [the] evidence"*. Also persuasive is the Hong Kong case of Zhu (*XY, LLC v Jessie Zhu* HCMP 869/2014 Au-Yeung J 13 November 2015) in which, 'effectively', the equivalent power to section 7 was exercised to require evidence for use in foreign proceedings.

13. I cannot accept these submissions. First, there is the phrase *"legal proceeding"* itself, in a statute which is unmistakeably about *"evidence"*. Parliament used the phrase *"legal proceeding"* throughout the Act. Accordingly: section 3 speaks of *"all legal proceedings"*; section 6 speaks of *"any legal proceeding"*; section 7 speaks of *"a legal proceeding"*. The expression *"legal proceeding"* is defined, for the purposes of *"this Act"*, in section 10. It means *"any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes: (a) an arbitration; (b) an application to, or an inquiry or other proceeding before, the Solicitors Disciplinary Tribunal or any body exercising functions in relation to solicitors in Scotland or Northern Ireland corresponding to the functions of that Tribunal; and (c) an investigation, consideration or determination of a complaint by a member of the panel of ombudsmen for the purposes of the ombudsman scheme within the meaning of the Financial Services and Markets Act 2000"*. Notwithstanding *"any"* in section 10 and *"all"* in section 3, Parliament was clearly not making provision in section 3 about banker's book entries being *"received as … evidence"* in proceedings outside the United Kingdom. The same is true for *"proof"* in section 4, *"received in evidence"* in section 5 and compellability in section 6 in *"any legal proceeding to which the bank is not a party"*. Every relevant *"legal proceeding"* for sections 3-6 would necessarily need to be 'in the United Kingdom', even though Parliament did not expressly qualify *"all"* (section 3) or *"any"* (section 6) by using that phrase. Section 7 allows access to entries in a banker's book, specifically *"for any of the purposes of"* the *"legal proceeding"*. That provision fits alongside the others. It is the means of access to entries which could then be received as *"evidence of such entry, and of the matters, transactions, and accounts therein recorded"* in the *"legal proceedings"* (section 3). This link is reinforced by the fact that a section 7 order can be accompanied (under section 8) by an order as to the bank's costs of compliance, which *"may be enforced as if the bank was a party to the proceeding"*. There is no reason to think that Parliament intended *"legal proceeding"* to have a different 'scope' in section 7 than its necessarily-implied 'UK-limited scope', seen elsewhere in the Act, especially bearing in mind the single definitional provision. There is every reason to conclude that Parliament intended the same scope.

14. Secondly, there is the clear link between *"legal proceeding"* and *"court"*. Both of these terms appear in section 7 itself. Obtaining the section 7 order from *"a court"* is the first of two options. The second option is obtaining the section 7 order from *"a … judge"*, which under section 10 *"means with respect to England a judge of the High Court, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court in Northern Ireland"*. The first option engages this definition in section 10: *"The expression "the court" means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken"*. Parliament clearly recognised that *"a legal proceeding"* involves a *"court"* – even if it is an arbitrator or even a *"person"* – before whom that *"legal proceeding"* is *"held or taken"*. Parliament empowered the court to make a section 7 order, for entries in a banker's book to be inspected and copies taken for the purposes of the proceedings before the court. Clearly, proceedings outside the United Kingdom have a *"court, judge, arbitrator, persons or person before whom [the] legal proceeding is held or taken"*. In the present case the Canadian Extradition Proceedings are held before the Canadian Court. Clearly, Parliament was not in section 7 making provision about the Canadian Court making a section 7 order. Clearly, Parliament was not in section 8 making provision about costs of a section 7 order (including one made by the High Court) being enforced *"as if the bank was a party to"* the Canadian Extradition

Proceedings. The irresistible conclusion is that *"court" – "before whom [the] legal proceeding is held or taken"* – in section 7, read with section 10, means 'in the United Kingdom'. It follows that the *"legal proceeding"* is 'in the United Kingdom'.

15. Thirdly, the phrase *"a legal proceeding"* in section 7 is not a 'precondition for the exercise of the power'. It is the functional and destinational focus of the power. The purpose and function of the section 7 power involves ordering inspection and copying of entries in a banker's book *"for any of the purposes of"* the *"legal proceedings"* in which the applicant is a *"party"*. The *"proceeding"* also provides the *"court"* which can make the section 7 order, and a costs-enforcement forum (section 8).

16. Fourthly, where the second option is in play – section 7 application to the *"judge"* – this will be a judge of the High Court (of England and Wales) *"with respect to England"* (meaning England and Wales), a lord ordinary of the Outer House of the Court of Session *"with respect to Scotland"*, and a judge of the High Court in Northern Ireland *"with respect to Ireland"* (meaning Northern Ireland). By this means, Parliament has provided for a *"judge"* able to consider *"the purposes of such proceedings"* under section 7, and able to consider *"special cause"* for ordering that a banker or officer of a bank *"appear as a witness to prove the matters, transactions and accounts … recorded"* in the banker's book (section 6), in the context of a statute with an unmistakeable evidential focus. By making provision *"with respect to"* the three constituent parts of the United Kingdom Parliament was not focusing on the location of the bank, but on the location of the legal proceeding. This feature of the Act reinforces the conclusion that the *"legal proceeding"* will be in England and Wales, or Scotland or Northern Ireland. But not in Canada. In Kissam (*Kissam v Link* [1896] 1 QB 574) the Court of Appeal explained that *"the … judge of that part of the United Kingdom where the proceeding is set on foot may be asked to make an order for inspection"* (AL Smith LJ at 576); the *"order is rightly made by a judge having jurisdiction in that part of the United Kingdom where the legal proceeding is pending"* (Rigby LJ at 576), so that *"where an order is asked for in a legal proceeding in England it must be made by a judge in England and in the cases of Scotland and Ireland the order must be made by judges there"* (Lord Esher MR at 575).

17. Fifthly, the statutes concerned with the *"statutory"* jurisdiction *"to order persons"* to *"provide oral or documentary evidence in aid of proceedings in foreign courts"* (Westinghouse at 633A) reinforce this analysis. The 1975 Act (civil), 2003 Act (criminal) and 1989 Act (regulatory) all make provision for 'mutual assistance' for foreign proceedings. In each of them Parliament has expressly spelled out that material is being provided, pursuant to actions of a United Kingdom court, for use in foreign proceedings. These statutory schemes have clear parameters, reflective of that role and purpose, in particular that a formal request emanates from a foreign court or tribunal (or public authority) – not from a private party or criminal defendant – and is mediated through special arrangements and filtering safeguards. Under the 2003 Act, foreign courts and public authorities and international authorities may make a request for assistance in obtaining evidence (section 13) and a United Kingdom court can be nominated by the Secretary of State to obtain evidence to which the request relates (section 15). The evidence-obtaining proceeding before that United Kingdom court then becomes a proceeding in which a party can invoke the 1879 Act – including section 7 – as Schedule 1 paragraph 7 spells out (though, as both Counsel rightly accept, that would be the case even if paragraph 7 were absent). The applicant's logic is striking. It

is that a foreign criminal prosecutor could apply direct to the High Court under section 7 of the 1879 Act, without any nominated court proceedings being on foot. Moreover, a criminal defendant in foreign proceedings could apply direct to the High Court under section 7 of the 1879 Act, notwithstanding that that party is not entitled to make a request under the 2003 Act. This would provide a direct, bypassing provision in all criminal cases everywhere, and the same would be true as to the 1975 Act and foreign civil proceedings. And yet it would only do so in the case of entries in banker's books: other evidence would still have to be adduced through the mechanisms of the 'mutual assistance' statutes. It is impossible to believe that Parliament intended this. Parliament would not have intended a general judicial discretion as a parallel – or to fill a 'justice gap' – alongside such carefully crafted statutory regimes (see Omar at §§19 and 25), a point with resonance as to the section 7 discretionary power, as with a common law power (in Omar). This is not a question of the 1879 Act being 'cut down' by later primary legislation. By section 1 of the Evidence by Commission Act 1859, Parliament had already made provision for the taking of evidence (including the production of documents) in relation to proceedings before a court or tribunal of Her Majesty's Dominions which had duly authorised this. By section 5 of the Extradition Act 1873, Parliament had also already empowered the Secretary of State by order to require magistrates to take evidence *"for the purposes of any criminal matter pending in any court or tribunal in any foreign state"*, which extended to the giving of oral evidence and the production of documents. It does not assist for the applicant to submit that, in an extradition context, section 14(2) of the 2003 Act expressly limits 'mutual assistance' to the trial in a foreign prosecuting state and not the extradition proceedings in the foreign requested state. Assuming that to be correct, that is Parliament's deliberate choice. It is as much part of the express design of the statutory scheme as is the provision which prevents a request being made by the accused and requires it to be from a foreign court or prosecutor (section 13(2)). The consequence is that the requested person is unable to come to the United Kingdom court for an order to obtain banker's books evidence for the purpose of use in foreign extradition proceedings, just as they are unable to do so for an order to obtain other evidence for that purpose.

18. Sixthly, the authorities cited do not in truth support the applicant's position. Bonalumi was a case where (i) Swedish criminal proceedings were on foot before a district court in Sweden and (ii) United Kingdom proceedings to take evidence for the purposes of those Swedish criminal proceedings were also on foot before the Guildhall justices pursuant to an order of the Secretary of State under section 5 of the Extradition Act 1873. It was in those circumstances that an application was made under section 7 of the 1879 Act. In today's terms, this would be a situation covered by Schedule 1 paragraph 7 to the 2003 Act. Mr Lewis QC is able to say that Macpherson J had adjourned the case and made the order sought only after the Swedish prosecutor was made an applicant, which indicates that he thought the *"legal proceeding"* for section 7 purposes was the Swedish district court proceedings. No reasoned ruling, if there was one, survives. A judicial review challenge in the High Court failed, unsurprisingly since judicial review does not allow a challenge to a decision of the High Court. On appeal, the Court of Appeal held that the case was a *"criminal cause or matter"* over which it had no jurisdiction. Stephenson LJ recorded Macpherson J's conclusion that the Swedish prosecutor needed to be an applicant (see 679B-C). But elsewhere, Stephenson LJ spoke of the Secretary of State as having *"sought an order from the High Court, as he was empowered to do"* (678D). Mr Moses, who represented both the Swedish prosecutor and the Secretary of State in the Court of Appeal, argued that Macpherson

J's judgment was *"in relation to evidence to be taken in a court of criminal jurisdiction, namely the justices' court at Guildhall, according to criminal rules of evidence for the purpose of a criminal case which is known to be taking place in Sweden"* (680A). The Court of Appeal agreed. Stephenson LJ described *"the position"* as involving *"proceedings in train before the Guildhall justices and proceedings starting next week in Sweden"*, where *"quite clearly"* the order had *"been made in criminal proceedings both in a magistrates' court in this country and in a district court in Sweden"* (680D). He posited that an alternative route might have been the use of the 1975 Act, being *"proceedings in a civil court, in this country"*, which would be a *"criminal cause or matter"* given the subject-matter being what was *"to be litigated in Sweden"* (680F). His conclusion was that this was an order in a criminal cause or matter, being *"a case in which proceedings have actually been started in two criminal courts, in London and in Sweden"* and where *"this order"* was *"made for the purpose of putting evidence before first one of those courts and then the other"* (686F). Lloyd LJ agreed, concluding that *"the cause or matter is the proceeding under section 5 of the Extradition Act 1873"* (688A). Sir David Cairns agreed with both judgments. Thus, the analysis of the Court of Appeal – endorsing that of Mr Moses – was that the section 7 order had been made in proceedings before the Guildhall magistrates. The alternative contemplated was an order under the 1975 Act. The case does not support the contention that there could be a direct application pursuant to section 7 of the 1879 Act to the High Court, including by the defendant in the Swedish criminal proceedings, with those proceedings as sufficient to constitute *"a legal proceeding"* under section 7.

19. The Hong Kong case of Zhu was a case where there were Hong Kong proceedings on foot, for enforcement of a foreign judgment, and banker's books evidence was sought in that context. There was an originating summons in Hong Kong and a Hong Kong Mareva injunction (§13), in aid of the enforcement of a Canadian monetary judgment (§5, 13) accompanied by a Canadian Mareva injunction (§9), based on the claim that the Canadian monetary judgment could be enforced in Hong Kong (§31). There was a Canadian disclosure order (§15) and the Hong Kong court had before it a disclosure summons (§16). In seeking the banker's books disclosure order (§87), the plaintiff was a party to Hong Kong proceedings and obtained *"leave to use the information and documents obtained … for the purpose of proceedings … in Hong Kong and elsewhere"* (§103(4)), the order being one which would aid recovery (§93) and assist the Canadian court (§98). Zhu is no authority for the proposition that a direct application was possible by a person relying on their status as party in foreign proceedings. The Court's order was not based on characterising the Canadian, rather than the Hong Kong, proceedings as the relevant *"proceedings"* for the purposes of section 21 of the Hong Kong Evidence Ordinance.

20. For these reasons I find against the applicant on this first issue. The consequence is that I have no jurisdiction to make the order sought. Jurisdiction was not argued as a preliminary issue (cf. Omar at §27) and, notwithstanding Mr Lewis QC's submission that my decision on this application is not amenable to appeal, in light of the fact that all points were argued I will deal with the remaining issues as I would have done had I reached the opposite conclusion on this first issue.

Second Issue: Banker's Books

21. The second issue is whether *"entries in"* (section 7) in *"other records used in the ordinary business of the bank"* (section 9(2)) is a phrase which means (i) transactional records (as the respondents submit) or (ii) transactional records together with non-transactional records maintained for regulatory compliance (as the applicant submits). The following points are common ground: (1) that this is a question of interpretation of the 1879 Act; (2) that transactional records are within the phrase; and (3) that not all documents *"used in the ordinary business of the bank"* (section 9) which would evidence *"matters ... therein recorded"* (sections 3, 6) are within the phrase.

22. Mr Lewis QC's submissions on this second issue in essence, as I saw them, came to this. (1) The 1879 Act has to be interpreted in a way which keeps apace with modern banking. Section 9 has always referred to *"the ordinary business of the bank"* and that *"ordinary business"* can change in its nature over time, just as the mode of record-keeping can change. Section 9 as enacted referred to *"all other books used in the ordinary business of the bank"* and in Barker (*Barker v Wilson* [1980] 1 WLR 884) the Divisional Court had decided that *"book"* would include *"microfilm"* and any other *"methods which modern technology makes available"* (see 887D, G-H). The section 9 language was in due course amended to say *"other records used in the ordinary business of the bank"* and Parliament added the words *"whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism"*. (2) Although the older case-law focuses on transactional records, modern banking has moved into a 'compliance-based system' and then a 'risk-based system' with 'monitoring' and 'risk assessment' at the fore, as can be seen in 2005 EU legislation and 2007 UK regulations. The 1879 Act, which itself refers – and always has – to *"matters"* and not just *"transactions"* (sections 3, 6), needs an 'always speaking' (updating) interpretation which recognises the significance of these shifts. (3) Of particular assistance is the comparative case-law interpreting equivalent legislation. In particular, Wee (*Wee Soon Kim Anthony v UBS AG* [2003] 5 LRC 171) where the Court of Appeal of Singapore held (at §36) that in interpreting *"other books"* the Court should *"take a purposive approach and recognise the changes effected in the practices of bankers"*; and Protasco where the High Court of Malaysia held (at §38) that *"in order to come within the definition of 'banker's books', a document: (a) must comprise any transaction record that is generated by the bank; or (b) must be a document which the bank maintains, for the purposes of accounting, audit, reconciliation or reporting"*. This Court should follow and adopt Protasco §38 extended category (b). (4) This will not impose undue burdens on banks. It is in the nature of documents which a bank maintains for the purposes of accounting, audit, reconciliation or reporting that these documents must be readily, and speedily, accessible (to a regulator). The applicant's case, in short, is that records maintained for regulatory compliance fall within section 9(2), and it is those records to which the applicant seeks access by order of this Court under section 7.

23. I cannot accept those submissions. First, the 1879 Act is, and has always been, concerned with facilitating the proof, by evidence in proceedings, of concrete banking actions. Those concrete actions are what the bank 'records' on the 'books'. These 'books' in 1879 were called *"ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank"*. Parliament wanted to keep *"books"*, and bankers, in the banks; and not away from the bank because they were needed in the courtroom. Parties to proceedings could therefore rely on a *"book"*, and get a banker to say that was what it was (section 4), by someone going into the bank to

"copy" an *"entry"* in the book, getting a third party to verify it as a copy (section 5), and have the copy of the *"entry"* then *"received as prima facie evidence"* (section 3), avoiding the banker being called as a witness except for special cause (section 6), if necessary getting a court or judge to make an order (section 7), the product being evidence to *"prove the matters, transactions and accounts ... recorded"* in the books (sections 3, 6). Concrete banking actions can be recorded, by making an *"entry"*, in a number of ways. Those ways can change, and have changed, over time. That is why *"records"*, *"microfilm"* and any *"electronic data retrieval mechanism"* have all entered the lexicon of section 9(2). But the Act was never concerned to cover everything that a bank has, or does, or writes down, in the course of its ordinary business as a bank. The scope of the 1879 Act would not, for example, include an 'attendance note' of a conversation with a customer or prospective customer; nor correspondence between the bank and a customer or prospective customer. Naturally, those documents could become evidentially relevant in legal proceedings. It has always been the case that: *"if the document sought is not within the meaning of banker's books, then the usual procedures relating to third party discovery will apply. A bank officer in possession or control of such a document would also be compellable in the same manner as any other witness"* (Protasco at §42(c)).

24. Secondly, it is very well established that the focus of 'entries' in 'books' and 'records' is transactional. That is entirely unsurprising. What a court can readily, and reliably, get from the banker's book or record is prima facie evidence of whether a banking transaction took place: when, in what amount, involving whose account, at what branch, and so on. I will survey the domestic cases that were cited to me, adding emphasis to quotations. Barker (Divisional Court, 1.2.80) decided that section 9 covered Barclays Bank's microfilm records showing the identities of the recipients of cheques paid by Mr Barker, under criminal investigation for stealing over £38,000 from his employer. Bridge LJ said (at 887G-H) that *"clearly"* the phrases *"bankers' books"* and *"an entry in a banker's books"* were *"apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available"*. Simpson (*R v Marlborough Street Magistrates' Court, ex p Simpson* (1980) 73 Cr App R 291) (Divisional Court, 6.2.80) decided that section 7 orders, allowing inspection of Lloyds and Allied Irish Bank's records of bank accounts of three family members charged with knowingly living on the earnings of prostitution, should have been temporally limited. The Lord Chief Justice identified the purpose of section 7 as being *"to save bankers from the inconvenience of having their books and their staff in court for the purposes of giving evidence"* and that its *"discovery application should be limited as much as possible"* (at 292-293). Williams v Williams (*Williams v Williams* [1988] 1 QB 161) (Court of Appeal, 10.7.87) decided that unsorted bundles of cheques and credit slips held by Barclays Bank and sought in connection with matrimonial proceedings were not *"entries in a banker's book"* for the purposes of section 7, there being no *"making [of] an 'entry'"* (167D, 168F). Howglen (*Re Howglen Ltd* [2001] 1 All ER 376) (Pumfrey J, 23.2.00) decided that HSBC Bank's records of meetings (notes of interviews with a customer and a firm of accountants), access to which was sought by the customer to defend himself in directors' disqualification proceedings, were not covered by section 9(2). Pumfrey J surveyed the previous authorities, from which he derived the proposition that *"other records"* covers the other *"means by which a bank records day-to-day financial transactions"* and does not cover *"records kept by the bank of conversations between employees of the bank, however senior, and customers"*, which

are *"records of meetings"* and *"notes of meetings"* and not *"entries in books"* (381j-382a). This fitted with Pumfrey J's own interpretation: that the words should be *"construed restrictively"*, bearing in mind that Parliament intended *"to provide a convenient mode of proof for documents inherently probative of particular facts"* (381a). The fact that an individual facing directors' disqualification proceedings should have *"a proper opportunity to defend"* those proceedings with *"relevant documents … made available"* (380f) called for analysis under the Civil Procedure Rules relating to disclosure (382b-384c).

25. Thirdly, the decision of the Court of Appeal of Singapore in Wee (10.2.03) is entirely consistent with this transactional focus. That Court decided, in the context of a civil action brought by a customer against UBS Bank for damages that *"other books used in the ordinary business of the bank"* in Singapore's equivalent of the 1879 Act extended to correspondence between a bank and customer only if it recorded a transaction, and notes of meetings were not covered. The Court cited the English authorities and its *"purposive approach"* to the expression *"other books"*, recognising *"the changes effected in the practices of bankers"*, led the Court to the conclusions (at §36) that: *"Any form of permanent record maintained by a bank in relation to the transactions of a customer should be viewed as falling within the scope of [the] expression"*; that *"[c]orrespondence between a bank and a customer which records a transaction"* is included; but that *"notes taken by bank officers of meetings with customers"* are excluded.

26. Fourthly, there is no support in this line of authority for an extended meaning of section 9(2) to mean records maintained for regulatory compliance (unless those records are themselves transactional records). Changes is banking practice have been recognised within the authorities, as embraced within the statutory definition of *"banker's books"*, where they involve entries which record banking transactions. If banks recorded transactions by sending emails, or SMS messages, then that mode of recording would fall within section 9(2) just as surely as did microfiche. None of the cases so far discussed treat records which a bank is required to maintain for regulatory purposes, but which do not record transactions, as being within the scope of the 1879 Act. Nor is there any sign within the authorities of a recognition that some of the *"records kept by the bank of conversations between employees of the bank … and customers"* as *"records of meetings"* and *"notes of meetings"* (Howglen), or some of the *"notes taken by bank officers of meetings with customers"* (Wee), are within the scope of the 1879 Act after all. It is surely the case that some records of meetings, or notes of conversations, are required by regulators to be maintained by banks. Due diligence exercises, such as 'know your customer' and money laundering would require communications with a customer or potential customer. The courts would need to be asking this question: is there any regulatory requirement that the bank conduct such a meeting or communication, and maintain records for regulatory oversight? Such a question appears nowhere within the authorities so far discussed. Then there is this problem. How would the Court go about identifying what records are maintained by the bank (i) for its own internal purposes and (ii) for the purposes of regulatory compliance. That could be a difficult question to answer. It is unsurprising that the cases cited so far do not involve any such approach. After all, the idea of facilitating the proof, by evidence in proceedings, of concrete banking actions (transactions) was straightforward. Whether a transaction has been undertaken – when, by whom for whom, involving what amount and what account, and so on – these are transactional

facts readily evidenced by a banker's record. Of course, other relevant evidentiary content may be found within notes of meetings, or communications with customers or potential customers, or internal memoranda. But these are far more likely to be evaluative, discursive, subjective and requiring explanation. Regulators may have a clear and important interest in having access to such materials, to check the bank's risk-based compliance mechanisms. But they are very different from the nature of the transactional materials associated in the case-law with banker's books and records.

27. Fifthly, the analysis of the High Court of Malaysia in Protasco at §38(b) of that judgment is not a convincing basis for giving section 9(2) an extended meaning which includes non-transactional records maintained for regulatory compliance. The judgment in Protasco is not binding on this Court. It includes discussion of the English cases: Barker; Williams v Williams; Howglen. There is no criticism in the judgment of those cases or of the approach taken in them, including the transactional approach explicit in Howglen and Barker. Indeed, the judgment in Protasco (at §§36-37) cites with specific approval Bridge LJ's observation in Barker: *"any form of permanent record kept by the bank of transactions relating to the bank's business"*. This is relied on (at §37 of Protasco) as the basis of a *"similarly expansive view of the word 'books' within the definition of 'banker's books'"*. The judgment then goes on (§38) to express the *"view"* that there are the two categories: (a) *"any transaction record that is generated by the bank"* and (b) *"a document which the bank maintains, for the purposes of accounting, audit, reconciliation or reporting"*. I can find in the judgment no explanation, no underlying reasoning, and no cited support, for the step taken in including §38 category (b) if it is intended to mean non-transactional records. The judgment goes on to explain (at §41) that *"statements issued by a bank to its customer"* would not fall within banker's books, since they would *"not have been generated by the bank for the purposes of accounting, reconciliation, audit or reporting"* and since they are derivative (*"derived from entries in the banker's books"*). The judgment also says (§73(a)) that *"evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question"*. I cannot accept that Protasco §38 category (b) reflects the scope of section 7 and section 9(2) of the 1879 Act. I was shown no other case or commentary supportive of this approach. The extension beyond the transactional focus reflected in all the other authorities, with its absence of reasoned support, and with its §73(a) satellite evidence-led enquiry (as to what documents are and are not generated or maintained for *"accounting, audit, reconciliation or reporting"*), are features which in my judgment are out of step with the authorities. Mr Allen submitted that it is possible that what the Court actually meant in Protasco was two categories of transactional record. I would encapsulate those as: (a) the immediate individualised documentary record of a transaction; and (b) a subsequent derivative document which is produced as an accounting, reconciliation, audit or reporting document nevertheless recording transactions. That reading of Protasco is a possible (though perhaps an unlikely) one, and would be congruent with the other authorities cited. However, if that is what the two categories (a) and (b) in Protasco §38 mean, my respectful view is that it would be easier and better to stick to substance ('transactional records'), avoiding a dual classification and a satellite 'regulatory-purpose' enquiry. I prefer – and adopt – the transactional approach in Barker, Williams v Williams and Howglen. Of the comparative cases cited to me, I prefer the Court of Appeal of Singapore's transactional approach in Wee to the High Court of Malaysia's extension in Protasco at §38(b).

28. For all these reasons, I prefer the respondents' interpretation on the second issue: the phrase *"entries in"* in *"other records used in the ordinary business of the bank"* in section 9(2), read with section 7, means transactional records. It does not include non-transactional records maintained for regulatory compliance. Mr Lewis QC, rightly in my judgment, accepted that the 13 categories of document access to which is sought by the applicant are not transactional records. The applicant does not, for example, say that she needs or seeks documentary records which evidence the transactions processing US-dollar denominated transactions through the United States, where the first or second respondent acted as banker to Networkers. Evidencing that those transactions took place forms no part of what she seeks to achieve through this application. It follows that, even had I found in her favour on the first issue, I would have dismissed the application in light of my conclusion on this second issue.

Third Issue: This Court's Discretion

29. What if the applicant were right on the first issue (that section 7 of the 1879 Act can apply to the Canadian Extradition Proceedings as *"a legal proceeding"*), and right on the second issue (that a section 7 order can include non-transactional records maintained for regulatory compliance)? Had I reached those conclusions, would I have exercised my discretionary power in section 7 to grant this application? That question raises what, in my judgment, are two key themes.

Securing a Fair Hearing in the Canadian Extradition Proceedings

30. I identified the essence of the application earlier (§8 above). Mr Lewis QC submitted that the Court should exercise its discretion to order the respondents to provide access to the 13 categories of documents sought (§9 above), to promote and ensure fairness in the Canadian Extradition Proceedings. That argument in essence, as I saw it, came to this. (1) The Requesting State Authority's summary of the case against the applicant is clearly based to a significant extent on information provided to the US authorities by entities and individuals within the HSBC Group. This is also borne out by the February 2019 Reuters Report (§5 above). The ROC itself refers to several HSBC Group witnesses and their expected testimony. The ROC, SROC and SSROC refer to documents, of which the following are examples. In support of the claim that reliance was placed on the PPP, the ROC refers to an email sent to other senior HSBC Group personnel by a senior executive responsible for HSBC Group's banking operations throughout Asia including its banking relationship with Huawei TCL. In support of the claim that Huawei TCL had control over Skycom's bank accounts the ROC refers to *"a number of HSBC documents"* examined by an FBI special investigator. In relation to the HSBC Group and HSBC US having cleared transactions related to Skycom through the United States, reference is made to emails sent by Networkers to its relationship manager within HSBC Group in the context of a 2016 internal review within HSBC Group, and to *"records obtained from … HSBC"*. The SROC refers to *"the minutes"* of a meeting of HSBC's global risk committee on 31 March 2014 in London. (2) Although the substance is redacted, the Sidley Letter (§7 above) records Huawei TCL's New York lawyers communicating to the US prosecuting authorities in strong terms in the context of the US Criminal Proceedings the contentions that (i) materials disclosed by the US prosecutors serve to undermine the prosecution case and (ii) further materials held by the US authorities need in fairness to be disclosed. (3) The SPO expressly provides that disclosure made by the US prosecuting authorities in the US Criminal Proceedings to Huawei TCL and Huawei DUI and their US lawyers may be disclosed

and discussed with the applicant and US Counsel in Canada *"only for the limited purpose of assisting [Huawei TCL and Huawei DUI] in defending"* the US Criminal Proceedings; that the applicant and her US Counsel *"are prohibited from having possession, custody, or control"* of materials disclosed; and that they are prohibited from using the disclosed materials *"in any other proceedings, including specifically in [the applicant]'s extradition proceedings in Canada"*. (4) As explained in the witness statement of her solicitor Mr Ewens, the applicant *"seeks relief"* under section 7 of the 1879 Act *"as the material is not discoverable against the Requesting State in the Extradition Proceedings (indeed a similar position applies in extradition proceedings before the courts of England and Wales). Nor is the material sought discoverable to the Applicant as an individual defendant in the US Criminal Proceedings, owing to the Requesting State's characterisation of her as a 'fugitive' (a status she disputes)"*. As Mr Ewens also says, the *"principles of Canadian extradition law"* applicable to an abuse of process argument advanced by a requested person are *"materially similar to those which apply in extradition proceedings before the courts of England and Wales"*. The authority which best illustrates the position is Tollman (reported as *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin) [2007] 1 WLR 1157). The applicant's difficulty in the Canadian Extradition Proceedings is that (a) the Canadian Court will not order that disclosure be made by the Requesting State Authority and (b) the onus remains on the applicant to show that the ROC is (i) manifestly unreliable such that the evidence is not sufficient and she should be discharged and/or (ii) deliberately misleading by reason of evidence being deliberately withheld or misstated by the Requesting State Authority such that the extradition proceedings should be stayed as an abuse of process. No HSBC entity is a party to the Canadian Extradition Proceedings. (5) The documents sought in this application are plainly *"material"* to the Canadian Extradition Proceedings. It is materiality (relevance: see Protasco at §§46-49) which this Court needs to assess in deciding whether to grant this application. This is no impermissible 'fishing' expedition (cf. Protasco at §65). The documents sought are needed in those proceedings by the applicant, so that she can make arguments which the Canadian Ruling has decided are open to her to advance. As to the timing of this application, it would have been pointless for the applicant to have pursued this application without first obtaining the Canadian Ruling. There are fundamental rights at stake, specifically the applicant's right to a fair hearing in the Canadian Extradition Proceedings. If (as is the necessary premise) section 7 of the 1879 Act applies in a case of foreign proceedings, then this Court is acting properly and as Parliament intended in securing that evidence can be made available in foreign proceedings. Nothing is forced on the Canadian Court, who would still have to decide admissibility and relevance. This Court, by granting this application, can secure fairness and do justice, and securing justice is always something that promotes comity.

31. I am not persuaded by these arguments. First, this application is seeking to obtain, through the exercise of this Court's statutory discretion, documents which the US prosecuting authorities hold, documents which are disclosable to the applicant and her US lawyers in the context of the US Criminal Proceedings, but which disclosure is subject to an express prohibition on use in the Canadian Extradition Proceedings. That express prohibition is contained in an order made in the US Criminal Proceedings (the SPO). I am satisfied that this Court must proceed on the basis that the express prohibition is lawful under US law. I have no doubt that were there any ground to challenge it, such a challenge would be being pursued. So far as concerns any

prosecution of the applicant in the United States, were she to be extradited as the outcome of the Canadian Extradition Proceedings, that would engage the applicant's fair trial rights under US law.

32. Secondly, the key points that are made – as providing the justification for this Court's order under section 7 of the 1879 Act – are about securing the fairness of the Canadian Extradition Proceedings. It is the right to a fair hearing in those proceedings which constitutes the fundamental right which is invoked. And it is *"for … the purposes of [those] proceedings"*, in the language of section 7, that the documents are sought. But this question and concern as to procedural fairness – if there is anything in it – must necessarily be on the radar of the Canadian Court. The Requesting State Authority is a party – the other party – in the Canadian Extradition Proceedings. It is seeking extradition of the applicant in those proceedings. It is said to hold the documents. It is said to have given a summary (the ROC) which is said to be deliberately misleading, by reason of it having deliberately withheld or misstated that evidence, which it holds. The applicant has been recognised in the Canadian Ruling as entitled to challenge the ROC as both manifestly unreliable and deliberately misleading, and to do so – to a limited extent – by adducing items of evidence which she has been able to put forward. Under Canadian law, she has a right to a fair hearing, that right having such nature and shape as Canadian law recognises is appropriate to extradition proceedings. The legal or evidential onus that is placed on the applicant or the Requesting State Authority, and any shift in that onus based on evidence satisfying any relevant threshold, are themselves questions calibrated under Canadian law, with such regard as is appropriate to the scope of any right to a fair hearing. There is no reason to suppose that the Canadian Court would exercise its power to order extradition, or would adhere to an application of 'onus' which would lead to an order for extradition, if the Canadian Court considered that the choices which the Requesting State Authority has made, in relation to what it has and has not disclosed as a party to the proceedings, have fatally undermined the applicant's right to a fair hearing of a relevant issue. I have no doubt that any serious question as to whether there is a fair hearing would be of central concern to the Canadian Court in the Canadian Extradition Proceedings. I can see no reason to exercise this Court's discretionary power based on a judgment of an English judge that, unless it is granted, there stands to be the denial of a fair hearing in the Canadian Extradition Proceedings.

33. Thirdly, the Tollman case on which the applicant relies and which Mr Lewis QC and Mr Ewens ask me to accept enunciates principles equivalent to those applicable in the Canadian Extradition Proceedings, does not advance the applicant's case. The following propositions can, in my judgment, be derived from Tollman. (i) Although the onus is on the requested person to establish that conduct by the requesting state authority constitutes an abuse of process, once the threshold is reached of showing *"reasonable grounds for believing that such conduct may have occurred"*, the position is then that *"the judge should not accede to the request for extradition unless … satisfied … that such abuse has not occurred"* (§84). (ii) In extradition proceedings the judge *"is not in a position to order the [requesting state] authority … to disclose information or evidence if it is not prepared to do so"* (§91). (iii) However, if the judge *"has reason to believe that an abuse of process may have occurred"*, the judge can as an *"appropriate course … call upon the [requesting state authority] for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not"* (§89). (iv) Where information or evidence is provided, it

should in principle *"be made available to the party contesting extradition"*, since *"[e]quality of arms requires that, in normal circumstances, the party contesting extradition should be aware of, and thus able to comment on, the material upon which the court will be basing its decision"* (§90), as will usually be possible (§93). (v) It may be the case that the requesting state authority is *"content that the court should see evidence but, on reasonable grounds, is not prepared that this should be disclosed to the person whose extradition is sought"* (§92). (vi) Where *"the procedure will fail to satisfy the requirement of fairness"*, because *"fairness requires that material be disclosed, but the requesting … state [authority] is not prepared to agree to this, then the appropriate course will be for the judge to hold that fair process is impossible, that to grant the application for extradition in the circumstances would involve an abuse of process, and to discharge the person whose extradition is sought"* (§92). Those six propositions from Tollman reflect a careful calibration designed to secure that the contextually-applicable standard of fair process is not surrendered in the context of abuse of process, onus, disclosure and non-discoverability. The applicant's invitation to proceed on the basis that *"materially similar"* principles apply in Canadian Extradition Proceedings as are articulated in Tollman supports my conclusion that it is not necessary, to secure a fair hearing for the applicant in those proceedings, that I make an order in the exercise of my discretionary power, designed to secure disclosure to her for the purposes of the Canadian Extradition Proceedings of the materials held by the Requesting State Authority in those proceedings. I am not assuming that Tollman principles (i) to (vi) are replicated, and with nothing else besides, in Canadian extradition law. But Tollman is a helpful working illustration of the ways in which extradition law can address questions of abuse of process, onus and disclosure to ensure fair process. And it is the applicant who contends that similar principles would apply in Canada. Nothing which I have seen in this case dents my confidence that the Canadian Court is the appropriate forum, and will have at its fingertips the appropriate toolkit, for addressing those matters. By contrast, I have no real confidence that I am properly equipped to judge whether and if so what HSBC documents would be needed to secure a fair hearing for the applicant in Canada.

34. Fourthly, there are the implications of the timing of this application, having first obtained the Canadian Ruling on 28 October 2020, following the three-day hearing in September 2020 before the Canadian Judge. The applicant's position is that it was necessary and appropriate to obtain that Ruling first, and only then to make this application to a judge in London. Having done so, I am able to see the careful and measured way in which the Canadian Court approaches the question of the nature of evidence which is relevant to the issues raised in the extradition proceedings. The Ruling reflects that the starting point is that the Requesting State Authority is required only to give a summary of the evidence against the requested person, and is not required or expected to disclose the underlying evidence itself. I can find in the Ruling nothing to suggest that the Canadian Judge considered further disclosure from the Requesting State Authority to be necessary or appropriate or desirable, or conducive to a fair hearing on the particular issues being raised. Bearing in mind what I am told about Tollman and *"materially similar"* principles, I can find no hint of the Tollman propositions being invoked. It is not difficult to imagine the strategic decision-making which arises in the approach to extradition proceedings. But if and to the extent that the Ruling was 'paving the way' for this application, I can find no ventilation with the Canadian Judge of the question of whether fairness would call for the disclosure – through whatever mechanism – of the documents held by the Requesting State

Authority's and forbidden by the SPO of 10 March 2020. The Canadian Judge was plainly alive to the issues as to what documents were described in the ROC, SROC and SSROC. I have in mind the nature of the applicant's case (§4 above), the points which she says she is unfairly prejudiced through the absence of disclosure, and points which (as Mr Allen submitted) she is – on the face of it – well able to make: about whether the PPP involved misstatement; whether certain HSBC Group personnel were 'junior'; and whether the 'logic' of the case against her suffers multiple breakdown. This section 7 application, if granted, is designed to give the applicant access to the entirety of the HSBC materials held by the US Prosecuting Authorities, or a very large portion of those materials. It is likely to give the applicant access to far, far more than the material for which any fair hearing standard in an extradition-context would call. Reading the Canadian Judge's analysis and reasoning in the Canadian Ruling, and supposing that the 13 categories of documents which are the subject-matter of this application had been suggested as necessary for a fair hearing, I find it very difficult indeed to see that the Judge would have been calling upon the Requesting State Authority to provide the disclosure (Tollman proposition (iii)) or holding that fair process was impossible without it (Tollman proposition (vi)). Putting it another way, if I suppose that there were in an extradition case a route under the 2003 Act for the Canadian Judge to request the taking of evidence from the respondents in London, I find it very difficult indeed – reading the Canadian Ruling – to see that such a course would be taken by the Canadian Judge. I cannot, of course, know and I will not speculate. But these difficulties reinforce the conclusion which I have reached, that it would not be an appropriate exercise of my statutory discretion to make the order sought in this case, nor order any subset of the materials listed in the 13 categories.

Identifying Records Maintained for Regulatory Compliance

35. There is a second key topic, relevant in the context of discretion. The point is a short one. As has been seen (§§21-22 above), the applicant's case requires that this Court adopt category (b) in Protasco at §38: *"a document which the bank maintains for the purposes of accounting, audit, reconciliation or reporting"*. Mr Lewis QC characterised those as records maintained for regulatory compliance. Had I found in his favour on the first issue (foreign proceedings), and had I adopted Protasco §38 category (b), I would have concluded that the application as framed faces an insurmountable hurdle. In my judgment, the applicant has not supplied any clear or rigorous link between particular documents sought and specific regulatory duties to maintain records. Vague and generic references to compliance do not suffice. Nor am I persuaded by the contention that the link is self-evident. On the applicant's case, maintenance of records for regulatory compliance is the feature which delimits the class of documents whose disclosure can be ordered under section 7 of the 1879 Act. In my judgment, if it were correct in law that records maintained for regulatory compliance constitute the extended category to whom access can be granted under section 7, it would follow that it is incumbent on the applicant to specify records sought and reference them to a specific regulatory duty to maintain those records. The regulatory duty would be the gateway to the relevant field of application and the relevant population of document. This is nothing more than the point made by the High Court of Malaysia itself in Protasco at §73, when Azizul Azmi Adnan J spoke of the need for the Court to *"make a determination"* by reference to *"the purpose for which the bank had generated, or maintained a record of, the document in question"*. Protasco is the case on which the applicant relied. In my judgment, the application was not focused in this way. I would

not have acceded to the request to make the very far-reaching order sought without that discipline first having been brought to bear. I would have been in no position to make the necessary determination. In light of this problem, and subject to other points which were raised by the respondents, I would have invited submissions as to what the appropriate next step was: dismissal of the application as constituted; or an opportunity properly to support and focus it. In the event, that position has not been reached, for I have found against the applicant on issues one and two, and for freestanding reasons on this issue three. I have said 'subject to other points which were raised by the respondents'. In all the circumstances, I am satisfied that I do not need to grapple with these. But I record that they included, in particular, points relating to materiality, proportionality, third parties and foreign entities, on which topics Mr Allen relied in particular on *R v Grossman* (1981) 73 Cr App R 302, *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation* [1986] 1 Ch 482 at 493G-494G, and *DB Deniz Nakliyati Tas v Yugopetrol* [1992] 1 WLR 437 at 442.

Conclusion

36. The application is refused. Following circulation of this judgment in draft I can deal here with the Order and consequential matters. As always, the Court is grateful to the parties' lawyers for their cooperation and responsiveness. It was common ground that, in the light of my judgment, I should formally dismiss both the applicant's CPR Part 8 claim issued on 19 January 2021 and her application issued on 21 January 2021 seeking disclosure pursuant to section 7 of the 1879 Act. It was also common ground that costs should follow the event and that I should summarily assess them. I will do so. The sum of costs claimed is £81,679.91 and it is not inappropriate to note, for context, that: (a) the costs claim was based on a half a day hearing which in the event needed a full day which further time will have involved some further costs; (b) the applicant's own costs were £180,921.60; and (c) the application included as a virtue the applicant's acceptance that – if granted – the respondent should be fully indemnified as to costs of compliance. I turn, then, to the assessment of the costs of opposing the application. The applicant raises a single, focused objection. She invites me to conclude that 67.9 hours of lawyers' time working up the single 16-page witness statement of Ms Monks, partner at Latham & Watkins, was excessive and should be reduced to a more proportionate amount. In my judgment, the work done on the witness statement is justifiable and is not excessive. Experience shows that the production of a crisp and clear document of this nature can be the product of very considerable time, care and industry. I am sure this one was and that, foreseeably, it needed to be. Lawyers and judges frequently encounter that truth attributed to Blaise Pascal (1657) and Mark Twain (1871). Ms Monk's witness statement explicitly references – as well as evidencing the product of – the work that was needed to be able to give this Court a clear picture as to matters such as (for example): the accounts that are held, the location and accessibility of documents, and the implications of the 13 categories requested and responding to them. I am willing to do no more than make a modest adjustment to reflect the fact that I am not ordering costs on an indemnity basis. In relation to costs I will order that by 4pm on 5 March 2021, the Applicant shall pay the Respondents' costs of and incidental to the claim and the application which are summarily assessed in the sum of £80,000.00.

19.2.21