Neutral Citation Number: [2022] EWHC 2792 (Ch)

Case No: BL-2019-002023

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/11/2022

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY

Claimant

- and –

(1) KONSTANTINOS PAPADIMITRAKOPOULOS
(2) DIMITRIS GRYPARIS

Defendants

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Mr A George KC and Mr R Fakhoury (instructed by **the FCA**) for the **Claimant**
Mr G Brodie KC and Mr R Power (instructed by **BCL Solicitors LLP**) for the **First Defendant**
Mr A Hunter KC and Ms L Sagan (instructed by **Boutique Law LLP**) for the **Second Defendant**

Hearing date: 27 September 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down remotely at 10 am on 4 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Mrs Justice Joanna Smith:

1. These proceedings, commenced by the Claimant ("**the FCA**") in December 2019, concern allegations that, between 2011 and 2015, the First Defendant ("**D1**") and the Second Defendant ("**D2**"), the CEO and CFO of Globo Plc respectively, engaged in market abuse under section 118 of the Financial Services and Markets Act 2000 ("**FSMA**") and/or were knowingly concerned in contraventions of section 397 of FSMA and section 89 of the Financial Services Act 2012 ("**the Proceedings**"). D1 contends that the claim (which is brought pursuant to sections 382 and 383 of FSMA, requiring the Defendants to pay a just sum to the FCA for distribution to qualifying investors who have suffered a loss as a result of the Defendants' alleged conduct), is an abuse of process or is otherwise likely to obstruct the just disposal of the Proceedings and, by his application dated 15 November 2021 ("**the Application**"), D1 applies to strike it out pursuant to CPR 3.4(2)(b).

2. The basis for the Application is that in investigating, building and formulating the civil claim against D1, the FCA has made use of material ("**the MLA Material**") obtained through mutual legal assistance requests ("**the MLA Requests**") without first obtaining the consent of the relevant overseas authorities. In doing so, D1 contends that the FCA has breached the absolute prohibition against collateral use of MLA Material contained in section 9(2) of the Crime (International Co-Operation) Act 2003 ("**the 2003 Act**").

3. It is common ground that the Application raises four key issues: (i) the proper construction of the word "use" in section 9 of the 2003 Act; (ii) whether the FCA's use of the MLA Material in relation to D1 falls within that definition and therefore that prohibition as a matter of fact; (iii) whether if the answer to (ii) is "yes", the FCA has nevertheless obtained consent for collateral use as against D1 as required by section 9 of the 2003 Act; and (iv) the consequences, as a matter of law, if the FCA has breached section 9 of the 2003 Act and, in particular, whether it is appropriate for the court to strike out the claim as an abuse of process.

PROCEDURAL BACKGROUND

4. In October 2019, the FCA applied to the court for permission to serve the Proceedings on the Defendants outside the jurisdiction. In support of that application, the FCA relied upon the first witness statement of Mr Anthony Williams dated 31 October 2019 ("**Williams 1**") which, amongst other things, explained that:

    i) the FCA had been conducting an investigation into the Defendants' conduct since October 2015 and that this had included the use of the FCA's information gathering powers, requests under regulatory information sharing agreements and requests for mutual legal assistance to obtain relevant information and documents from 13 different jurisdictions as well as from within the UK;

    ii) the findings of the investigation led the FCA to conclude that the actions of the Defendants had resulted in the publication of false and/or misleading accounting information and other statements by Globo Plc and by the Defendants between at least 22 November 2010 and 26 October 2015;

iii) the decision had been made to bring criminal proceedings against both Defendants, but attempts to extradite them from Greece had proved unsuccessful;

iv) in the circumstances, it was in the public interest to bring a civil claim against the Defendants "so that at least some form of redress may be obtained for the investors who suffered from [their] actions" and "[t]he FCA will seek to deploy the material gathered during its investigation for the purposes of this claim". Williams 1 did not expressly say whether, and if so how, any MLA Material had been used for the purposes of the preparation of Williams 1, or would be used for the purposes of the claim.

5. The court granted permission to the FCA to serve the Proceedings out of the jurisdiction by an order dated 29 November 2019 and on 2 December 2019, the FCA commenced the Proceedings. The combined effect of the Covid 19 pandemic and challenges encountered by the FCA in effecting foreign service subsequently delayed matters, but the claim form was ultimately served on D1 on 4 March 2021 and on D2 on 23 June 2021. D2 served his Defence on 15 November 2021.

6. On the same day, and instead of serving a Defence, D1 made the Application to strike out the claim supported by the first witness statement of Hannah Raphael ("**Raphael 1**"). In a nutshell, Raphael 1 contends that, by its own admission in Williams 1, the FCA has used MLA Material obtained in the context of a criminal investigation for the purposes of commencing these Proceedings and that it has done so without consent from the relevant overseas authorities. At paragraph 30, Raphael 1 identifies various categories of document referred to in Williams 1 which (it is said) were likely obtained through the mutual legal assistance process from a foreign jurisdiction ("**the Challenged Documents**").

7. The FCA responded to the Application in a third witness statement from Mr Williams dated 24 May 2022 ("**Williams 3**"). This statement explains the "standard FCA practice" in potential market abuse cases of running "dual track" investigations; i.e. investigations which recognise the potential for both criminal offences and civil/regulatory contraventions to have been perpetrated. Williams 3 acknowledges that this investigation (referred to as "Operation Newhaven") has involved (amongst other things) requests for Mutual Legal Assistance from foreign jurisdictions, but asserts that the FCA is "fully aware of its legal obligations", that care was taken in Williams 1 to ensure that evidence obtained pursuant to MLA Requests was not included or relied upon and that the Challenged Documents were all obtained via non-MLA channels, or were not relied upon for the purposes of these Proceedings. Williams 3 therefore maintains that, with the exception of two sentences included in paragraph 90 of Williams 1 in error (to which I shall return), nothing in Williams 1 was founded on MLA Material and further that, in so far as MLA Material has been obtained from the Swiss and Greek authorities, the FCA has had the necessary consent for its collateral use from the outset.

8. Service of Williams 3 prompted an application by D1 for disclosure of six categories of documents referred to in Williams 3 ("**the Disclosure Application**"), which I heard on 21 July 2022. As is set out in my judgment ([2022] EWHC 2061 (Ch)), I ordered disclosure of some, but not all, of the documents sought, including disclosure of "requests for assistance" made by the FCA from international authorities. Although I considered that some documents (expressly said to have been obtained via the Mutual Legal Assistance process) satisfied the test for disclosure under paragraph 21 of CPR PD51U

(now PD 57AD), I nevertheless refused disclosure in circumstances where the issue of consent from the relevant overseas authorities remained to be determined.

9. On 19 August 2022, Mr Williams filed a fourth witness statement ("**Williams 4**") in which he provided more detail as to the basis of the investigation which gave rise to the current Proceedings, focusing specifically on the occasions on which the FCA formally sought evidence from other entities and authorities, including by way of (i) requests for assistance under the International Organisation of Securities Commissions ("**IOSCO**") Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information; (ii) information requirements to domestic entities and organisations using the FCA's compelled powers under sections 171 to 173 and 175 of FSMA; and (iii) MLA Requests made to (amongst others) the authorities in Greece, Saint Vincent and the Grenadines and Switzerland under the 2003 Act. Williams 4 states that the vast majority of the evidence in the investigation came through non-MLA routes and that it is this vast body of evidence that supports the allegations in the Particulars of Claim. However, Williams 4 acknowledges that, in so far as MLA Material was obtained by the FCA, such material was used to inform the continuing investigations. Williams 4 exhibits the "requests for assistance" that the FCA was ordered to disclose, together with various other communications with foreign authorities to which I shall return. Two typographical errors in Williams 4 were corrected by service of a fifth witness statement from Mr Williams ("**Williams 5**") on 7 September 2022.

10. D2 is not a party to the Application, but on 5 May 2022, he served a Request for Further Information asking detailed questions of the FCA about its use of MLA Material in the Proceedings. By a response dated 14 June 2022, the FCA maintained that none of the MLA Material identified by D2 had been "used for the purposes of these proceedings", that no passages in the pleadings served by the FCA had been informed by the contents of any MLA Material and that no MLA Material had been provided to external counsel. D2 pursued his requests further in a letter dated 15 July 2022, identifying that the FCA appeared to be relying upon a narrow definition of the word "use" in the 2003 Act and again seeking full information as to the use made by the FCA of MLA Material against D2. The FCA responded on 6 September 2022, refusing to provide further information pending determination of D1's Application but making it clear that the FCA contends that it has received consent to use all of the MLA Material that it has obtained in the Proceedings and that, accordingly, it intends to make that material available for disclosure in due course subject to the resolution of D1's Application.

11. In the circumstances, D2 is plainly an interested party in the Application. He was represented by Mr Hunter KC and Ms Sagan at the hearing for the purpose only of advancing submissions on the meaning of the word "use" in section 9 of the 2003 Act. D1 was represented by Mr Brodie KC and Mr Power. The FCA was represented at the hearing by Mr George KC and Mr Fakhoury. I am extremely grateful to all counsel for their detailed skeleton arguments and helpful submissions.

THE LAW ON STRIKE OUT

12. It is common ground that CPR 3.4(2) provides that the court may strike out a statement of case if it appears to the court that the statement of case "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".

13. Before the court can strike out a claim for abuse of process, it must first determine whether the conduct complained of is properly characterised as an abuse. The categories of abuse of process are many and are not closed. Proceedings can be struck out as an abuse of process "where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct…Recognised aspects of abuse of process include *Henderson v Henderson* abuse, bringing the administration of justice into disrepute and proceedings which are manifestly unfair to the other party" (see *JSC VTB Bank v Skurikhin* [2021] 1 WLR 434 per Phillips LJ at [51]).

14. The court should consider whether, as a matter of fact, a party has used the court's procedures "for a purpose or in a way significantly different from its ordinary and proper use" (see *Attorney General v Barker* [2000] 1 FLR 759, per Lord Bingham CJ at 764). In *JSC VTB Bank* at [51], Phillips LJ identified the critical question as follows: "whether, taking a broad merits-based approach, a party is misusing or abusing the process of the court".

15. Where the court determines that conduct amounts to an abuse of process, it must then consider whether to exercise its discretion to strike out the claim. A finding of abuse will not inexorably lead to a strike out; any decision to strike out involves a balancing exercise – the court's decision must be consistent with the overriding objective and must be proportionate to the abusive conduct (see *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2015] 1 Costs LO 157, per Richards LJ at [44], citing Lord Neuberger's observation in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64 at [16] that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified").

16. In the context of an application to strike out a claim on the ground of abuse under the *Jameel* principle, where the question of abuse depends on whether the game "is worth the candle", Moore-Bick LJ observed in *Ansari v Knowles* [2014] CP Rep 9 at [17] that applications of this kind "should not be allowed to become a vehicle for an investigation into the merits of the claim", which should be taken at face value unless "it is obvious" that the claim has very little prospect of success. Vos LJ made a similar point at [27], where he made the general observation that:

> "…it is not appropriate for the court to undertake any kind of mini-trial, based upon incomplete evidence, either as to liability or quantum. Such a course is to be avoided on a strike out or a CPR Pt 24 application for summary judgment…".

THE STATUTORY FRAMEWORK AND UNDERLYING POLICY

17. The 2003 Act gives UK prosecuting authorities the power to request legal assistance from overseas authorities (under MLA Treaties or Conventions between the UK and those authorities) in respect of criminal investigations and proceedings. The power to request material from overseas authorities is set out within Part 1 of the 2003 Act at section 7:

7 Requests for assistance in obtaining evidence abroad

(1) If it appears to a judicial authority in the United Kingdom on an application made by a person mentioned in subsection (3)—
(a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and
(b) that proceedings in respect of the offence have been instituted or that the offence is being investigated,
the judicial authority may request assistance under this section.
(2) The assistance that may be requested under this section is assistance in obtaining outside the United Kingdom any evidence specified in the request for use in the proceedings or investigation.
(3) The application may be made—
(a) in relation to England and Wales and Northern Ireland, by a prosecuting authority,
…
(5) In relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request assistance under this section if—
(a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and
(b) the authority has instituted proceedings in respect of the offence in question or it is being investigated.

18. It is clear from section 7 that the mutual assistance contemplated by Part 1 of the 2003 Act relates exclusively to criminal proceedings or criminal investigations. It is also clear that the request for assistance may specify evidence "for use in the proceedings or investigation". In other words, the request for assistance need not focus purely on the use of evidence in proceedings, it may equally be concerned to obtain evidence for use in an investigation. The word "evidence", as it is used in Part 1 of the 2003 Act, is defined in wide terms in section 51 thereof as including "information in any form and articles, and giving evidence includes answering a question or producing any information or article".

19. Section 8 of the 2003 Act provides that a request for assistance under section 7 may be sent to a court exercising jurisdiction in the place where the evidence is situated (section 8(1)(a)), or to any authority recognised by the government of the country in question as the appropriate authority for receiving requests of that kind (section 8(1)(b)).

20. The prohibition on collateral use is set out in section 9(2) of the 2003 Act (also within Part 1) and applies to any "evidence obtained pursuant to a request for assistance under section 7". Section 9 provides:

9 Use of evidence obtained

(1) This section applies to evidence obtained pursuant to a request for assistance under section 7.
(2) The evidence may not without the consent of the appropriate overseas authority be used for any purpose other than that specified in the request.
(3) When the evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned.
…

21. It follows from the definition of "evidence" to which I have already referred that the collateral use prohibition in section 9(2) applies expressly to "information in any form" which is provided pursuant to a request for assistance.

22. There are important policy reasons for ensuring that evidence obtained pursuant to a request for assistance under section 7 is not used for a collateral purpose. In *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409, a case concerned with the operation of CPR 31.22 and specifically with the question of whether documents disclosed in English litigation could be used outside the jurisdiction (it being assumed that the relevant documents fell outside the absolute prohibition imposed by section 9(2) of the 2003 Act), Jackson LJ drew attention (at [58]) to the dictum of Lord Hope in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at 219D-E as follows:

> "I do not think that it is possible to overstate the importance, in the public interest, of ensuring that material which is disclosed in criminal proceedings is not used for collateral purposes".

Jackson LJ observed that he had drawn attention to this dictum "because it underlines the high public interest in ensuring the integrity of the criminal process", a point he repeated later in [66(iv)], a paragraph to which I shall return in a moment.

23. At [66(ii)], in drawing together the general principles on collateral use, Jackson LJ observed that:

> "The collateral purpose rule contained in section 9(2) of the 2003 Act is an absolute prohibition. Parliament has thereby signified the high degree of importance which it attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension".

24. In the recent case of *R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, Lord Lloyd-Jones JSC made a similar point at [45]:

> "…It can be seen that successive Acts of Parliament have developed the structures in domestic law which permit the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. Of critical importance to the functioning of this international system are the safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put and provision for its return. These provisions are fundamental to the mutual respect and comity on which the system is founded. (See generally Gohil v Gohil [2013] Fam 276)."

25. The decision in *Gohil* lies at the heart of the argument between the parties to the Application and I shall return to it in more detail in due course. For now, I observe that paragraphs [18] and [19] of the judgment of the Court of Appeal in that case, delivered by Lord Dyson MR, are in similar vein to the statements of policy identified above.

ISSUE (I): THE CORRECT INTERPRETATION OF "USE" IN SECTION 9 OF THE 2003 ACT

26. In his skeleton argument for the hearing of the Application, Mr George submits that the effect of section 9(2) of the 2003 Act is to preclude a party from deploying (or substantially deploying) MLA Material "in evidence" without the consent of the relevant foreign authority, an interpretation which he contends is supported by a consistent line of Court of Appeal authority. On this submission, and setting aside for present purposes the question of consent, it is possible to "use" MLA Material for the purposes of informing the content of pleadings, or the questions posed in an investigative interview or the further documents sought during an investigation, without falling foul of the collateral use prohibition in section 9(2) of the 2003 Act, as long as the MLA Material is not expressly relied upon in evidence. However, during the course of his submissions, Mr George moved away from this narrow interpretation, contending instead that "use" involved deployment or substantial deployment (and dropping the reference to "in evidence"). For reasons to which I shall return, this was, to my mind, as Mr Hunter submitted, a significant change of position which served to highlight the difficulties in the FCA's overly narrow interpretation of the word "use".

27. Mr Brodie and Mr Hunter both submit that the word "use" in section 9(2) should bear its ordinary wide meaning i.e. "making use of". In other words it covers "any dealings at all with material whether it might be adduced in evidence or used in the course of investigations". They submit that this interpretation is clear from an orthodox construction of the 2003 Act, from the policy underlying the 2003 Act, and from case law.

28. Having considered the parties' respective submissions in detail, I agree with the Defendants. In my judgment, the word "use" in section 9(2) has a wide meaning, consistent with its natural meaning. I set out my main reasons below.

The Words of the Statute

29. The starting point for any exercise of statutory interpretation is that the language of the statute should be given its ordinary meaning. In my judgment, the language of section 9(2) of the 2003 Act is straightforward and clear. The natural meaning of the words used is plainly to preclude "use" of any kind for any purpose other than that stated in the request.

30. There is nothing in the language used in section 9(2) to suggest the narrow, autonomous meaning for which the FCA contends. No restrictions are placed on the word "use" and there is nothing to suggest that the "use" prohibited by the section is only a certain type of use (i.e. on the FCA's written case, deployment of the MLA Material at trial or reliance on it as evidence).

31. On the FCA's written case, the use of MLA Material to interview witnesses, or as a springboard to obtain non-MLA Material or to consider whether to bring civil proceedings, would not be caught by the word "use" in section 9(2). Yet there is nothing in the wording of that provision to indicate that it was Parliament's intention to restrict the natural meaning of the word "use" in favour of a narrower "bespoke" meaning.

32. Looking a little further afield, the word "use" also appears in section 7(2) of the 2003 Act. As I have already remarked, the language of section 7(2) plainly contemplates that the permissible "use" of material requested under the section will include investigatory use as part of a criminal investigation (even if proceedings are never instituted) as well as evidential use in proceedings. (See also *Re McIntyre* [2018] NIQB 79, in which the court accepted that evidence requested under section 7(2) of the 2003 Act was properly to be regarded as "material sought for use in the investigation", owing to the fact that it was likely to be relevant to the manner in which the investigation was pursued and might influence the course of the investigation (at [33])). This can also be inferred from section 7(5)(b) which sets out the requirements to be satisfied before a prosecuting authority can request assistance – the institution of proceedings is distinguished from cases where the offence "is being investigated". In this context, "use" in the investigation can only be something distinct from deployment in evidence (i.e. in proceedings). I did not understand Mr George seriously to suggest otherwise.

33. If I am right that the true interpretation of the word "use" in section 7 is to give it a broad meaning, then that is entirely consistent with the Defendants' submissions as to its meaning in section 9(2). The FCA's narrow interpretation, on the other hand, requires the court to attach a different meaning to the word "use" as it appears in section 9(2) from the "wide" meaning I have determined it must have under section 7. I consider that this would be a very surprising result. Sections 7, 8 and 9 of the 2003 Act appear to me to operate as a coherent whole in creating a mechanism and regime for the making of requests for mutual assistance. Section 7 is concerned with the circumstances in which a request may be made for evidence "for use" in the proceedings or investigation and section 9 prohibits that use (without consent) "for any purpose other than that specified in the request" – which purpose may be simply investigative and so have nothing to do with deployment in evidence. I can see no basis for concluding that while the word "use" in the context of section 7(2) has a wide meaning, consistent with its natural and ordinary meaning, nevertheless the same word in section 9(2) carries a different, and substantially more restricted, meaning.

34. A wide construction of the word "use" also appears to me to be further supported by the very wide definition of "evidence" in section 51 of the 2003 Act. This includes "information in any form", a broad concept which is apt to encompass different types of information which may be used in different ways; it is difficult to see how the prohibition on the use of information in any form could be restricted to "deployment" in evidence as the FCA contends.

<u>The Statutory Purpose and Policy underlying Section 9(2)</u>

35. Section 9 of the 2003 Act replicates the wording of its predecessor legislation, sections 3(7) to 3(9) of the Criminal Justice (International Co-operation) Act 1990, which in turn gave effect to international treaties and conventions on Mutual Legal Assistance. The preamble to the 1990 Act stated that its purpose was: "*to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations*". Another of the statute's purposes was *"to enable the United Kingdom to join with other countries in implementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances"*. Paragraph 13 to Article 7 of the Vienna Convention states: *"The requesting Party shall not transmit nor use information or evidence furnished by*

the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party."

36. It is not in dispute that the collateral use prohibition now to be found in section 9 of the 2003 Act was implemented in order to comply with the UK's long standing international law obligations, and there is a strong presumption that the legislation conforms with those obligations (see *Gohil* at [29]). The statements of policy, as identified above, in cases such as *Tchenguiz v The Serious Fraud Office* and *R (on the application of KBR Inc) v Director of the Serious Fraud Office* are clear: safeguards in respect of the use to which MLA Material can be put are "of critical importance to the functioning of international systems of cooperation". As the Court of Appeal pointed out in *Gohil* at [18]:

> "Restrictions on use ensure that states are not deterred from assisting each other in the prosecution of crime by the fear that material that they supply for one or more specified purposes might be used for other unrelated purposes. There may be legal issues under the national laws of the requested state (for example, relating to obligations of confidence) which would discourage or prevent the disclosure of material for the purposes of a criminal investigation, if it might then be used for other purposes, including civil litigation".

37. The restrictions enable the requested state to retain an element of control over the evidence that it provides, which evidence may have been obtained by the exercise of powers of compulsion or may comprise sensitive or confidential information.

38. Accordingly, I accept Mr Hunter's submission that the narrow interpretation for which the FCA contends would undermine the object of mutual assistance which the 2003 Act was intended to promote; the important purpose of ensuring that the scheme of international mutual assistance in criminal matters works effectively would not be achieved if the prohibition on use in section 9(2) was confined to "deploying, or substantially deploying, in evidence" only, such that MLA Material could be used for (say) other investigations without consent.

Case Law

39. That the word "use" is intended to be interpreted widely, and in a manner consistent with its natural and ordinary meaning, finds some support in the existing case law.

40. I have already referred to the Court of Appeal's decision in *Tchenguiz v Director of the Serious Fraud Office* in the context of the policy behind section 9(2) and I should set out in full [66(iv)] which appears to me to be entirely consistent with the proposition that the prohibition on "use" in section 9(2) was intended to accord a wide meaning to the word "use":

> "There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from **any wider dissemination of that information**, other than in the resultant prosecution" (**emphasis added**).

41. Indeed, I agree with the Defendants that the cases dealing with the interpretation of the word "use" in the context of CPR r.31.22[1] may be applied by analogy:

    i) As Christopher Clarke LJ observed in *IG Index Ltd v Cloete* [2015] ICR 254, when considering the meaning of the word "use" in CPR r. 31.22 at [40]:

    > "What the rule precludes is the use of the document(s) disclosed. 'Use' is a wide word. It extends to (a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it…".

    ii) In *Tchenguiz v Grant Thornton* [2017] 1 WLR 2809, another case concerned with the interpretation of CPR r.31.22, Knowles J expressly rejected the submission (similar to that made in the present case by the FCA) that the word "use" should be limited to "a requirement of deployment of (or reliance on) the documents", finding (at [21]) that this was "but one form of use" and pointing out that (as is also the case here) "…the rule does not suggest that one form rather than another or others is its focus". At [31] Knowles J expressed the view that a review of documents disclosed in litigation in order to advise on "whether other proceedings would be possible or would be further informed" would be a use for a collateral purpose.

    iii) Cockerill J adopted a similar approach in *Lakatamia Shipping Co Ltd v Su* [2021] 1 WLR 1097 at [54]-[60].

42. I reject Mr George's submissions that the approach taken in these authorities cannot assist the court in considering section 9(2) of the 2003 Act. Whilst it is true that CPR 31.22 confers a discretion on the court, which will weigh up conflicting public interests in order to determine whether to permit collateral use in any given case, whereas there is an absolute prohibition on collateral use in the context of section 9(2), nevertheless, I cannot see why this distinction should affect the approach of the court to the interpretation of the word "use", at least in connection with its natural and ordinary meaning. In neither CPR 31.22 nor section 9(2) is there any form of wording which restricts this meaning. Equally, the fact that the limitation on collateral use of disclosed documents under CPR 31.22 arises in a different context and is motivated by different considerations than those underpinning section 9 of the 2003 Act, does not appear to me to shift the dial in favour of adopting an autonomous meaning for "use" in the context of the 2003 Act, particularly in circumstances where Mr George has provided no cogent justification for his proposition that the word "use" in section 9(2) should not be given its ordinary meaning.

43. Mr George accepts the underlying purpose of the 2003 Act of facilitating a properly functioning international system of legal assistance, and he says that it is precisely because of this important purpose that "the scope of the prohibition must be clearly and workably delineated". However, at no time in his submissions did he really grapple with the point that a narrow interpretation of "use" would undermine the underlying purpose of the 2003 Act and nor did he explain how the actual words used in section 9(2) were "clearly" to be interpreted as prohibiting "deployment or substantial deployment <u>in evidence</u>". Indeed, his change of position to reliance upon "deployment or substantial deployment" (apparently prompted by an appreciation of the difficulties caused to his

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[1] CPR r.31.22: "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where…"

original case by reason of the obvious need for "use" to have some meaning in the context of "investigations" as identified in section 7(2)), to my mind severely detracted from his case that the prohibition was "clearly and workably delineated" as "deployment or substantial deployment in evidence". As Mr Hunter pointed out in his reply, the concept of "deployment" of evidence (i.e. information in any form) is not materially different from the broad concept of "use" of evidence for which the Defendants contend. Information may be "deployed" for the purposes of interviewing witnesses or for the purposes of deciding whether to launch civil proceedings.

44. In support of the FCA's narrow interpretation of the word "use", Mr George relies heavily (as I have already foreshadowed) on *Gohil*. In my judgment, however, *Gohil* is not authority for the proposition that the word "use" in section 9(2) has the restricted meaning for which he contends. In order to address his submissions, I need to consider *Gohil* in a little detail.

45. In *Gohil* the claimant, Mrs Gohil, made an application to the family court for disclosure of documents which had been relied upon by the CPS in separate criminal proceedings against her husband, and which included material obtained by the CPS via the MLA procedure. The issue that arose on appeal was whether section 9(2) of the 2003 Act permitted use in the family proceedings of evidence obtained pursuant to a request under section 7. Importantly, Mrs Gohil had attended the criminal proceedings at which she had heard evidence against her husband, including evidence obtained by the CPS pursuant to requests under section 7 of the 2003 Act.

46. Lord Dyson MR, giving the judgment of the court, expressed the view at [36] that unless the foreign authority consents to its wider use "there is a statutory prohibition on the use of evidence for any purpose other than that specified in the request" and that "[t]he prohibition applies as much to the use of evidence in other criminal investigations and proceedings as it does to its use in civil proceedings of any description". However, he went on to identify the "practical difficulties" caused by reason of the fact that the MLA material had been adduced in open court, asking himself (at [39]) whether its introduction into the public domain affected the prohibition on its use ("Once it is in the public domain, can the use of the material be prohibited?"). His answer was as follows (at [40]):

> "In our view, section 9(2) of the 2003 Act clearly prohibits the subsequent use of documents and other articles obtained as a result of the letter of request, even where they have been adduced in evidence in open court."

47. Lord Dyson then referred to the decision of the Court of Appeal (Criminal Division) in *R v Gooch* [1999] 1 Cr App R (S) 283, a case in which evidence relied upon by the Crown in confiscation proceedings had been obtained pursuant to letters of request and no consent for such use had been obtained. The Court of Appeal (Criminal Division) held that the evidence was inadmissible because it had been used for a purpose other than that specified in the letters of request. Lord Dyson then continued:

> "We agree with this conclusion. Accordingly, documents obtained cannot be deployed as evidence in proceedings other than those specified in a letter of request, even where the documents have already been properly put into the public domain"

48. At [41] Lord Dyson concluded that:

> "Thus Mrs Gohil cannot adduce the documents. But although she cannot adduce the documents, she can use the information contained in them as a springboard for conducting her own inquiries with a view to obtaining other evidence on which she can rely without contravening section 9(2) of the 2003 Act. If there are difficulties in deciding whether she is in substance adducing the documents, then the judge conducting the hearing will have to decide whether she has crossed into forbidden territory".

49. Mr George submits that the Court of Appeal's acceptance of the proposition that "documents obtained **cannot be deployed as evidence** in proceedings other than those specified in a letter of request" (**emphasis added**) clearly establishes that the effect of section 9(2) of the 2003 Act is to preclude a party from deploying (or substantially deploying) MLA material in evidence without the consent of the relevant foreign authority. Further he submits that the conclusion that the information contained in the documents could be used as a "springboard" for conducting inquiries, is supportive of the proposition that use which does not involve deployment in evidence is not prohibited by section 9(2).

50. I disagree with these submissions, for the following reasons:

i) The key question in *Gohil* was whether section 9(2) permitted use in family proceedings (i.e. civil proceedings) of evidence obtained pursuant to a request under section 7. Save in one respect to which I shall return in a moment, this did not involve the court in focussing specifically on the true interpretation of the word "use" in section 9(2).

ii) However, in considering the international context and underlying purpose of the statutory provisions, including their importance in encouraging unfettered mutual assistance between states in criminal matters, the Court of Appeal talked of the "use" prohibition in the widest terms. Thus at [17] Lord Dyson said:

> "Provisions such as those referred to above provide the necessary guarantee that the material supplied will (i) only be used in criminal investigations and proceedings and (ii) only in the criminal investigations and proceedings specified in the request, unless the requested party consents to some wider use."

At [27] Lord Dyson accepted a submission that:

> "the objective of providing international mutual assistance is as likely to be placed at risk by the use of evidence in civil proceedings as in any other form of proceedings".

iii) Furthermore, in dealing with the language of section 3(7) of the Criminal Justice (International Co-operation) Act 1990, the predecessor to section 9(2) of the 2003 Act, Lord Dyson observed at [26] that "[t]he language of section 3(7) is straightforward and clear. The clear statutory prohibition is subject to a single

express exception, namely that it does not apply if the requested authority consents to the wider use of the evidence". At [36], he expressed the view that there was "no material difference" between the language of section 3(7) of the 1990 Act and section 9(2) and (3) of the 2003 Act and went on in that paragraph to make the broad observations as to the statutory prohibition identified above.

iv) At [38], Lord Dyson considered the meaning of use in the context of a submission that disclosure of evidence could be distinguished from use. He rejected this submission, noting that "An interpretation which drew such a distinction would undermine the object of mutual assistance which the statutes were intended to promote" and he went on to say that "A requested country would be just as likely to be deterred from co-operating with a requesting country if it knew that the evidence might be *disclosed* for purposes other than those specified in the letter of request as if it knew that the evidence might be *used* for such other purpose". This broad interpretation, consistent with the underlying objectives of the statute, is entirely inconsistent with the narrow interpretation for which the FCA contend.

v) Although Lord Dyson referred in paragraph [40] to documents being "deployed in evidence", that statement must be seen in its context. It followed an analysis of *R v Gooch*, a case in which evidence had in fact been "deployed" in confiscation proceedings. Lord Dyson's reference to deployment was no more than an acknowledgment that section 9(2) prohibited such deployment, even where documents had been put into the public domain. I do not read it as restricting the meaning of the word "use" in section 9(2) to deployment in evidence only. Such a restriction would not sit comfortably with the preceding sections of the judgment to which I have already referred.

vi) Against the background set out above, the acceptance in paragraph [41] that Mrs Gohil could use the information contained in the documents as a "springboard" for conducting her inquiries is nothing more than a solution to the "practical difficulties" created on the facts of the case by reason of Mrs Gohil already being aware of the content of the documents obtained by the CPS owing to the fact that they had been referred to in open court. In my judgment, it is clear from the question posed at the end of [39], that the permitted use as a "springboard" was expressly limited by reference to the fact that, in this case, the material was already "in the public domain". There is nothing in the judgment of Lord Dyson which permits the use of MLA material (which has not been read out in open court) as a springboard for the conduct of investigations into civil proceedings.

vii) That my analysis of *Gohil* is correct is supported by a summary of its *ratio* provided by the Court of Appeal in another aspect of the *Gohil* litigation [2014] EWCA Civ 274 per McFarlane LJ at [90]:

> "…the court concludes that the documents obtained by MLA cannot be deployed as evidence in proceedings other than those specified in the MLA request, even where those documents have already been properly put into the public domain in open court in the criminal proceedings. Mrs Gohil could not, therefore, adduce criminal documents as evidence, but she could use the information contained within them, **which she had learned of by attendance at the Crown Court**, as a springboard for

conducting her own inquiries with a view to obtaining evidence that would be admissible in the family court and on which she may rely" (**emphasis added**).

51. Mr George took me to paragraph 18.29 of *Nicholls, Montgomery and Knowles on The Law of Extradition and Mutual Assistance*, third edition, to the effect that *Gohil* is authority for the proposition that the effect of section 9(2) "is to render inadmissible in evidence material obtained under section 7 in any criminal or civil proceedings other than those explicitly specified in the letter of request". Whilst this may be accurate in the context of the specific findings made in *Gohil*, it is not support for the FCA's submission that the meaning of "use" in section 9(2) is a narrow one. Similarly, I found nothing in either *R v CII* [2008] EWCA Crim 3062, or *R v Sandeep Singh Gill* [2017] EWCA Crim 1612 (both referred to by Mr George) to support such a proposition. In *R v CII*, the court was not concerned with the principles underlying section 9 of the 2003 Act (as is clear from [34]) and it is doubtful that section 9(2) was engaged; there was certainly no suggestion that the MLA material was used for any purpose other than that identified in the letter of request. In *R v Gill*, the Full Court upheld the decision of the trial judge that evidence obtained through a request for MLA was admissible notwithstanding potential objection to its admissibility. Neither of these cases has anything to say on the issue with which I am concerned on the Application.

52. Finally, Mr George made an overarching submission to the effect that the FCA's construction achieved greater certainty than the construction of section 9(2) for which the Defendants contend. However, given his change of position I do not attach much credence to this argument. As I have already observed, even assuming that the test is "deployment" (as Mr George contended orally), it is difficult to see that there is any real distinction between "deployment" and "use" (when that word is given its natural and ordinary meaning). Use of MLA Material as a "springboard" to obtain non-MLA evidence for civil proceedings, could equally be described as "deployment" of that material for that purpose.

ISSUE (II): IS THE USE OF THE MLA MATERIAL BY THE FCA PROHIBITED BY SECTION 9(2) OF THE 2003 ACT AS A MATTER OF FACT (SUBJECT TO CONSENT)?

53. For the purposes of the Application, D1 accepts that paragraphs 19-100 of Williams 4, which record the steps taken by the FCA to obtain information pursuant to IOSCO, FSMA and section 7 of the 2003 Act, are accurate. In the circumstances, D1 says there is no need for a mini-trial on the question of actual use – his case is that the available evidence already establishes prohibited use. During the course of his submissions, I understood Mr George to agree that, further to my decision on the meaning of "use" in section 9(2) of the 2003 Act, I would be in a position to reach a finding of breach (always subject to the question of consent) without conducting a mini-trial.

54. In circumstances where neither the FCA nor D1 suggests that I cannot, or should not, determine the factual question of breach on the available evidence, I see no reason why I should not do so. I am obviously mindful that it would be inappropriate for the court on a strike out application to engage in a mini-trial, but I do not need to do that here.

The Evidence

55. The FCA's unchallenged evidence establishes that:

i) From the outset, as is clear from the FCA's Memoranda of Appointment of Investigators, the FCA's investigation into the Defendants has proceeded on a "dual track" basis. This is standard FCA practice where potential market abuse is suspected and "where the suspected misconduct encompasses potential criminal offences as well as civil/regulatory contraventions". The dual track approach has the advantage of enabling the FCA to "explore a range of possible regulatory outcomes" (Williams 3 [6]-[7] and Williams 4 [10] and [11]). D1 positively relies upon the "dual track" nature of the investigations for the purpose of his submissions.

ii) The FCA gathered evidence in support of its investigation via (i) IOSCO information requests; (ii) FSMA information requests; (iii) voluntary provision of information; and (iv) MLA requests. Williams 4 details the requests that were made and the information provided.

iii) Numerous requests for evidence were made by the FCA which Mr Williams confirms were not informed by MLA Material.

MLA requests to the Greek Authorities

iv) MLA requests were sent to the Department of Extradition & Judicial Assistance in Greece ("**the Greek Authorities**") on 30 November 2015 and 26 February 2016. On 30 March 2016, the FCA received from the Greek Authorities 19 hard copy files containing audit papers for Globo Mobile SA and Profitel subsidiaries for the year ending 2014 ("**the 2014 Greek Audit Files**"). Although this material had not been specifically requested in the MLA requests (see Williams 5 at [6]), Mr George accepts that it would not have been provided had those requests not been made and I accept D1's submissions that it is properly to be regarded as MLA Material because it was obtained "pursuant to a request for assistance under section 7" (section 9(1)). I note that the submissions made at the hearing on 17 July 2022 on behalf of the FCA in opposition to disclosure of the 2013 and 2014 Greek Audit Files included the submission (which I accepted) that this material could not be disclosed to D1 because it was material obtained through the MLA process (see [62] and [63] of the judgment), a submission that was consistent with the approach taken in Williams 3 at paragraph 35.10. I also note that an email from the FCA to the Greek Authorities dated 10 June 2016 (to which I shall return on the subject of consent) plainly treats audit papers obtained as MLA Material. Mr George did not suggest that this was not a conclusion that I could arrive at on this application.

v) On 16 February 2017, the FCA sent a further MLA request to the Greek Authorities seeking (amongst other things) Grant Thornton audit files of Globo and its subsidiaries for 2012 and 2013. Evidence relating to the 2013 audit ("**the 2013 Greek Audit Files**") was received on 24 May 2018.

vi) On 18 July 2017, the FCA sent an MLA request to the Greek Authorities which [71] of Williams 4 confirms was "partly informed by, and referred to, the 2014 Greek Audit Files".

vii) On 12 August 2019, the Greek Authorities provided a "substantial body of materials" to the FCA (Williams 4 at [98]).

MLA Requests to the SVG Authorities

viii) On 21 February 2017, the FCA sent an MLA request to the authorities in Saint Vincent and the Grenadines ("**the SVG Authorities**"). Evidence was received in response on 3 May 2017.

MLA Requests to the Swiss Authorities

ix) On 20 April 2017, the FCA sent an MLA request to the Swiss Federal Office of Justice ("**the Swiss Authorities**") seeking information relating to a safe deposit box. This referred to information obtained from the 2014 Greek Audit Files (as the corrections in Williams 5 confirm). A response was received on 15 March 2018 (Williams 4 at [82]). In Williams 3, at [36]-[37], Mr Williams confirms that paragraph [90] of Williams 1 contained two sentences which "were based on material supplied by the Federal Prosecutor's Office in Switzerland in response to a request for MLA", but that this information was included in error and represented "the sum total of the information contained in my first witness statement which was founded on MLA material".

x) On 13 June 2018, the FCA sent a supplemental MLA request to the Swiss Authorities which contained references to information from the 2014 Greek Audit Files. Evidence in response was provided on 1 November 2018 and 8 January 2019.

Other MLA Requests

xi) An MLA request was made to the United States Department of Justice on 21 March 2016, but this was later withdrawn and no material was obtained. A supplemental MLA request was sent on 5 June 2019. Parts of the letter were informed by the 2013 and 2014 Greek Audit Files together with evidence obtained from the SVG Authorities. No material was received in response (Williams 4 at [37] and [97]).

xii) On 16 November 2017 the FCA sent an MLA request to the Cypriot Ministry of Justice and Public Order, which request was informed by the 2014 Greek Audit files. No material was ever received in response to this request.

IOSCO Requests

xiii) Mr Williams confirms that various IOSCO requests were informed, or may have been informed, by the content of the 2014 Greek Audit Files. This applies to:

a) IOSCO requests to the Cyprus Securities and Exchange Commission (known as CySEC) on 10 August 2016, 27 February 2017 and 17 November 2017 (see Williams 4 at [48], [62] and [79]). A further IOSCO request sent to CySEC on 1 March 2017 specifically referred to the 2014 Greek Audit Files. A follow up request was sent on 16 June 2017 which also referred to the 2014 Greek Audit Files.

b) IOSCO requests to the Hellenic Capital Market Commission ("**HCMC**") on 7 March 2017, 18 July 2017 and 23 October 2017 (Williams 4 at [65], [72] and [76]). The request of 18 July 2017 specifically referred to information

from the 2014 Greek Audit Files. Some questions based on the 2014 Greek Audit Files were subsequently put to witnesses, but the majority were not (Williams 4 at [72] and [84]).

c) IOSCO requests dated 4 August 2017 and 4 October 2017 respectively, to the US Securities and Exchange Commission (known as "**SEC**") and to the Guernsey Financial Services Commission (Williams 4 at [73] and [74]).

d) An IOSCO request dated 9 October 2017 to the Securities and Exchange Board of India (Williams 4 at [75]). This request was informed by material contained in the 2014 Greek Audit Files (as the corrections in Williams 5 confirm).

Interviews

xiv) At [40] of Williams 4, the FCA confirms that the 2014 Greek Audit Files "informed parts of various interviews with witnesses".

xv) In June 2016, the FCA interviewed members of Globo staff. At [36] of Williams 4 it is said that "it is possible that a question about one of the Shell Companies was informed by the 2014 Greek Audit files", but it is confirmed that no documents deriving from MLA requests (including documents from the 2014 Greek Audit files) were put to the witnesses.

xvi) Pursuant to a March 2017 IOSCO request, CySEC facilitated interviews with various individuals. Williams 4 at [64] confirms that "some elements of these interviews (and other questions asked of employees who were not available for interview) were informed by the 2014 Greek Audit Files".

xvii) At [60] of Williams 4, it is acknowledged that it is possible that the SVG evidence obtained on the 3 May 2017 informed (i) questions subsequently posed in an interview; and (ii) questions asked of the company formation agent. It is further acknowledged that it did in fact inform "a small number of questions asked in interviews of…former Globo employees…in Greece and two documents from the material received in response were used in the interviews…" (see also Williams 4 at [94]).

xviii) On 25 January 2019, the FCA sent an IOSCO request to HCMC asking for it to arrange interviews with employees of Globo plc. Williams 4 at [94] states that "it is possible that some of the 2013 or 2014 Greek Audit Files informed those interviews".

European Investigation Orders

xix) On 18 April 2019, the FCA sent an European Investigation Order ("**EIO**") to the German Public Prosecutor's office which referred to documents "from the Greek audit papers" (Williams 4 at [96]).

xx) On 27 December 2019, the FCA sent an EIO to the Greek Authorities, which contained a brief reference to the 2013 and 2014 Greek Audit Files.

Discussion

56. It is clear from the undisputed evidence that the FCA chose to blend its criminal and civil investigations, using MLA Material to inform it as to further investigations, questions to pose in interview, the content of further MLA requests, the content of IOSCO requests and the content of EIOs. Specific references were made to MLA Material in various documents, as identified above. Furthermore, as Williams 3 concedes, the allegations contained in paragraph 90 of Williams 1 (in support of the application for permission to serve out of the jurisdiction) were expressly (albeit inadvertently) based on material supplied by the Swiss Authorities via the MLA process.

57. Mr Brodie contends that this use is a clear breach of the absolute prohibition in section 9(2) of the 2003 Act. He points to Mr Williams' evidence in [32] of Williams 3 to the effect that when he prepared Williams 1 "care was taken to ensure that evidence obtained by MLA was not included or relied upon" and he submits that this approach was taken by the FCA on the (misconceived) basis that the prohibition related solely to deployment in evidence. He maintains, however, that on the construction of the word "use" which I have accepted, it is impossible to detach those parts of the civil claim which have been informed by MLA Material from those parts which were not so informed. He describes this rather elegantly as the incorporation of MLA Material into the "warp and the weft" of the investigation on which this civil claim is based.

58. Had the FCA been conducting itself properly, submits Mr Brodie, it would either have obtained consent for use of the MLA Material in the context of the civil investigation and subsequent proceedings, or it would have ensured that an information barrier was erected between those individuals at the FCA who received and considered MLA Material and those individuals who were entrusted with considering and pursuing the civil action. It is common ground, however, that no such information barrier exists and indeed that the consequence of running a "dual track" investigation is that the same FCA team has reviewed the MLA Material for the purposes of both the criminal, and then the civil, proceedings.

59. I accept Mr Brodie's submissions. I find that the unchallenged evidence of the FCA clearly establishes prohibited use of MLA Material. That material has been used to investigate both the potential for criminal proceedings and the potential for civil proceedings, the latter being a use which is not permitted by section 9(2). The only way to have avoided this situation would have been to erect an information barrier, or obtain consent for such use. MLA Material plainly informed the gathering of non-MLA Material.

60. Mr George realistically accepts that on a wide interpretation of "use" in section 9(2), and in particular an interpretation which requires the creation of an information barrier, then (always subject to consent) the FCA will have impermissibly used MLA Material for the purposes of these proceedings, at least in so far as Mr Williams has had sight of the MLA material and has also been involved in this civil claim. Mr George acknowledged during his oral submissions that the difficulty with a dual track investigation is that the criminal and civil investigations are inextricably linked such that it would always have been the case that the potential for civil proceedings might underlie the investigations into the criminal proceedings.

61. On the issue of springboarding, however, Mr George argues that insofar as MLA Material was used to inform requests for further information and/or to inform questions posed to witnesses, the primary (or "actuating") purpose of such springboarding was the legitimate purpose of the criminal investigation and he relies upon the judgment of Mantell LJ in *R v Gooch* at page 291[2] for the proposition that because the sole purpose of the use of the MLA Material has not been for the impermissible civil proceedings, it was not prohibited. It is not clear to me on the evidence that I am in a position to make a finding on this "sole purpose" point, but in any event it appears to me to be answered by Mr Brodie's point as to the "warp and the weft". Where the criminal and civil investigations were (as is accepted by the FCA) inextricably linked such that the use of the MLA Material was part of the fabric of both investigations, it does not assist the FCA to argue about the actuating purpose of the springboarding exercise.

62. Finally, Mr George makes a further and different point, which does not affect the answer to the present issue, but which is plainly relevant to the question of whether the FCA's claim should be struck out. He argues that, notwithstanding that the court is in a position to determine the principle of breach, the court will not be in a position to assess (i) the extent to which MLA Material was "intermingled" with non-MLA evidence; (ii) the nature and significance of the MLA Material; (iii) the precise extent to which the MLA Material informed requests or investigative steps; (iv) the significance of the material received in response to such requests (including the extent to which it informed still further requests); (v) the extent to which the MLA Material informed the questioning of relevant witnesses; and (vi) the significance (if any) of that witness evidence in relation to the allegations set out in the Particulars of Claim. This is important, says Mr George, because it is only through a proper understanding of these issues, which would inevitably require a mini-trial, that the court will be in a position to determine the scale or significance of the breach on the part of the FCA for the purposes of determining whether it amounts to an abuse of process and/or whether it would be proportionate to strike out the Proceedings. I shall return to this point in the context of considering the final issue.

ISSUE (III) – HAS THE FCA OBTAINED CONSENT TO USE OF THE MLA MATERIAL FOR THE PURPOSES OF THE CIVIL PROCEEDINGS?

63. I will need to consider the question of consent by reference to (i) the MLA Material obtained from the Greek Authorities; (ii) the MLA Material obtained from the SVG Authorities and (iii) the MLA Material obtained from the Swiss Authorities. No material was received in response to the FCA's MLA requests to the Cypriot and US authorities and so no issue of consent arises in relation to those requests.

64. As I understood his submissions, Mr George invites me to make a factual finding in his favour on the issue of consent or, at the very least, to determine that consent is a triable issue which cannot be determined at a strike out application. He submits that if D1 is to have any prospect of succeeding on the strike out application, he must convince me that

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[2] "We have come to the clear conclusion that the material obtained as a result of the letters of request should not have been used in the confiscation proceedings nor should it have been used for the purposes of interviewing the appellant if (as it was) the sole purpose of the interview was the preparation of a section 3 statement."

there was no consent and that there is no triable issue on the point. Mr Brodie did not suggest otherwise.

65. I shall return to the issues of fact that arise in relation to consent in a moment, but first I should address a point of construction that arises in respect of some of the MLA requests. None of the parties suggests that this is not capable of being determined on this application and so it seems to me that I should, as with the other legal issues that I have been asked to determine, seize the nettle.

A Point of Construction

66. The FCA contends (in Williams 3) that standard wording ("**the FCA Standard Wording**") contained in its MLA requests to the Greek and Swiss Authorities conferred "sufficient consent" for the use of MLA Material for the purpose of these civil Proceedings. The FCA Standard Wording reads as follows:

> "Unless you indicate otherwise, any evidence obtained pursuant to this request may be used in any criminal prosecution or other judicial proceedings connected with this investigation, including any restraint or confiscation proceedings, whether relating to the above named subject(s) or any other person who may become a subject of this investigation."

67. I am bound to say that whilst superficially attractive, I do not consider this argument can withstand scrutiny, primarily because of the context in which the FCA Standard Wording is used in the FCA's letters of request and therefore the way in which it would have been understood by a reasonable recipient of the request. In particular:

    i) The FCA Standard Wording only enables material to be used in proceedings "connected with **this investigation**", i.e. a criminal investigation. Taking, by way of example, the wording of the letter of request sent by the FCA to the Greek Authorities on 30 November 2015 ("**the Greek MLA Request**"), which in material respects is echoed by the MLA request sent to the Swiss Authorities on 20 April 2017, the first paragraph expressly requests "assistance…in obtaining and preserving evidence **in relation to a criminal investigation** being conducted into market abuse and insider dealing" (**emphasis added**). There is no room in the FCA Standard Wording to permit use in the context of a civil investigation.

    ii) This "criminal" context is plainly identified in the second paragraph of the Greek MLA Request which makes clear that it is a request made pursuant to the 2003 Act for Mutual Legal Assistance: "The FCA is a designated prosecuting Authority for the purposes of [the 2003 Act] and I am authorised to make this request pursuant to section 7(5) of [the 2003 Act]".

    iii) Under the heading "Basis of the Request", the Greek MLA Request reinforces the fact that it is a request for Mutual Legal Assistance in connection with criminal matters: "I make this request pursuant to the Council of Europe's 1959 Convention on Mutual Legal Assistance in Criminal Matters together with both the 1978 and 2001 Additional Protocols".

iv) The Greek MLA Request specifically identifies "[t]he offences under investigation", namely offences under sections 89 and 90 of the Financial Services Act 2012 of presenting misleading statements or impressions to the market and insider dealing contrary to section 52 of the Criminal Justice Act 1993. There is no mention of a civil investigation or civil proceedings (and given that the sole purpose of an MLA request is for Mutual Legal Assistance in the conduct of criminal investigations or proceedings, that is unsurprising).

v) Seen against that background, the reference to "other judicial proceedings connected with this investigation" in the FCA Standard Wording can only be understood as a reference to judicial proceedings connected to the criminal investigation. I do not consider that this wording in its proper context clearly refers to a criminal/civil divide, as Mr George submitted, or, indeed, that it is wide enough to cover any civil proceedings, even if they are (as Mr George argued) civil proceedings premised upon breach of a criminal statute. The fact that the FCA Standard Wording goes on to say "including any restraint or confiscation proceedings" (both ancillary criminal proceedings) serves only to reinforce the impression that these "other judicial proceedings" must be criminal proceedings. I agree with Mr Brodie's submission that had the FCA Standard Wording been intended to have the effect of enabling the FCA to use the material in civil proceedings, there would have been no need to clarify that ancillary criminal proceedings were included in the definition: such proceedings would obviously be covered by a broad meaning of "other judicial proceedings".

vi) I understood Mr George to accept that the court "may have difficulty" in finding that a request made pursuant to section 7 of the 2003 Act can specify evidence for use in any proceedings or investigation which are not criminal – and he is right about that. Section 7 of the 2003 Act provides a mechanism exclusively for requests for assistance in the gathering of information for criminal investigations and proceedings. However, he pointed out that, pursuant to section 9(3), it was possible to seek consent for use of evidence "for any other purpose" and he contended that the FCA Standard Wording had that effect in seeking permission for use in "other judicial proceedings" including civil proceedings. Whilst I accept that section 9(3) obviously contemplates requests for consent to the use of MLA Material for a purpose not identified in the request, I disagree that this is the effect of the FCA Standard Wording here for the reasons I have already referred to. I note that the Greek MLA Request refers exclusively to section 7 of the 2003 Act.

68. I reject Mr George's submission that the FCA Standard Wording should attract analogous reasoning to that used in respect of the "sweep-up" provisions contained in the letters of request in *R v Gill* [2017] EWCA Crim 1612. In *Gill*, the defence objected to evidence provided in response to letters of request under the 2003 Act on the grounds that the material provided was restricted to a different operation and that the appellant had not been specifically named by the requesting authority. The letters of request included the following 'sweep up' provision:

> "Any evidence obtained…may be used in the criminal prosecution connected with this investigation…whether relating to the above named or to any other person who may become a subject of this investigation".

69. The court dismissed the appellant's challenge to the trial judge's decision that the evidence was admissible at [23]:

> "The principal ground under this head is that what has been termed the 'sweep up' provision in the letters of request could not give rise to consent by the foreign government to the use of material in proceedings against the applicant. That ignores the fact that in each case the relevant state was aware of the nature of the request made – which plainly permitted use of evidence obtained in any criminal prosecution connected with the investigation identified in the letter of request."

70. The court held that the 'sweep up' provision was sufficient on its wording to cover the factual situation with which the court was concerned. In particular, "[t]he investigation was detailed in each letter of request setting out the state of the investigation as it then was" and "[t]he identities of particular individuals were indicated as and when they became known". Accordingly, the relevant state was able to give its informed consent to the potential use of evidence as set out in the relevant letter of request because the proceedings against Mr Gill were connected with the investigation in which they were issued and Mr Gill was a person who became a subject of the investigation. Interestingly, and in the context of whether the proceedings were "connected" with the investigation, the court noted that "[t]he argument that the legislation in relation to which the applicant was prosecuted had a different operational name to that referred to in at least some of the letters of request **might have had some force** had the judge not had evidence from the [Crown] explaining the change in operational names as being no more than a change of name" (**emphasis added**). It was in this context that the court went on to observe that "The overall investigation remained the same", an observation which Mr George contends is applicable in the context of the present case.

71. However, in my judgment a change from a criminal to a civil prosecution is not merely "a change of name", particularly given the criminal context of the letter of request. *Gill* was decided on the basis that the prosecution of Mr Gill was encompassed in the purpose of the investigation identified in the letters of request such that the relevant authorities were able to give informed consent. The same cannot be said here. A civil claim is not encompassed in the criminal investigation and an overseas authority faced with the FCA Standard Wording in the context to which I have referred above would not be in a position to give its informed consent to such a claim. Absent clearer wording in the letter of request, I do not consider that the fact that the need to establish a criminal offence lies at the heart of the civil claim, as Mr George pointed out, affects the position. I have already drawn attention to the wording at [18] in *Gohil* where Lord Dyson expressly identifies that an overseas state may well take a different view to the use of evidence in criminal and civil proceedings owing to specific legal issues arising under the relevant national laws of that state.

72. Mr Brodie drew my attention to the (notably different) standard form wording used by the FCA in its IOSCO requests. In an IOSCO request to HCMC on 29 October 2015, the FCA said this in relation to the proposed use of information:

> "The information will be used by the FCA for the purposes of our investigation and any subsequent proceedings which may include criminal proceedings (including restraint proceedings)

> **and/or civil proceedings** in relation to market abuse" (**emphasis added**).

73. Wording along these lines would have put the intended use of the MLA Material beyond doubt, notwithstanding that the request was made pursuant to the 2003 Act. However, absent a clear reference to civil proceedings, I fail to see that the FCA Standard Wording in its MLA Requests is sufficient to confer consent by the relevant overseas authority to use of responsive MLA Material in civil investigations or proceedings. In all the circumstances, I do not need to address in any detail Mr Brodie's additional argument that the FCA's attempt to impose a negative resolution procedure on an overseas state is "disrespectful and inconsistent with" the objectives of the rules of international comity, an argument which appeared to me to focus more on issues of diplomacy than consent. Certainly the concept of a 'sweep up' provision (which did not even expressly provide for objection by the overseas state) being sufficient to create informed consent does not appear to have troubled the court in *Gill*.

74. Finally on this point, I should record that Mr Hunter argued in his oral submissions that a "lawful" request under section 7(2) of the 2003 Act had to be limited to a request for evidence to be used in a criminal investigation or proceedings. This, he submitted, supported a construction which limited the meaning of the FCA Standard Wording to criminal matters only, because the request for evidence must be construed as lawful. In his submission, a request couched in the form used in the FCA's IOSCO requests would be outside the scope of section 7(2) and thus unlawful. On the wording of section 9 of the 2003 Act, any request to use evidence for a purpose inconsistent with section 7 of the 2003 Act would need to be made separately from the request. This, he submitted was a definitive answer to the FCA's reliance upon the FCA Standard Wording. Neither Mr George, nor Mr Brodie, agreed with these submissions. They both argued that section 9 of the 2003 Act expressly contemplates that consent may be sought from the appropriate overseas body not only for the purpose identified in the request, but also "for any other purpose" (section 9(3)) and that it would not be unlawful to make an express request to rely on MLA Material for other purposes in the MLA Request itself. However, given the decision I have made as to the FCA Standard Wording, I do not have to decide this point.

Have the Greek Authorities consented to use of the MLA Material for civil proceedings?

75. The Greek Authorities did not indicate any objection further to the FCA Standard Wording in the Greek MLA Request. However, for reasons I have given, that wording was insufficient to allow an inference that the Greek Authorities have given their informed consent to use of the MLA Material in civil proceedings. Nevertheless, the FCA points to other matters on which it relies in submitting that the Greek Authorities have in fact provided consent, or that there is at least an arguable case that they have consented.

76. On 10 June 2016, Mr Wayil Eisa of the FCA Criminal Prosecutions Team ("**Mr Eisa**") sent an email to Chief Judge Karakonstantis ("**CJK**") in connection with a meeting that had already been arranged between the FCA and the Greek Authorities on the following Monday (13 June 2016). In the email, Mr Eisa apologised for a last minute addition to the points for discussion at the meeting, namely a request that had been received by the FCA from the UK's Financial Reporting Council ("**FRC**"), described as "a body that regulates and takes enforcement action in the UK in relation to the conduct of accountants". The email went on to say this:

> "As you will see from the FRC's request, they are conducting an investigation in relation to Globo Plc, specifically an investigation into Grant Thornton's conduct with respect to the audit of the company. Given the related nature of the investigation, we at the FCA have liaised with the FRC counterparts. No material obtained under international assistance has been provided to the FRC, but we indicated our possession of audit papers kindly provided by the Greek authorities in relation to the audit in Greece. The FRC have requested access to or disclosure of the same…Perhaps on Monday we can discuss what information would be required by the Greek Authorities for any permission to transfer such material, if such permission can in fact be granted".

77. Pausing there, Mr George candidly accepted during his submissions that there can be no doubt that this email was written in the context of a request by the FCA for consent to disclose MLA Material to the FRC. He also accepted that the FCA obviously considered that consent was required for such disclosure (i.e. that it was not covered by the FCA Standard Wording) but he explained that this was because disclosure to the FRC would not fall within the scope of "other judicial proceedings".

78. A meeting duly took place between the FCA (amongst others Mr Williams and Mr Eisa) and CJK the following Monday, whose main purpose, as is set out in Williams 4, was to inform CJK "about the nature of our investigation, to discuss the prospect of requiring the Defendants to attend interviews in Greece and to discuss the processing of the seized digital items". A handwritten note ("**the Note**") exhibited to Williams 4 records that at the outset of the meeting CJK explained that he is the senior judge in the court of first instance and that he receives MLA requests from all over the world. He confirmed that he is handling "the case". The Note records a discussion which appears to focus on criminal investigations (CJK asks whether a criminal case is open against D1 and there is then a discussion about conducting interviews with the "suspects"). There is no reference in the Note to any discussion of possible civil proceedings and no suggestion from Mr Williams in his evidence that the possibility of civil proceedings was mentioned.

79. However, it is clear that Mr Eisa (for these purposes, "WE") referred at the meeting to the request for disclosure of the MLA Material from the FRC. The Note reads:

> "WE: Another Q. FRC regulate acc. Professions. FRC asking whether can disclose material. [C]JK: Up to our legislation. If can provide info to other authorities, then it is ok for [C]JK. WE: Yes our legislation allows. We just wanted to check. [C]JK: Yes it is no problem".

80. As is explained in Williams 4, the reference to "Up to our legislation" is a reference to CJK's response that the question of disclosure to the FRC was dependent upon UK legislation. Williams 4 goes on to say that "It was clear from this discussion that [CJK] was content for the FCA to make such use of the materials that he provided to us as was permitted under English law, and that he did not intend to place any restrictions on their use".

81. This is not my reading of the Note itself, which, at best, indicates that CJK told the FCA that if disclosure to the FRC was permitted by UK legislation then he was comfortable with such disclosure being given. I agree with Mr Brodie that (i) the Note does not suggest that it was made clear to CJK that specific consent from the Greek Authorities was required for disclosure under UK legislation; and (ii) even assuming the statement from CJK recorded in the Note amounted to consent, such consent appears to have been limited to disclosure to the FRC (or on the most generous interpretation possible, to "other authorities"). Mr George acknowledged during his oral submissions that the position in relation to consent from CJK was "somewhat nebulous".

82. In the circumstances I have identified, it seems to me that a question arises on this application over whether I can properly make a finding that no general consent was given in the face of Mr Williams' evidence about what was "clear from" the discussion (Mr Williams having been present). This evidence appears in one of the paragraphs which D1 was prepared to accept for the purposes of this application as being true, although Mr Brodie's subsequent submission that the Note is plainly limited to disclosure to the FRC appears inconsistent with that acceptance.

83. I remind myself that this is a strike out application and that I cannot engage in a mini trial, much less make any finding of fact where the available evidence discloses a dispute of fact which gives rise to a triable issue.

84. However, having considered the Note and Mr Williams' evidence with care it seems to me that:

    i) it is clear from the Note that, even assuming for present purposes consent was given, it was given only in relation to the request for disclosure to the FRC (or perhaps, on the widest possible interpretation, to "other authorities") if UK legislation allowed it. The discussion took place in the context of the request made in the email of 10 July 2016, and the specific question posed by Mr Eisa at the meeting. CJK's response was plainly intended to respond to that question.

    ii) even assuming consent for disclosure to the FRC (and perhaps to "other authorities"), such consent does not (either expressly or impliedly) include use of MLA Material for civil proceedings more generally.

    iii) the Note does not record any discussion whatever about a more general use of the MLA Material; indeed, as I have said, its focus appears to be on the criminal investigations.

    iv) Mr Williams does not suggest that there was any additional discussion that is not recorded in the Note (and about which he would want to give evidence) or that CJK (or anyone else present at the meeting) would be in a position to confirm any additional discussion.

    v) Mr Williams' statement about what was "clear" from "this discussion" is plainly referable solely to the words that appear in the Note. It is a statement of his own understanding. Breaking it down, and focussing on the specific wording of the Note, it is unclear how that understanding could possibly have extended to any use of the MLA Materials which went beyond their provision to "other authorities" in so far as UK law allowed. Furthermore, in so far as it is Mr Williams' evidence

that CJK "did not intend to place any restrictions on the use of the MLA Material", there is nothing in the Note to support such a broad proposition. Any understanding of this type can only be referable to the specific use that was being discussed – i.e. disclosure to the FRC, and possibly, "other authorities" if UK legislation allowed.

vi) In any event, and crucially, what Mr Williams may have understood from the discussion as recorded in the Note does not matter. The question is whether CJK in fact gave his express or implied consent to the use of the MLA Material in civil proceedings. The FCA have produced no evidence to support such a broad proposition. The only evidence of consent on which they seek to rely is contained in the Note itself and, for reasons I have explained, that simply does not support the FCA's case.

85. In his skeleton argument, Mr George did not once suggest that there might be any additional available evidence at trial on which the FCA would wish to rely on the issue of consent. In his oral submissions, however, he accepted that the questions posed by the FCA of CJK were specifically about disclosure to the FRC but he said that "the witness evidence might establish something different" and he postulated (in extremely vague terms) that <u>if</u> there was a dispute of fact, the court would wish to hear evidence about it. The trouble with this submission is that nowhere in the FCA's evidence for this hearing is it suggested that any other evidence as to consent might be available beyond what is said in the Note. If Mr Williams' evidence had been that the Note is only a limited record of the discussion and that the discussion was more wide ranging in nature, then that might have given rise to a triable issue. However, that is not his evidence.

86. Ultimately Mr George's submissions were reduced to asking the rhetorical question, whether it could really be said that the FCA should expressly have sought consent for use of MLA Material in civil proceedings "given what CJK had said", as reflected in the Note. However, given the absolute prohibition in the 2003 Act on use of MLA Material without consent (a prohibition which the FCA appreciated when it came to seeking permission for disclosure of material to the FRC), the answer to the question must be in the affirmative.

87. For all the reasons I have identified above, I reject Mr George's submission that there is evidence of a "continuum of communications" with the Greek Authorities on which I can find that there is an arguable case that the Greek Authorities have given their consent to collateral use of the MLA Material for the purposes of these civil proceedings. I find that on all the available evidence they have not given their consent and that, in the circumstances, there is an actual, or (at least) potential, continuing unlawful use of MLA Material in these proceedings.

<u>Have the SVG Authorities consented to use of the MLA Material for civil proceedings?</u>

88. It is acknowledged by the FCA that "due to an oversight" the FCA Standard Wording in relation to consent was not included in the MLA request sent to the SVG Authorities on 21 February 2021. The FCA apologised, through Mr George, at the hearing, for this oversight. Material was received in response to this request on 3 May 2017 and Williams 4 identifies how this material was used in the context of the FCA's dual track investigation.

89. On 15 July 2022, long after these proceedings had been commenced, the FCA sent a letter to the SVG Authorities seeking their consent to the use in these Proceedings of the evidence supplied. The SVG Authorities responded on 16 August 2022 providing that consent.

90. Absent the FCA Standard Wording (which I have found in any event is not as wide as the FCA contends that it is) the FCA has no other basis on which it can maintain that it had consent from the SVG Authorities prior to 16 August 2022.

91. The fact that the SVG Authorities have (belatedly) been asked for, and provided, their consent, is obviously relevant to the question of whether this claim should be struck out, and I shall return to it shortly, but it is common ground that this recent consent cannot cure any impermissible collateral use of MLA Material prior to that date.

Have the Swiss Authorities consented to use of the MLA Material for civil proceedings?

92. An MLA request containing the FCA Standard Wording, together with a focus on criminal investigations in similar terms to the Greek MLA Request, was sent to the Swiss Authorities on 20 April 2017. Responsive material was provided on 15 March 2018. Unlike either the Greek or SVG Authorities, the Swiss Authorities included their own provisions as to the circumstances in which MLA Material could be used. Thus their letter said that "[t]he use of evidence and information obtained as a result of legal assistance is subject to the principle of specialty (see appendix)". Attached to the letter was an appendix entitled "Note on the principle of speciality". This note identified the permissible use as follows:

> "1. Evidence and information obtained as a result of legal assistance may be used in the state that has requested the legal assistance for the purposes of the investigations and as evidence in the criminal proceedings for which the legal assistance was sought, as well as for any other criminal proceedings…"

93. However, this was subject to various additional provisions, including that:

> "5. After obtaining permission from Switzerland, evidence and information obtained as a result of legal assistance may be used."

And that: "6. The prior permission of Switzerland is also required":

> "(b) for any use in proceedings other than those mentioned in para 1, i.e. in civil or administrative proceedings. Prior permission is not, however, required for the Schengen states for the use of evidence and information obtained as a result of legal assistance in civil matters which are connected with a criminal action (art. 49 lit. d of the Convention implementing the Schengen Agreement)".

94. Aside from its case on the FCA Standard Wording, which I have rejected, the FCA contends that, at the relevant time, the UK qualified as a Schengen State for the purposes of Article 49 of the Convention Implementing the Schengen Agreement, by virtue of Council Decision 2004/926/EC and that these civil Proceedings fall within the scope of

"civil matters which are connected with a criminal action" such that no consent was required. Furthermore, it points to correspondence with the Swiss Authorities in May 2022 in which the FCA advanced these points and sought confirmation as to whether consent was required. The "competent case worker" at the Office of Justice responded by email on 19 May 2022 in the following terms:

> "There is a difference between common law and civil law. Proceedings that are considered civil law in the United Kingdom may be considered criminal law in Switzerland. According to Swiss case law a "civil forfeiture in rem" (the civil recovery of the proceeds of unlawful conduct) may be of a criminal nature if it has a connection with the criminal conduct. The procedure must have a repressive/penal character (crime shouldn't pay) and must be conducted by a judicial authority. In this specific *case* – with the little information we have received – we think that the conditions are given to consider the procedure as a criminal procedure according to Swiss law".

95. The email concludes that these Proceedings in fact fall within paragraph 1 of the Note on the principle of specialty (i.e. as "any other criminal proceedings") such that consent is not necessary. In the circumstances, the email confirms that there is no need to consider whether the Schengen Agreement was applicable at the relevant time.

96. In light of this correspondence, the FCA submits that it has always had consent from the Swiss Authorities to use the MLA Material provided by them for civil proceedings and that this court is not in a position to go behind what has been said in the email of 19 May 2022.

97. In response, Mr Brodie says this is academic given the position in relation to Greece, but nevertheless, he submits that it is clear from the 19 May 2022 email that the Swiss only consider that consent has already been given because they understand these civil proceedings to have a repressive or penal character. He says they are wrong about that – these proceedings are restitutionary. Further, whilst Mr Brodie accepts that the UK was a Schengen state at the relevant time such that paragraph 6(b) of the Note on the principle of specialty is capable of applying, nevertheless he says that these civil matters are not "connected with a criminal action". Accordingly, Mr Brodie contends that there has been no express consent.

98. I do not consider that this is an issue I can determine on this application. To date the Swiss Authorities have taken the view that there would have been no need for their consent to use of the MLA Material in these Proceedings and, absent expert evidence of Swiss law, I cannot determine whether the points made by Mr Brodie are correct or not. I agree with Mr George that I should be extremely cautious about going behind the views expressed by the Swiss Authorities and I am not prepared to do so.

99. Accordingly, I find that the question of consent, in relation to the Swiss Authorities only, gives rise to a triable issue and that issue (iv) does not therefore arise in the context of MLA Material obtained from the Swiss Authorities. This does leave a question, however, over whether any steps need to be taken to resolve the question of consent. My understanding from Williams 4 is that, with the exception of paragraph 90 of Williams 1 (which in any event contains information which is irrelevant to the civil Proceedings),

there has been no use of this material for the purposes of springboarding or otherwise. I note in particular paragraph [101(c)] of Williams 4. If that is correct, then it would appear to be disproportionate to consider the question any further. However, should any of the parties disagree with this approach, I invite them to raise the matter at the consequentials hearing in due course.

ISSUE (IV): SHOULD THE CLAIM BE STRUCK OUT AS AN ABUSE?

100. I have found (for the most part) in D1's favour on Issues (i)-(iii) and so, the final issue arises as to whether I should strike out these Proceedings.

101. Dealing first with the question of whether the conduct that I have identified amounts to an abuse of the process of the court, I am satisfied that it does. The FCA has used MLA Material without consent from the Greek and SVG Authorities to "springboard" into further investigations which have ultimately informed its civil claims. In my judgment this is a use of the court's procedure which plainly gives rise to the scope for both potential and actual unfairness to D1. Adopting the broad approach approved in the authorities to which I have already referred, this appears to me to involve a use of the court's process which is significantly different from its ordinary and proper use. Whilst I accept that the FCA has acted in good faith on an apparently misconceived interpretation of section 9(2) and of the ratio of *Gohil*, such that there has been no deliberate attempt improperly to use the court's procedures, that is not enough to escape a finding of abuse, as the authorities make clear.

102. Given the "critical importance to the functioning of this international system" of the "safeguards and protections enacted by the legislation, including the regulation of the uses to which documentary evidence might be put" (see *KBR v Director of the SFO* at [45]), I do not consider that I can properly ignore the FCA's failure to ensure that the necessary safeguard to collateral use in the form of consent (or indeed the establishment of information barriers) was in place. I note that this court has already found itself in the position of accepting that an order for disclosure of documents should be made, whilst at the same time having to refuse to order such disclosure in circumstances where the FCA maintained that the relevant documents had been obtained via the MLA process.

103. What then is the appropriate sanction for this abuse? D1 contends that "it must follow" from a finding of abuse in this case that the claim should be struck out. The key factor, submits Mr Brodie, must be that the court should not countenance the continuation of the Proceedings in circumstances where there has been an impermissible collateral use of MLA Material contrary to the provisions of the 2003 Act and the important requirements of international comity. Whilst he accepts that the effect of a strike out may be to bring to an end a meritorious claim, he contends that this consideration is more than outweighed by the serious consequences of not striking out the claim; namely that permitting the claim to proceed without sanction "would affect the ability of UK authorities to obtain MLA Material for the purpose of investigating criminal offences". He invites the court to "send a clear message" that the FCA's approach to this case has been wholly unacceptable and that it must not be repeated so as to deter other public bodies from adopting a similar course.

104. In contrast, the FCA contends that it is wrong in principle to suggest that an order for strike out must automatically follow from a finding of abuse. Mr George points to the

decisions in the criminal cases of *Gill* and *R v I* in which he contends that the Court of Criminal Appeal indicated that it would be open to the trial judge to admit MLA evidence if that evidence had been adduced without the consent of the relevant authorities. He also submits that a strike out in the circumstances of this case would not be a proportionate response to the identified breaches as set out in Williams 4. He relies on the FCA's (unchallenged) good faith and the fact that the Proceedings have been brought in the public interest. Further, he points to the fact that the SVG Authorities have now consented to use of the MLA Material. As for the MLA Material obtained from the Greek Authorities, Mr George submits that any breaches by the FCA have been *de minimis* on the evidence and/or that any investigation into the question of whether the Proceedings could properly have been brought in the absence of the MLA Material is inappropriate on a strike out application. The FCA thought it had consent by reason of the FCA Standard Wording in the Greek MLA Request. The dual track investigation was always "criminal led" and every "use" of documents was done for the purposes of that dual track investigation. When the decision was taken to commence these civil Proceedings, the MLA Material was stripped out; it was not exhibited to Williams 1, it was not sent to external counsel and it was not relied upon in the Particulars of Claim. While an information barrier was not created at the FCA, the instruction of external counsel by reference only to non-MLA material was an attempt to ensure fairness to D1.

105. Having considered this question with great care, and weighed the factors identified by each party in the balance for the purpose of the exercise of my discretion, I am not satisfied that this is an appropriate case for a strike out. My reasons are as follows:

i) I do not consider that my finding of abuse "automatically" mandates an order striking out the proceedings as D1 contends. Notwithstanding the principles of international comity to which I must have regard, I must also have regard to the overriding objective and the proportionality of the court's response. I do not consider that the need to "send a clear message" to others should trump a clear-sighted analysis of the competing interests.

ii) The court in the case of *R v CIII* left open the possibility that MLA material might be admitted at a criminal trial subject to "consideration of s 78 Police and Criminal Evidence Act 1984 but also of s9 [of the 2003 Act] and the principles underlying that section". The court in *Gill* observed that "material obtained not in accordance with the terms of a letter of request might be admissible in any event" and it found that the trial judge had been entitled to take the view that material obtained via letters of request was admissible notwithstanding potential objections to its admissibility. Albeit obviously in the criminal context, I note that considerations of international comity do not appear to preclude the potential admissibility of evidence obtained without consent.

iii) It does appear to me that I should attach significant weight to the fact that these Proceedings are plainly brought in the public interest and in furtherance of the FCA's statutory objectives of protecting consumers and safeguarding the integrity of the UK financial system. It is not suggested that the FCA has behaved improperly or unreasonably, merely that it has been mistaken in its approach. I bear in mind that the effect of striking out the Proceedings might very well be to strike out what Mr George described as a claim with "overwhelming" merit.

iv) The improper use with which I am concerned does not involve actual deployment of the MLA Material in evidence in the civil proceedings. It is not relied upon in the Particulars of Claim and it was not relied upon in Williams 1 for the purposes of obtaining permission to serve the Proceedings on the Defendants out of the jurisdiction (save for the inadvertent reference to MLA Material in paragraph [90] of that statement). As Mr Williams says in Williams 3, "it was unnecessary to rely on MLA Material given the volume of other material and evidence that had been obtained through other mechanisms" and he points out that it is wrong to suggest that these Proceedings "have been 'founded' wholly or substantially, or indeed at all, on MLA Material".

v) I reject D1's submission in his skeleton argument that I can infer from these statements in Williams 3 that:

> *"the FCA's decision as to* ***what material to deploy in the civil proceedings*** *was informed by its review of the MLA Material. It considered that MLA Material, drew its conclusions and then found non-MLA material which it could use to evidence the allegations" (****emphasis added****).*

That is not what Mr Williams' evidence says and I cannot properly draw such an inference on a strike out application. Equally, I cannot properly draw the inference, as D1 invites me to do, that "Mr Williams' conclusion that it is 'unnecessary to use MLA Material' can only have been reached by reviewing that MLA material for the purpose of civil proceedings". Given that external counsel was instructed purely by reference to non-MLA material, it is just as likely (if not more likely), in my judgment, that the ultimate decision to pursue the civil Proceedings (including the decision as to how the civil Proceedings should be pleaded) was made having regard solely to the non-MLA material, in ignorance of the content of any MLA material.

vi) In his skeleton argument at paragraph 39, D1 set out three examples which were said to support the inference to which I have just referred. However, these examples do nothing of the sort:

a) The first concerns a reference in Williams 3 to "altered bank statements" which Mr Williams explains were obtained via various non-MLA channels. He goes on to say that "other examples" of allegedly altered bank statements were obtained via MLA, but he expressly says that "these are not relied upon in support of…these proceedings". There is no justification for D1's submission that "the information obtained from them has clearly been used for the purpose of these proceedings" and D1 has not identified any evidence on which he relies in support of such proposition;

b) The second concerns Mr Williams' statement in Williams 3 that "the FCA does have some evidence obtained via MLA that also supports what is said at paragraphs 73 and 74 of [Williams 1] but we did not rely on it for that purpose". D1 submits that this is "not credible" where no distinction was drawn between MLA and non-MLA material until the commencement of these Proceedings, but once again I do not see that I can make a finding about the credibility of Mr Williams' evidence on a strike out application.

c) The third concerns a statement in Williams 3 to the effect that "the contents of the letters provided to Grant Thornton Greece", referred to at paragraphs 81 and 82 of Williams 1 are inferred from the evidence obtained by the FCA from non-MLA sources. D1 says that it is "risible" to suggest that the FCA relied on inferences drawn from other non-MLA material to determine the content of letters which he says "it is assumed" the FCA had in the Greek audit files obtained via the MLA process. However, once again I cannot determine a strike out application by reference to an assumption, which may or may not be correct. Further and in any event I note that paragraphs 81 and 82 of Williams 1 address an entirely logical process of comparing original bank balance confirmation letters with inconsistent entries recorded in the records of the UK auditors (all non-MLA material).

vii) In the circumstances, the gravamen of D1's complaint concerns springboarding from MLA Material for the purposes of these Proceedings, i.e. the submission that while MLA Material may have been stripped out for the purposes of the proceedings, it is nevertheless impossible to strip out what Mr Brodie described as "derivative" or "tainted" material, namely material obtained through non-MLA channels which would not have been requested or obtained had the FCA not been able to make use of the MLA Material in the context of its investigations.

viii) Against that background, an important question seems to me to be whether it remains possible for D1 to have a fair trial given the fact that FCA caseworkers have plainly worked on the dual track investigation and during the course of that investigation (albeit for the primary original purpose of the criminal investigation) MLA Material (and in particular the 2013 and 2014 Greek Audit Files) has been used as a springboard in the manner identified in Williams 4, i.e. it was used to inform (and was sometimes directly referred to in) IOSCO requests, MLA Requests, EIOs and questions posed in interviews. Does Mr Brodie's "warp and weft" argument support the proposition that there cannot now be a fair trial?

ix) In my judgment, whilst superficially attractive, it does not. Mr Williams has candidly admitted that he is unable to set out an entirely comprehensive account of every way in which the 2014 Greek Audit Files may have been used to inform the investigation, but he confirms in Williams 4 that he has identified "the main occasions". Having regard to those occasions (which appear to be of limited compass), it is impossible for this court to determine either the extent to which the "springboarding" from MLA Material might have influenced the content of the civil Proceedings or the strength of the civil case, absent such springboarding. These are potentially crucial questions in the context of determining the issue of proportionality. I agree with Mr George that I cannot engage in a mini-trial on this issue and I simply do not have the evidence in any event. Furthermore, absent consent from the Greek Authorities, I do not see how the court could currently engage in such an inquiry.

x) Should I nevertheless assume in D1's favour that (where it is impossible to conduct an inquiry) it is simply unfair to permit the Proceedings to continue? On balance, given Mr Williams' evidence, I do not think such an assumption would be appropriate. As I have said, it is clear that only non-MLA material was sent to external counsel. Whilst this does not provide the protection that would have been afforded by an information barrier within the FCA, nevertheless it means that,

taking Mr Williams' evidence at face value, the case against D1 has been advised upon, and pleaded, having regard only to non-MLA material.

xi) I bear in mind that the SVG Authorities have (belatedly) consented to the use of the MLA Material obtained from them and that such use, as is described by Mr Williams in paragraph 60 of Williams 4, appears to be *de minimis*. I also bear in mind that (even if I am wrong that there is a triable issue on consent in relation to the Swiss Authorities), it is clear from Mr Williams' unchallenged evidence that the MLA Material initially received from the Swiss Authorities was not in fact used for any purpose other than the preparation of a subsequent MLA request. The two sentences containing information from MLA Material that were inadvertently included in paragraph [90] of Williams 1 do not in fact appear to be relevant to these Proceedings, as I have already said, (and Mr Brodie did not suggest otherwise).

xii) In all the circumstances, and doing the best I can to balance the competing interests, I consider that it would be a harsh result indeed to strike out these proceedings. I am not satisfied that it would be a proportionate response to the FCA's conduct and nor am I satisfied that it is now impossible for D1 to have a fair trial. Indeed, as I shall come to in a moment, I consider that there are steps that the court can and should take (of a less draconian nature than a strike out) to seek to ensure a level playing field.

xiii) For the sake of completeness I add that Mr Brodie sought, in his skeleton argument, to suggest a close analogy with the case of *Miller v Scorey* [1996] 1 WLR 1122, a case in which the court struck out proceedings which had been issued in breach of the implied undertaking given to the court in earlier proceedings as to the use of disclosed documents (not least in circumstances where the continuation of the second proceedings would deprive the defendants of a limitation defence). However, in his oral submissions, Mr Brodie appeared to distance himself from this submission, submitting that the expiry of any limitation period is "irrelevant". I do not consider that the decision of Rimer J in *Miller v Scorey,* a case involving different facts and a finding of contempt of court, alters the approach I should take to this application.

CONCLUSION

106. Notwithstanding that I am not prepared to strike out this case, I have found that (i) there has been impermissible collateral use of MLA Material provided by the SVG Authorities (prior to the date on which consent was given), albeit of a relatively *de minimis* nature (see Williams 4 at paragraph [60]); and (ii) there has been impermissible collateral use of MLA Material provided by the Greek Authorities, which use is potentially continuing despite the fact that no consent has ever been given. In the circumstances, I consider that the proper course is for me to take steps to mark the court's disapproval of the FCA's conduct, thereby paying proper regard to (amongst other things) the importance of international comity, whilst at the same time seeking to ensure (in so far as is possible in the circumstances) a level playing field.

107. Accordingly, I intend to rule, first, (as Mr George suggested that I could do) that none of the materials obtained via the MLA process from either the Greek or the SVG Authorities

shall be admissible in the current proceedings. In so far as not already separated from the documents in the civil Proceedings, these MLA Materials must be retained solely for the purpose of any future criminal proceedings or returned to the relevant overseas authorities where that purpose has come to an end. They should not be made available to counsel dealing with the civil Proceedings and they should not be accessible by the case workers at the FCA dealing with the civil Proceedings.

108. Of course, this ruling cannot and does not address the fact that impermissible springboarding has taken place without consent and thus contrary to the requirements of international comity. However, it is not clear to me why a formal request for permission could not now be made by the FCA to the Greek Authorities (just as they have sought, and received, retrospective permission from the SVG Authorities) and I am presently minded to make an order to that effect (although I invite the parties to address me further on the point at the consequentials hearing). Given the arguments being raised on this application, I am not at all clear why the FCA did not take steps to clarify this issue in advance of the hearing. Retrospective permission at this stage from the Greek Authorities would address the concerns around international comity expressed by Mr Brodie.

109. Finally I have also considered whether it would be appropriate to require the FCA to pay the costs of this application, notwithstanding that ultimately I have rejected the strike out application. My preliminary view is that the FCA should be ordered to pay the costs, but I am inclined to give the parties the opportunity to address me further on the point before I form a concluded view. Therefore this is an issue that I shall also deal with at the consequentials hearing following this judgment.