Neutral Citation Number: **[2025] EWCA Civ 1581**

Case No: CA-2025-002116

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, FINANCIAL LIST (ChD)
Mr Justice Michael Green
[2025] EWHC 2136 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2025

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SNOWDEN
and
LORD JUSTICE MILES

- -

Between :

PERSONS IDENTIFIED IN SCHEDULE 1 TO THE RE-RE-AMENDED PARTICULARS OF CLAIM	**Claimants/ Respondents**
- and -	
STANDARD CHARTERED PLC	**Defendant/ Appellant**

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- -

Rupert Allen KC and Dominic Kennelly (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Appellant**
Shail Patel KC and William Harman (instructed by **Signature Litigation LLP**) for the **Respondents**

Hearing date : 20 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Miles:

Introduction

1. The defendant ("SC") appeals from the order and judgment of Mr Justice Michael Green dated 4 August 2025 by which he dismissed its application to withhold certain documents from disclosure unless and until foreign regulators grant the necessary permissions.

2. The claim has been brought by 216 claimants said to represent some 1,410 funds. They were investors in SC, a listed company. They claim some £1.5 billion. The trial is due to commence in October 2026.

3. The basic facts may be drawn from the agreed case memorandum. SC is a public company listed on the main market of the London Stock Exchange and the Hong Kong Stock Exchange. It is the parent company of Standard Chartered Bank ("the Bank"), which operates as a global retail, wholesale and investment banking institution.

4. In September and December 2012 the Bank entered into settlement agreements with various US authorities ("the 2012 Settlements") in connection with failures to comply with US economic sanctions. As part of the 2012 Settlements, the Bank agreed to forfeit $227 million and admitted that "[s]tarting in early 2001 and ending in 2007" it had violated US and New York State law by illegally sending payments through the US financial system on behalf of entities subject to sanctions. The Bank also admitted that it had sought to conceal the involvement of sanctioned counterparties by manipulating and falsifying electronic payment information. The 2012 Settlements stated that the Bank had "made the decision to exit the Iranian business" in October 2006, ended its US-dollar business for Iranian banks by March 2007 and suspended all new Iranian business in any currency by August 2007.

5. On 17 December 2012 Brutus Trading LLC ("Brutus") filed a *qui tam* action in the US District Court for the Southern District of New York ("the First Brutus Action"). *Qui tam* actions are claims brought by private individuals or entities (known as "relators") on behalf of the US Government seeking monetary recovery which is shared between the US Government and the relators. Brutus was founded by a former employee of the Bank, Mr Julian Knight, and an individual who had previously worked with (but not for) the Bank, Mr Robert Marcellus. In the First Brutus Action, Brutus alleged, among other things, that the Bank had misled the US authorities in the run-up to the 2012 Settlements by failing to disclose sanctions violations involving Iranian clients after 2007.

6. From 5 March 2013 SC's annual and half-year reports and other announcements contained disclosures about, among other things, ongoing investigations by US and UK authorities. The claimants dispute the adequacy of the disclosures.

7. In October 2014 media outlets reported that US authorities had reopened investigations into the Bank in respect of sanctions violations. In November 2015 SC stated that US authorities were investigating sanctions compliance in respect of the period after 2007 and the completeness of the Bank's disclosures to the US authorities at the time of the 2012 Settlements.

8. From April 2016 global news agencies reported allegations that Maxpower Group PTE Ltd ("Maxpower"), a company incorporated in Singapore in which the SC group of companies ("the Group") has held a minority interest, had between 2012 and 2015 engaged in a corrupt scheme to bribe Indonesian government (and other) officials to win or renew contracts or obtain other advantages such as quicker payments ("the Bribery Scheme"). SC does not admit that Maxpower engaged in the alleged scheme, but it denies that the group of which it is the parent or its employees made, directed or condoned any improper payments. The Bank voluntarily approached the US and UK authorities to disclose the bribery allegations relating to Maxpower. The allegations were investigated by the US Department of Justice, which closed its enquiry without bringing any prosecution against the Group. SC has said that it is unaware of any ongoing investigations into Maxpower by any authority.

9. In February and April 2019 the Bank entered into settlement agreements with US authorities in respect of further non-compliance with US sanctions law and with the UK's Financial Conduct Authority ("the FCA") in respect of anti-money laundering breaches ("the 2019 Settlements"). By these, the US authorities imposed a further financial penalty of some $947 million and the FCA imposed a penalty of £102 million. The US authorities found that, in breach of US sanctions law, the Group had between 2008 and 2014 facilitated payments worth some $600 million from clients resident in Iran and payments worth some $20 million involving entities from other sanctioned countries. The FCA found that there were "serious, and sustained" shortcomings in the Group's financial crime controls, customer due diligence and ongoing monitoring.

10. By this stage, Brutus had sought and obtained voluntary dismissal of the First Brutus Action and, in November 2018, filed a new *qui tam* action in the US District Court for the Southern District of New York ("the Second Brutus Action"). As amended on 20 September 2019, the complaint in the Second Brutus Action ("the Brutus Complaint") alleged that the 2019 Settlements addressed "a relatively small subset of the course of conduct by [the Bank] in violation of the Iran sanctions". Brutus' case was supported by declarations by Mr Marcellus, Mr Knight and another former employee of the Bank, Mr Anshuman Chandra.

11. On 21 November 2019 the US Government filed a motion to dismiss the Second Brutus Action, explaining that Brutus' allegations had been thoroughly investigated by several government agencies and that they had formed the view that "most of the transactions at issue were legitimate winding-down of the Bank's pre-existing relationships … and the remaining transactions were otherwise not problematic". On 2 July 2020 the US District Court for the Southern District of New York granted the motion on the basis that the Government had given "valid government purposes" for doing so and that Brutus had not shown these to be "fraudulent, arbitrary and capricious, or illegal". Brutus appealed, but the appeal was dismissed in August 2023.

12. The present proceedings involve four claims which are being case-managed together and have been the subject of a single set of consolidated pleadings. The claims have been brought pursuant to sections 90 and 90A of the Financial Services and Markets Act 2000 ("FSMA"). These sections provide for compensation to be payable in certain circumstances where there have been misstatements or omissions in prospectuses or other published information relating to securities. The claimants, all of whom are said to have held interests in securities issued by SC, assert deficiencies in numerous items of published information issued by SC between 2007 and 2019. Claimants who

participated in rights issues for which SC published prospectuses in 2008, 2010 and 2015 also contend that the prospectuses included untrue or misleading statements or had omissions.

13. The claims are in part founded on the Bribery Scheme and on allegations found in the Brutus Complaint. Statements in information published by SC are said to have been rendered false by the Bribery Scheme and the "Relevant Misconduct". It is also said that the Bribery Scheme and the "Relevant Misconduct" were omitted despite being required to be included. The "Relevant Misconduct" is defined in para 25 of the re-re-amended particulars of claim ("RRAPC") to refer to "misconduct described above, insofar as it formed the subject matter of the 2019 Settlements and the Brutus complaint". In this respect, therefore, the claimants are relying both on matters which SC admitted in the 2019 Settlements and on matters alleged in the Brutus Complaint which SC denies.

14. The Bank operated through both subsidiaries and branches. The Bank operated in the US through a branch in New York ("SCBNY"). In its defence SC pleads that as at 2007 the Group had 70,000 employees in 57 countries (including over 3,000 employees in the Middle East) and it cleared global US dollar transactions of about $144 billion per day through New York.

15. Section 90 of FSMA is concerned with listing particulars, including prospectuses. Under section 90, subject to exemptions to be found in schedule 10, a person responsible for listing particulars is liable to pay compensation to someone who acquires securities to which the particulars apply and suffers loss in respect of the securities as a result of an untrue or misleading statement in the particulars or the omission from the particulars of required information.

16. Section 90A of FSMA states that schedule 10A to the Act makes provision relating to the liability of issuers of securities to pay compensation to persons who have suffered loss as a result of a misleading statement or dishonest omission in certain published information relating to the securities or a dishonest delay in publishing such information. Section 90A and schedule 10A apply to a range of published information, including annual and half-year reports. Liability depends on a "person discharging managerial responsibilities within the issuer" (a "PDMR") having had relevant knowledge or acted dishonestly.

SC's application to withhold disclosure

17. SC's application was made on the basis that SC or the Bank owes duties of confidentiality to foreign regulators in relation to specific categories of documents and that those regulators have refused their consent to disclosure of the documents in these proceedings. SC contended in its application and supporting evidence that it would be at risk of criminal proceedings or regulatory sanction in the relevant foreign jurisdictions if it were to disclose the documents pursuant to an order of the English court.

18. SC anticipated that once disclosure is complete, it will have disclosed 50,000 documents. The application before the judge concerned about 250 unique documents.

19. When the application was issued and at the time of the July hearing before the judge, SC relied on the risk of potential criminal proceedings or regulatory sanctions in both Singapore and the United States. Since the hearing the Monetary Authority of Singapore has informed SC that, in the light of the judge's order of 4 August 2025, it no longer objected to SC disclosing the documents referred as to "the MAS documents", subject to redaction of irrelevant material.

20. There remain about 176 unique documents which are subject to restrictions on disclosure under US law.

21. The first category of documents is called "the US SAR Documents". This comprises US Suspicious Activity Reports ("the US SARs") or communications or other documents containing information that may reveal the existence and content of US SARs ("the US SAR Information") that were filed by SCBNY with the US Department of the Treasury's Financial Crime Enforcement Network ("FinCEN").

22. It was common ground that, under the US Bank Secrecy Act and regulations issued by FinCEN, banks and their directors, officers, employees and agents are prohibited from disclosing a US SAR or any information that would reveal the existence of a US SAR, subject to certain exceptions.

23. SC contended before the judge that the unauthorised disclosure of the US SAR Documents is a criminal offence under US law and that it would be liable to attract civil or regulatory sanctions under US law.

24. SC also contended that the US SAR Documents are regarded by the Board of Governors of the Federal Reserve Bank ("the Board") and the Federal Reserve Bank of New York (together with the Board, "the FRB") and/or by the New York Department of Financial Services ("NYDFS") as containing confidential supervisory information ("CSI"), a statutorily defined term, and that they cannot be lawfully disclosed without the permission of the relevant regulators. SC contended in its application and supporting evidence that the unauthorised disclosure of CSI is a criminal offence, and that its disclosure may also attract civil or regulatory sanctions under US law.

25. SC has requested the US regulators for their consent to the disclosure of the US SAR Documents. The FRB and NYDFS have refused. FinCEN has not responded to SC's requests.

26. The second category of documents is called "the CSI Documents". These comprise certain documents (not being US SAR Documents) which SC contends contain CSI of the FRB or the NYDFS. It is common ground that, as a matter of US law, CSI is the property of the relevant regulators and that there are restrictions on the disclosure of CSI without the authorisation of the relevant regulators.

27. As explained in more detail below, the judge refused to make the withholding order sought by SC. He required the disclosure and production of the relevant categories of documents but (with the agreement of the claimants) imposed a confidentiality ring to restrict the dissemination of the documents.

28. As a result of developments since the judge's order, SC no longer seeks to challenge the judge's findings as to a risk of criminal prosecution or other action or sanction in

relation to the CSI Documents (excluding the US SAR Documents). SC did not explain the reasons for this change of stance. The claimants invited the court to infer that the relevant regulators must have indicated that they would not bring a criminal prosecution or take regulatory action in relation to these documents and SC did not contest that suggestion.

29. SC continues, however, to maintain that the judge failed to give any or proper weight to the wider considerations of comity it says arises from the public interest in maintaining regulatory confidentiality. SC submits that, irrespective of any risk of prosecution or other sanction, the balancing exercise should have come down in favour of granting SC's application over these documents.

The judgment

30. Mr Justice Michael Green is the assigned judge. He has heard five case management conferences, including a two-day hearing on 30-31 July 2025, which led to the judgment appealed from. The judge wanted to give the parties a judgment as quickly as possible and he read out the judgment on 4 August 2025, using notes, over about two hours.

31. Given the nature of the challenges raised on this appeal, it is necessary to set out the judge's reasoning in some detail.

32. The judge started by explaining the background. He explained in relation to the CSI Documents that shortly before the hearing, the FRB and NYDFS had written to SC's solicitors granting its request for permission to disclose internal documents containing CSI (other than the US SAR Information) on the basis that they be restricted to a lawyers-only confidentiality ring. The FRB and NYDFS had otherwise refused to authorise disclosure of the CSI Documents (including the US SAR Documents).

33. The judge explained that there was little in issue between the parties about the legal principles. He referred to a number of authorities, including *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 ("*Bank Mellat*"). The judge set out para 63 of that decision (quoted in para 80 below).

34. He also referred to a number of first instance decisions in which *Bank Mellat* was applied, including *Tugushev v Orlov* [2021] EWHC 1514 (Comm); *The Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm); *Joshua v Renault SA* [2024] EWHC 1424 (KB); and *NMC Health PLC (in administration) v Ernst & Young LLP* [2025] EWHC 1048 (Comm).

35. The judge recorded that a number of these cases stated that the burden is on the party seeking to resist disclosure or inspection and that the issue was whether there was a real or actual risk of prosecution.

36. As to the balancing exercise the judge said on the authorities that, even where a real risk of prosecution was made out, the court would lean very much in favour of disclosure. The judge noted that the only case where disclosure was refused was *Bank Mellat* at first instance in relation to Turkish documents (a point no longer live on the appeal). He went on to say however that the balance was not so heavily weighted in favour of disclosure that no real balancing needs to take place. He said at para 34 that

"once [the documents] are deemed to be relevant it is going to be difficult to persuade the Court to dispense with disclosure".

37. The judge concluded that if the only risk was of civil enforcement penalties or regulatory enforcement (and there was not a real risk of criminal prosecution) it must be still less likely that the court would dispense with disclosure. He said that this could only be contemplated in an exceptional case.

38. The judge addressed a submission of SC based on *National Crime Agency v Abacha* [2016] EWCA Civ 760 ("*Abacha*"). SC argued that it showed that the fact that a party may be in breach of obligations of confidentiality to a foreign regulator, where those obligations have an evident public purpose, may itself excuse disclosure. The judge concluded that *Abacha* had little relevance because SC was arguing in the current case that there was a real risk of prosecution.

39. The judge then turned to address the specific categories of documents, starting with the CSI Documents. These fell into a number of sub-categories: (1) Reports by the FRB and NYDFS concerning SCBNY and accompanying correspondence. (2) Responses to reports sent by SCBNY to NYDFS or the FRB, including drafts. (3) Reports prepared by the NYDFS-appointed independent compliance Monitor (the role of which was to monitor compliance with the 2012 Settlements and its remediation programme). This related to five compliance reports prepared by the Monitor and associated documents. (4) Letters and other correspondence between SCBNY and the FRB, NYDFS or the Monitor and SCBNY presentations to the same authorities. These four sub-categories were still in issue before him.

40. In addition SC had previously objected to two further sub-categories: (5) internal documents of SC, the Bank or SCBNY referring to communications with the FRB, NYDFS or the Monitor; and (6) internal documents containing high-level, cursory or passing references to CSI. As already noted, shortly before the hearing the relevant regulators had authorised the disclosure of these documents on condition that they were placed into a confidentiality ring.

41. The judge then addressed the issue of the relevance of the CSI Documents. He first noted that CSI does not attach to pre-existing documents that do not themselves contain CSI, even where subsequently provided to the authorities in the course of the investigations leading to the 2019 Settlements.

42. The judge then addressed SC's submission that the internal documents in sub-categories (5) and (6) were far more likely to show contemporaneous knowledge and understanding within SC in relation to the misconduct alleged by the claimants. The judge observed that SC and its lawyers had concluded that the documents they were seeking to withhold from disclosure were relevant. The judge referred to the witness statement of Mr Rupert Lewis (a partner in SC's solicitors), who had explained that, assisted by counsel, his team had reviewed the documents, and had concluded that the documents in sub-categories (1) to (4) were of only tangential relevance. The judge accepted the claimants' submission that assessing relevance was an evaluative exercise and that it would be potentially unfair for the court simply to accept the assessment of one party and its lawyers without being able to see the documents themselves.

43. The judge then continued, at paras 57ff, to consider the degree of relevance of the documents. He described sub-categories (1) to (4) as communications between SCBNY and its regulators. He concluded that a large part of the claimants' case concerned the alleged misconduct of SC that led to the 2019 Settlements, what people knew about that conduct, and what should have been said to the market at various dates. Part of the alleged misconduct referred to in the 2019 Settlements was the alleged misleading of the regulators in 2012 in the communications leading up to the 2012 Settlements. The judge observed that in para 21.3 of the RRAPC there was an allegation that prior to the 2012 Settlements senior officers within the SC Group were aware that payment instructions from Iran could be transmitted in such a way as to avoid detection or prevention and that between 2010 and 2012 compliance officers expressed concrete concerns to senior managers that the Bank was at risk of infiltration by Iranian parties through the online banking platform. The senior managers included a senior member of the executive management of the Bank who reported directly to the CEO. These allegations are based on express findings in the 2019 Settlements. The judge noted that the claimants do not, however, have access to the underlying evidence. The judge recorded their submission that it was important for them to know who saw the communications with the regulators who were investigating these matters.

44. The judge was unpersuaded by Mr Lewis' evidence that the documents within sub-categories (1) and (2) were only of peripheral relevance. He noted, based on Mr Lewis' evidence, that the documents were concerned with Group level oversight and compliance issues, which formed what he called "a fairly central part" of the claimants' case. He rejected the case advanced by SC that the documents were only tangentially relevant because they did not refer specifically to controls applicable to the UAE branch or the UK wholesale bank's corresponding banking business (which was principally where the activities complained of had occurred).

45. As to sub-category (3), the Monitor documents, the judge said that these again concerned oversight and compliance and that, if the Monitor was saying that there continued to be serious failings and this had been brought to the attention of those close to the top of the bank, that would be highly relevant. The judge accepted that this involved an element of speculation but said that without seeing the documents one could not know.

46. As to sub-category (4), the judge noted that Mr Lewis had again said that they were only peripherally relevant. The claimants submitted that they may go to the issues of PDMR knowledge and are therefore potentially highly relevant. The judge noted in para 64 that SC had offered in the course of submissions that they would provide information as to which PDMRs saw the documents in question within sub-category (4). However the judge noted that the offer was not repeated in writing and concluded that it was not appropriate to take it into account in exercising his discretion. He noted that sub-category (4) also included documents showing that the US authorities were provided with information which was relevant to the 2019 Settlements and which might evidence the investigations carried out by SC itself. The judge considered that these matters were potentially relevant.

47. Generally in relation to sub-categories (1) to (4) the judge concluded that he could not safely accept SC's submissions that the documents were likely to have limited probative value.

48. The judge turned next to two letters written by the FRB and the NYDFS to SCBNY's solicitors in July 2025. As already explained, by these letters the FRB and NYDFS had granted SC permission to disclose documents in sub-categories (5) and (6), being internal documents referring to CSI, on the basis that they were placed into a confidentiality ring, and had refused permission to disclose the other categories of documents. The regulators had distinguished sub-categories (5) and (6) from the others on the basis that SC's solicitors had represented to it that documents in those categories were relevant to the proceedings. The regulators had concluded that these categories contained relevant documents and that would provide the parties with information they need in connection with the UK litigation. The letters said that sub-categories (5) and (6) were far more likely to contain relevant information regarding SC and its officers' and directors' knowledge of events relating to the 2019 Settlements, the 2012 Settlements and other topics relevant to the UK litigation than the sub-category (1) to (4) documents. In relation to those other categories, the regulators said that the Bank had not shown a substantial need to use or disclose those documents that "outweighs the Board's need to maintain confidentiality over these direct supervisory communications".

49. The judge addressed SC's submission that the contents of these letters made it still more likely that the FRB and the NYDFS would take steps to prosecute the Bank or initiate regulatory processes if it defied their refusal to permit disclosure even under an English court order to disclose. The judge concluded that there was nothing in the letters suggesting that the regulators would take such a course and said that he thought that it would be extraordinary if they did.

50. The judge then turned to the question of the risk of prosecution. At para 75 he said,

> "So turning to the risk of prosecution, it will be recalled from my survey of the authorities that we are looking here for a real risk of prosecution, namely whether it is likely or not, or maybe more probable than not."

51. The judge explained that both sides relied on expert evidence concerning the risk of prosecution or regulatory action. SC had relied on three letters from Mr Nicholas Bourtin of Sullivan & Cromwell LLP. The claimants relied on a letter from Miss Laurel Loomis Rimon of Jenner and Block LLP. The judge recorded that Miss Rimon has served as a prosecutor and then federal financial regulator in the US for more than 20 years. She is independent of the parties. The judge recorded that Mr Bourtin was not independent. He has acted for the Bank since at least 2010, including in relation to the negotiations leading to both the 2012 and 2019 Settlements. It appeared that some of the CSI Documents involved Mr Bourtin and that Sullivan & Cromwell were involved in communications with the regulators.

52. The judge explained that the experts were agreed on the definition of CSI and that it was protected by statute. Both said that there have not been prosecutions of banks or bank personnel for unauthorised disclosure of CSI in cases like this. Mr Bourtin said this was because it was highly unlikely that any bank would ignore the clear restrictions on disclosure of CSI. Miss Rimon, on the other hand, concluded that the prospect of prosecution was remote in a case where disclosure was made by compulsion of an order of a foreign court.

53. The judge noted that in a letter dated 12 June 2025 Mr Bourtin said that if a bank defied a direct instruction not to disclose CSI "the relevant regulator would believe it had no choice but to bring a civil enforcement action and perhaps to make a referral to a criminal enforcement agency." The judge noted that Mr Bourtin had not given an opinion about what such an agency would do with such a referral. He concluded that this was pretty weak evidence of a risk of prosecution.

54. The judge noted that Miss Rimon considered that the prospect of criminal prosecution in a case like this was remote. She said that there was no clear federal or state statute rendering unauthorised disclosure of CSI a crime and noted that the only offence that has been identified was section 641 of the US Criminal Code (18 U.S.C 641), but that that was essentially about the theft or conversion to own use of government property. She concluded that the real prospect of criminal prosecution outside those circumstances was remote.

55. The judge noted that Mr Bourtin did not directly contradict Ms Rimon's evidence that the risk of prosecution was remote. In his reply dated 22 July 2025 he said, "in the context of disclosure in a civil litigation such as this, a regulator would likely feel compelled to pursue a civil enforcement action (if not a referral to a criminal enforcement agency) if a bank, having engaged with its regulator as to which documents containing CSI may or may not be shared, then chose to defy." The judge concluded that this evidence concentrated on civil enforcement action rather than prosecution.

56. At para 82 the judge said that he was surprised that there seemed to be no express consideration by Mr Bourtin of the impact of the disclosure being made pursuant to an order of the English court and whether this would make a difference as to how it was viewed by the regulators. He noted that SC had submitted that this was the premise under which Mr Bourtin's evidence was given, as he referred to the question being "in the context of disclosure in civil litigation such as this". The judge said, however, that he could see no reference to the assumption that disclosure was given pursuant to a compulsory order of the court. The judge noted that in his letter of 22 July 2025 Mr Bourtin had said more about section 641 of the US Criminal Code. The judge concluded, from the examples of prosecutions given there, that it seemed clear that the principal focus of the offence was on the theft or misappropriation or conversion of information to own use. The judge said that there was no analysis of how section 641 would operate in a case where the disclosure had been made under the compulsion of an English court order against SC. He concluded that it was highly improbable that there would be a criminal prosecution.

57. The judge also referred to a passage in a FRB consultation paper which said that unauthorised disclosures that lacked criminal intent such as those made inadvertently would not be subject to prosecution under section 641. The judge concluded that it was unlikely that there would be a criminal offence in circumstances where SC had made this dispensation application to the court but in the end the court itself had compelled disclosure.

58. At para 85 the judge concluded that the defendant had "got nowhere near demonstrating that there is any real risk of criminal prosecution."

59. At para 86 the judge turned to civil enforcement regarding the CSI. Mr Bourton's evidence was that the regulators would have no choice but to bring a civil enforcement action. He expressed the view that the regulators would wish to make an example of the first bank to have defied their refusal to authorise disclosure of CSI. The judge was not impressed by this evidence and said that Mr Bourtin's view might have been tainted by his lack of independence.

60. Both parties referred to parts of the Code of Federal Regulations under the heading "Board Policy". These provisions set out a procedure for parties required to give disclosure in US civil cases to apply for permission from the FRB. The evidence referred to various regulatory enforcement actions that had been taken in other cases. Ms Rimon distinguished them. She referred to various discretionary factors that would be relevant to the decision whether to bring enforcement action, including whether the party had sought consent, whether disclosure was ordered by a court of competent jurisdiction, the sensitivity of and the real risk of harm to other parties, including the ability of the regulator to carry on its functions. In relation to the issues of sensitivity and harm the regulator would consider whether the documents related to ongoing or closed investigations and whether the issues addressed in the documents had already been the subject of public sanctions. She said that regulatory decisions whether to take action were highly discretionary. The judge preferred the views of Ms Rimon. He concluded at para 90 that "the burden is on [SC] to satisfy me that it is appropriate to make this extraordinary order".

61. At para 91 the judge concluded that the defendant had not demonstrated a real risk of criminal prosecution or even civil enforcement action being taken by the US regulators. Even if some action were taken the penalties would probably be very small. He considered that SC and its expert had failed to take into account that it had done everything in its power to avoid disclosure and that ultimately disclosure was being forced upon it by an order of the English court.

62. At para 92 he returned to the importance of the documents and their probative value. He repeated that it would not be appropriate to assume that they were of only minimal or tangential relevance. At para 93 he concluded that sufficient protection would be provided to the US regulators by the disclosure of the documents into a confidentiality ring, which he described as itself an exceptional derogation from the principles of open justice.

63. At para 94 the judge turned to the US SARs and the US SAR Information. At paras 96 onwards he addressed the evidence of Mr Lewis. He noted that SC had given limited information about the documents, as it was constrained from doing so under US law. Mr Lewis had explained that in November 2015 SC's lawyers had sent four US SARs that had previously been filed with FinCEN to various US authorities in the context of the communications that led up to the 2019 Settlements. The US SARs raised issues concerning potential Iranian sanctions breaches. In his evidence Mr Lewis said that the documents would be of limited probative value as they did not evidence awareness by any PDMR that any of the representations in the published information were false. The judge recorded the submission of counsel for the claimants that the documents appeared to be highly relevant as they showed facilitation of the evasion of US sanctions on Iran, which is central to the case. The other documents in this category consisted of engagements by the bank with the US authorities between November 2014 and December 2018 again in the context of the discussions that led to the 2019 Settlements

(known as "Project Larch"). The claimants contended that the reference to Project Larch was significant as a number of PDMRs were involved in it.

64. The judge referred to the evidence of SC's expert evidence, from Mr Himamauli Das, who had served as acting director of FinCEN from September 2021 to September 2023, and who currently works at a consulting firm working with governments and financial institutions. The evidence was not contested by the claimants. Mr Das explained that the unauthorised disclosure of US SARs or US SAR Information is a violation of US federal law and that both criminal and civil penalties may be imposed for such violations. Mr Das had identified three cases where civil or criminal penalties for unauthorised disclosure of US SARs had been imposed on individuals. The judge recorded that the penalties in those cases were relatively modest.

65. The judge said this at para 101:

> "While Mr Das spent some time talking about disclosure in US litigation, he accepted that he was not aware of any case in which FinCEN had imposed penalties in a situation where a foreign court had ordered the disclosure of US SARS. What is singularly missing from Mr Das's analysis is any assessment of the risk of prosecution or even civil sanction in the circumstances of this case. He does not even seem to have been asked the question, despite that being the core issue on this application. I cannot conclude, therefore, based on the evidence before me that the Defendant has demonstrated any real risk of prosecution or civil sanction if the Defendant disclosures US SARs pursuant to an English Court order."

66. The judge ordered the US SARs and US SAR Information to be disclosed into a confidentiality ring (which was not opposed by the claimants).

67. The judge then turned to the MAS Documents. These are no longer a live issue and nothing more need be said about them.

68. The judge finally addressed the terms of the confidentiality ring. There is no appeal against that aspect of the decision

The grounds of appeal

69. There are three grounds of appeal: (1) that the judge erred in finding there was no real risk of criminal prosecution and/or regulatory sanction if SC were to disclose the CSI Documents and/or the US SAR Documents pursuant to an order of the English Court; (2) that the judge erred in failing to find that the CSI Documents and/or the US SAR Documents were likely to be of tangential relevance or limited probative value in these proceedings or of little, if any, importance to the fair disposal of the proceedings; and (3) that the judge erred in failing to exercise his discretion to grant SC's application to withhold disclosure and inspection of the CSI Documents and/or the US SAR Documents unless and until the FRB and/or NYDFS authorise such disclosure and/or inspection.

70. As already noted, under ground 1 SC no longer seeks to rely on a risk of criminal prosecution in relation to the CSI Documents (other than the US SAR Documents). It nonetheless sought to rely on a public interest in maintaining the confidentiality of the CSI Documents in the context of the relationships between regulators and regulated entities as a ground for seeking to withhold the documents from inspection.

Legal principles

71. The disclosure of documents by the parties is an important element in our civil procedural code. It is the compulsory process by which the parties are able to extract the relevant evidence supporting their own case and undermining that of their opponents. It promotes fairness to both parties and is one of the means by which cards are placed face up on the table. It also promotes earlier settlements.

72. Because giving disclosure is potentially expensive and burdensome it is controlled by the requirements of relevance and proportionality. There are other limitations. A party is not required to disclose documents covered by legal professional privilege. A party may also be relieved from disclosing documents by claiming public interest immunity.

73. There are also discretionary reasons for a court to dispense with the requirement to give disclosure, including, in appropriate cases, obligations of confidentiality owed to a third party by the disclosing party. In *Science Research Council v Nassé* [1980] AC 1028 the House of Lords concluded that while no public interest immunity protected confidential documents and they were not immune from discovery by reason of confidentiality alone, the court or tribunal should have regard to confidentiality when deciding whether to order disclosure. Relevance alone, though a necessary ingredient, did not provide an automatic test for ordering discovery, the ultimate test being whether discovery was necessary for disposing fairly of the proceedings.

74. In *Nassé* the House of Lords held that when considering claims of confidentiality the court should normally inspect the documents. They also drew attention to procedural safeguards that could be taken to preserve confidence. These might include confidentiality rings, the use of appropriate codes, and parts of hearings being conducted in private.

75. We were referred to *Abacha*, in which the United States Department of Justice made a request for legal assistance in support of civil forfeiture proceedings that were taking place in the US. On the application of the National Crime Agency, acting pursuant to that request, the High Court made a prohibition order under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 prohibiting the respondents from dealing with specified assets that were located in England and Wales. Under the 2005 Order the court had power to make an order in relation to property if it was "relevant property" that had been "identified" in an external request. The request was mentioned in one of the agency's witness statements and the respondents therefore had a right to inspect it, subject to the court ordering otherwise. The Court of Appeal held that any party requesting the assistance of the English court could reasonably be taken to accept that it had to abide by the local procedural regime. The inspection of the part of the request was required for the purpose of confirming that the property the subject of the order was "identified" in the request, but considerations of confidentiality outweighed the respondents' interests in a right of inspection with regard to whether the property was "relevant property".

76. SC relied on *Abacha* in support of an argument that the English court should give significant weight to obligations of confidentiality owed by regulated entities (such as SC) to foreign regulators. I shall return to this argument below.

77. *Bank Mellat*, which was heard in 2019, concerned a claim for damages by an Iranian bank and the Treasury for losses suffered as a result of a "financial restriction" order made by the Treasury and subsequently held to be unlawful. One of the claimed losses was that, by reason of the unlawful order, the bank had lost customers. The documents disclosed contained confidential customer data. The bank redacted them on the basis that they contained confidential information production of which would expose the bank to risk of prosecution in various jurisdictions including Turkey and Iran. By the time the case reached this court the Bank's case was that the needs of the trial could be catered for by using ciphers. The Treasury's position was that there should be disclosure of the unredacted documents into a confidentiality ring and that the redacted version should be supplied with a master list of ciphers but that the confidential documents should not be used in open court. Cockerill J ordered that the risk of prosecution under Turkish law was such that no master list should be provided to the Treasury for the relevant documents. By the time of the appeal that had become academic as the bank had decided not to pursue the Turkish losses. The appeal was therefore concerned only with the Iranian documents, where the judge had favoured the Treasury's position.

78. At para 54 Gross LJ framed the issue as one of confidentiality. He said:

> "For present purposes we are concerned with the species of confidentiality, namely, where a party to litigation in England asserts a right or a duty to withhold inspection of documents because a failure to do so would give rise to a contravention of foreign criminal law."

79. Gross LJ referred to a number of authorities, including *Abacha*. At para 62, he cited a passage from *Matthews and Malek*, Disclosure (5th ed.) at para. 8.26, without expressing any doubts about it:

> "The court may take into account, in deciding whether to order disclosure, the fact that compliance with the order would or might entail a breach of foreign law……. It will…need to be shown that the foreign law contains no exception for legal proceedings, and that it is not just a text, or an empty vessel, but is regularly enforced, so that the threat to the party is real. Even so, the court has a discretion and, on the basis that English litigation is to be played according to English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this ground. More often than not where foreign law is raised as an objection, any threat of a sanction abroad against the disclosing party is found to be more illusory than real."

80. At para 63, Gross LJ said:

> "Pulling the threads together for present purposes:

(i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.

(ii) Orders for production and inspection are matters of procedural law, governed by the lex fori, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law

(iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, op cit, at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.

(iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

(v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

(vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."

81. At para 64 Gross LJ emphasised that the relevant risk under foreign law was the actual risk of prosecution, not whether there was a breach of foreign law without more. At para 70(i) he described the inquiry into the actual risk of prosecution (as opposed to whether the conduct would breach foreign law) as essentially a factual one (albeit informed by foreign law evidence). At para 70(iii) he said that in approaching that inquiry the burden was on the party resisting disclosure and that the court was entitled to use its own intelligence in scrutinising the evidence. In the same passage he referred to the expert evidence about other prosecutions.

82. At para 3 Gross LJ said that where there is a tension between the constraints of foreign law on the one hand, and the need for the documents in question to ensure a fair disposal of the action in this jurisdiction on the other, the balance is to be struck by judges sitting at first instance, making discretionary, case management decisions. This court will only

interfere if the judge has erred in law or principle or has (in effect) reached a wholly untenable factual conclusion.

83. As already explained, *Bank Mellat* has been applied in a number of first instance cases, including those listed in para 34 above.

Ground 1

84. SC contended that the Judge erred in finding there was no real risk of criminal prosecution and/or regulatory sanction if SC were to disclose the CSI Documents and/or the US SAR Documents pursuant to an order of the English Court. As already explained this ground is now restricted to the US SAR Documents.

85. Mr Allen KC for SC submitted that the judge had seriously erred in principle in failing properly to apply the guidance found in *Abacha* and *Bank Mellat*. Those cases show that the English court will not lightly make an order for disclosure where it will involve the disclosing party breaching duties of confidence owed to foreign regulators that arise under foreign law, particularly, but not exclusively, where that would expose a party to a risk of prosecution or sanction in a foreign court.

86. Mr Allen argued that the judge had created far too high a threshold for the withholding application. It was common ground that the Bank owed duties of confidence under US law in respect of the US SAR Documents. The judge had plainly erred in his assessment of the risk of prosecution or other sanction.

87. Mr Patel KC for the claimants submitted that SC had to show that the judge had erred in principle or had reached a decision that no reasonable judge could have reached. SC had failed to meet this standard. He made detailed submissions in support of the judge's reasoning which I have considered in reaching my conclusions.

88. It is convenient to start with SC's arguments concerning the test applied by the judge. Mr Allen criticised a number of aspects of the judge's approach to the threshold.

89. Mr Allen said, first, that in para 75 of the judgment (quoted at para 50 above) the judge suggested that the court would only take account of breaches of foreign law where it was more probable than not that the disclosure would lead to a criminal prosecution. *Bank Mellat* does not put things that high. It refers to an actual or real risk. Secondly, the judge concluded that in the absence of evidence of actual prosecutions there could be no finding that there was a real risk of criminal prosecution. Thirdly, the judge considered that where the risk is one of civil or regulatory action (as opposed to criminal prosecution), it would only be in very rare or exceptional cases that a relevant document could be withheld.

90. In approaching these criticisms, I start by noting that the judge heard the application over two days. He gave judgment admirably soon after the hearing in order to let the parties know where they stood.

91. As to the tests to be followed, the judge referred to a number of authorities. As the judge said in his judgment there was little dispute about the principles, though there were some differences of emphasis. The claimants did not argue for any departure from the

principles set out in the cases. Indeed the judge set out the guidance from para 63 of *Bank Mellat* in full.

92. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

93. As to the first of Mr Allen's points, I would accept that para 75, read alone, might have suggested that the judge applied a threshold of likelihood or even a balance of probabilities. However, once the judgment is read as a whole, I am satisfied that the judge applied the *Bank Mellat* test of real or actual risk. In para 22 he referred to the passage from Matthews and Malek which contrasted real and illusory risks. In para 24 he recorded the claimants' submission that "there must be a real risk of prosecution – that is not just a theoretical risk". In para 26 he referred to a passage from *Joshua v Renault* where Cockerill J referred to the risk being a real, rather than fanciful one. In para 28 he referred to a passage from *NMC* which referred to the test as "the real – in the sense of the actual – risk of prosecution". The judge's recapitulation of the cases in para 75 was infelicitous and inaccurate, but I do not think that he actually went on to apply a test other than that of a real or actual risk.

94. I have set out above the way the judge approached the expert evidence of Mr Bourtin and Ms Rimon (who described the risk of prosecution or regulatory action as remote). The judge's conclusion at para 85 was that SC had "got nowhere near demonstrating that there is any real risk of criminal prosecution." Similarly at para 91 he concluded that there was not a real risk of such action being taken, whether criminal or not. In my judgment, reading the judgment fairly as a whole, the judge's conclusion was that there was no real or actual risk of prosecution.

95. As to the second complaint about the judge's approach, again the judgment needs to be read as a whole. There is some support for SC's complaint in a passage at para 28 where the judge, having quoted *NMC*, said that there needs to be actual evidence of prosecutions for it to be shown that there is a real risk of prosecution. That is not the case: logically, the evidence could demonstrate a real risk of prosecution before the first actual prosecution takes place. However, the judge went on to say in the same paragraph that explanations had been offered in this case for the lack of prosecutions and that those would have to be considered. He also agreed with counsel for the claimants that the lack of prosecutions was a "highly pertinent" factor. At another point he described this factor as "influential". Had he concluded that evidence of prosecutions was a threshold requirement he would not have made these points and would have stopped the analysis there. Instead, the judge went on later in the judgment to consider

in detail the reasons advanced in the parties' evidence for the lack of prosecutions and preferred the views advanced in the claimants' evidence. I am unable to accept Mr Allen's contention that the judge treated the absence of evidence of prosecutions as effectively determinative.

96. In addition, the judge referred to multiple authorities in which the question of the relevance of evidence about prosecutions was considered. None of them suggested that such evidence was a threshold requirement. Indeed in one of the passages quoted by the judge (para 78 of *Joshua v Renauld*) Cockerill J made the point that the absence of evidence of past prosecutions might or might not be a safe guide to the future, depending on the circumstances.

97. Reading the judgment fairly and as a whole, I am not satisfied that the judge made the suggested error.

98. The third complaint about the judge's approach is that he wrongly concluded that where there was no risk of prosecution there could be no material risk of civil or regulatory action. Mr Allen referred particularly to para 35 of the judgment where the judge said "[i]f, as I have just explained, even where there is a real risk of prosecution proved, the English Court will rarely be persuaded to dispense with disclosure, it must be even more unlikely that it would do so because of a risk of a much lesser penalty such as a form of civil enforcement. I agree with Mr Patel that this could only be contemplated in an exceptional case".

99. Mr Allen submitted that the judge was wrongly creating a hierarchy between criminal prosecutions and civil (including regulatory) sanctions. Again, read in isolation, the paragraph is not entirely felicitous. However, it will be noted that in this passage the judge referred in terms to "a lesser penalty", and logically a lesser sanction must carry less weight than a greater one. The judge made a similar point about "a lesser form of regulatory action" in para 41.

100. It is also important to see what exercise the judge in fact carried out. The judge considered the risk of prosecution for disclosure of the CSI and then proceeded separately to consider the risks of regulatory action. He would not have done so had he concluded that the second risk could never avail the disclosing party where the first would not.

101. Moreover, in para 41 the judge made the point that on the facts of this case any risk of a regulatory or civil sanction could be adequately protected by the imposition of a confidentiality ring. It seems to me that this shows that he did not fall into the suggested trap of thinking that if there was no actual risk of prosecution, the civil or regulatory consequences were immaterial to the exercise of the court's discretion.

102. For these reasons, I am unable to accept Mr Allen's submission that the judge erred in principle.

103. SC's second area of challenge under ground 1 concerned the judge's assessment of the risk of prosecution or civil or regulatory action in relation to the US SAR Documents.

104. This was a challenge to the judge's evaluative judgment. SC accepted that it had to surmount the usual hurdle for an appeal of this nature. Mr Allen submitted that the

evidence of Mr Das was not challenged. It established that the unauthorised disclosure of the US SAR Documents would be a violation of US federal law and that such violations may entail civil or criminal penalties. His evidence also established that the documents were CSI, and that the FRB had a policy of refusing to authorise the disclosure of US SAR documents or US SAR information in private legal proceedings in the US. Mr Das also explained that under US law if there was a request for disclosure the regulated party was required to notify the FRB and that the FRB would continue to refuse to authorise the disclosure of SARs or SAR Information. Mr Das stated that under US settled practice SAR Documents were subject to an evidentiary privilege and therefore immune from disclosure.

105. Mr Allen also relied on Mr Das's evidence about the penalties or sanctions for non-compliance. These include civil penalties of up to $100,000 for each violation and criminal penalties of up to $250,000 and/or imprisonment not to exceed five years.

106. Mr Allen also referred to a passage where Mr Das said, "I am unaware of a circumstance in which a US court or foreign court has ordered the disclosure of SARS or a case in which FinCEN has imposed penalties in a situation where the court has ordered the disclosure of SARS."

107. Mr Allen submitted that the judge's assessment of the risk of criminal prosecution or other sanction was insufficient and inadequate. He referred to para 101 where the judge said, "[w]hile Mr Das has spent some time talking about disclosure in US litigation, he accepted that he was not aware of any case in which FinCEN had imposed penalties in a situation where a foreign court had ordered disclosure of US SARs." Mr Allen criticised this passage as it passed over the point made in the same passage of Mr Das's evidence, that he was unaware of any case where a foreign court had ordered the disclosure of US SARs. There is some force in this criticism.

108. However, I am not persuaded that SC has shown that the judge went wrong in his approach to evaluation of the evidence or that he reached a conclusion that was rationally insupportable. As the judge went on to say in para 101, Mr Das had not addressed the extent of the risk of prosecution or civil sanction, despite this being the key issue. There was therefore no direct evidence of the extent of such a risk. The judge was entitled, in the words of Gross LJ in *Bank Mellat* to approach the issue using his own intelligence and experience in scrutinising the evidence and reaching an overall conclusion.

109. It is also worth noting that, as Mr Das explained, there were several factors going to the reduction or mitigation of any adverse consequences:

> "As stated above, I am not aware of the disclosure of a SAR or SAR information in a foreign court and am not aware of penalties being imposed on a US financial institution or an unauthorized SAR disclosure to a court. Accordingly, it is difficult to assess considerations that may reduce or mitigate sanctions from such a disclosure. As part of its enforcement factors, FinCEN considers a broad range of considerations, including (1) the nature and seriousness of the violation; (2) the impact or harm of the violations on FinCEN's mission to safeguard the financial system from illicit use; (3) the

> pervasiveness of the wrongdoing; (4) the history of similar violations, or misconduct in general; (5) the financial gain or other benefit resulting from, or attributable to, the violations; (6) presence or absence of prompt, effective action to terminate the violation; (7) timely and voluntary disclosure to FinCEN; (8) quality and extent of cooperation with FinCEN and other relevant agencies; (9) systemic nature of the violation; and (10) whether other law enforcement have already taken action. In view of these enforcement factors, I would expect that sustained engagement with FinCEN would play an important role in the assessment of any penalty, but FinCEN's assessment of the impact or harm of the disclosure to the broader SAR confidentiality requirements and in a particular case would be important factors for consideration as well."

110. Mr Das did not say the list was exhaustive. Here the relevant circumstances include the facts that the US SARs were historic and there was no evidence that they involve ongoing examinations or that any participants in the transactions that were the subject of the SARs would be tipped off. There had been full cooperation by the Bank, which reported the potential disclosure order to FinCEN and strenuously opposed the disclosure of the SAR Documents. There is also the fact that the Bank was not volunteering to disclose the Documents but was only liable to do so by order of the court. Moreover any disclosure was only to go into a confidentiality ring with a view to maintaining confidentiality. In my judgment, though the reasoning of the judge was compressed, there was ample material on which he could rationally conclude that the risk of prosecution or other action was remote.

111. For these reasons I would dismiss ground 1.

Ground 2

112. SC submitted that the judge erred in his approach to the significance of the US SAR Documents. They said that the judge erred in principle in two ways. First, he treated the scales as being heavily tilted towards disclosure; and, secondly, he approached the issue as a binary one by simply asking whether the documents were relevant, without further investigating their significance.

113. The first point was based on paras 31 and 34 of the judgment where the judge referred to the scales leaning very much in favour of disclosure once the documents had been identified as relevant. SC argued that there was no support for this approach in *Bank Mellat* or the other cases.

114. Resort to the convenient metaphor of a set of weighing scales may sometimes carry the cost of obscuring the true nature of the court's evaluative exercise in this area. As Lord Wilberforce said at page 1067 of *Nassé*:

> "It is sometimes said that in taking [confidentiality] into account, the court has to perform a balancing process. The metaphor is one well worn in the law, but I doubt if it is more than a rough metaphor. Balancing can only take place between commensurables. But here the process is to consider fairly the strength and value of the interest

> in preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective - to dispose fairly of the case - can be achieved without doing so, and only in a last resort to order discovery, subject if need be to protective measures. This is a more complex process than merely using the scales: it is an exercise in judicial judgment."

115. Rather than using the metaphor of weighing scales it may be better to put things this way. One of the ground-rules of our procedural code is that the parties must give disclosure of documents. Disclosure serves to promote fairness and facilitates settlements (see para 71 above). There may be departures from the ground-rule, but the party seeking to withhold disclosure carries the burden of persuasion. The question whether to allow a departure requires the court to assess competing factors and reach a judicial judgment. But in reaching its decision the court will not lose sight of the policies and principles supporting the default position. For these reasons the burden of persuasion is a substantial one.

116. I also note that in *Bank Mellat* Gross LJ cited the passage from Matthews and Malik, which stated, "[e]ven so, the court has a discretion and, on the basis that English litigation is to be played according to English and not foreign rules, it will rarely be persuaded not to make a disclosure order on this ground." That may be seen as an empirical statement, but it is based on the fact that the party seeking to depart from the default rule carries the burden of persuasion.

117. In my judgment, the judge properly allocated the burden of persuasion. He may have overstated its degree by saying "very" but I do not consider that he went wrong in the ways suggested. He did not fall into the trap of supposing that once the documents were relevant, there was no need to assess the materiality or significance of the documents. He followed the guidance in *Bank Mellat* which shows that the court has to assess the extent of the risk of prosecution and other possible sanctions against the materiality of the documents in question. The higher the risk of prosecution or action (and the graver the sanction) and the lower the materiality of the documents, the more likely it is that the result will come down against disclosure or inspection. As *Bank Mellat* stated, the burden is on the withholding party.

118. The second element of ground 2 was the argument that the judge had failed adequately to assess the significance of the US SAR Documents. I can address this shortly. The judge did assess their significance. He was required to do so without inspecting them but nonetheless addressed SC's arguments that they were of only peripheral relevance. He accepted the claimants' submissions that they are potentially highly relevant. The judge has considerable experience and understanding of the issues in this case. SC has failed to show that the judge's evaluation of the significance of the documents was rationally insupportable.

119. As Gross LJ said in para 3 of *Bank Mellat*, the balance between the constraints of foreign law and the need for the documents in question to ensure a fair disposal of the case is to be struck by the court at first instance, making discretionary, case management decisions, so that this court will only interfere if the judge has erred in law or principle or has in effect reached a wholly untenable factual conclusion. This was in my judgment no more than an attempt to re-run an argument about the weight to be given to the various factors.

120. For these reasons I would dismiss ground 2.

Ground 3

121. This concerns the CSI Documents (other than the US SAR Documents). It was based on two principal complaints. The first concerned the judge's approach to the exercise of the discretion. The complaint was that the judge had wrongly pre-tilted the scales in favour of disclosure. I have already addressed this contention above.

122. The second contention was that (even absent a real risk of criminal prosecution or regulatory or civil action) the judge should have given substantial weight to the public interest in the confidentiality of communications between foreign regulators and regulated entities as a matter of comity, and that had the exercise been properly conducted, the proper order would have been a withholding order over sub-categories (1) to (4).

123. As already explained, SC advanced the argument in this form because it no longer asserts that there is a real risk of criminal prosecution or other action.

124. SC contended that, on the basis of *Bank Mellat* and *Abacha*, the court's discretion to make a withholding order is not restricted to cases where there is a real risk of criminal prosecution or other adverse action. Mr Allen submitted more generally, irrespective of the risks of prosecution or other sanctions, the judge failed to give appropriate weight to the obligations of confidentiality owed to the US regulators under US law. He accepted that private law obligations of confidence alone would not generally constitute a reason for the court to refuse to order disclosure. He said that it would only be in a rare case that private law obligations would excuse a party from giving disclosure. But he argued that where, as here, the obligations were owed to a foreign regulator under statutes designed to promote the proper functioning of financial institutions, the English court would treat confidence as a particularly weighty consideration. He relied on the *Abacha* case as an example of the English court giving weight to the confidentiality owed to a foreign governmental body. He said the English court should give weight to such regulatory confidentiality under principles of comity.

125. SC also submitted that in *Bank Mellat* Gross LJ also said that the English court would not treat the breach of a foreign law lightly and would have regard to the requirements of comity.

126. As to the authorities, it is correct that in *Bank Mellat*, Gross LJ did refer to the fact that the English court does not lightly disregard breaches of foreign law when ordering disclosure. But he also said that comity works both ways. In other words, the English procedural code, which generally requires disclosure of documents, applies and the English court may expect the foreign authorities to recognise that.

127. There is nothing in the present case to suggest that the judge treated any breaches of foreign law lightly.

128. In *Abacha*, the relevant request was made under a 1994 treaty between the governments of the US and the UK for mutual legal assistance. Article 7 provided that the requested party should keep confidential information that might indicate that a request has been made or responded to. The Court described the claim to confidentiality as concerning

state-to-state communications. The case did not concern the obligations of a regulated entity to maintain confidence in documents under a foreign regulatory regime.

129. In my judgment, the *Abacha* case is consistent with the general principle set out in *Nassé*, namely, that third-party confidentiality is potentially a ground for withholding documents from disclosure or inspection. I do not consider that they provide any support for Mr Allen's submission that the fact that confidence is imposed under regulatory rules (including foreign) entails that the confidentiality should be given more weight than under private law obligations. I can see no reason why this should inherently be so: some private law obligations of confidence or indeed other non-regulatory statutory duties may be of great importance. I do not think there is any basis for the broad submission that enhanced weighting should be given to regulatory communications.

130. The evidence before the court does not support SC's submission that the court should give regulatory confidentiality special weight or force. SC relied on the regulators' July letters. In those letters the regulators set out the regulators' reasons for contending that the documents in question should remain confidential, principally to preserve candour in communications between regulators and regulated banks. They referred to notices that appear on CSI Documents reminding the reader that the document is strictly confidential and the property of the FRB and that unauthorised disclosure may subject the person disclosing to penalties. The FRB concluded that these categories "have marginal if any relevance to the issues and matters in the UK litigation, and that information adequate to the needs of your case are available to the parties from other sources, in particular, the [sub-category (5) and (6) documents]."

131. Apart from these generic statements in the letters, which were in response to SC's requests for authority to disclose, there was no evidence before the court from the US regulators as to the importance of maintaining confidentiality in CSI material. The regulators did not seek to intervene or even submit evidence. There was nothing to support a blanket claim rather than a more targeted claim. Nor was there anything to address the potential for using protective measures such as a confidentiality ring. Indeed, the regulators were prepared to authorise the disclosure of some documents (sub-categories (5) and (6)), which shows that they take a nuanced view of confidentiality in relation to civil proceedings, based on an assessment of the relevance of the documents to the issues on the particular case. The letters therefore provide little support for SC's suggestion that any disclosure at all would seriously damage the interests of the US regulators and that those interests should be given special or enhanced weight.

132. In addition, the documents themselves were not before the court. As the House of Lords explained in *Nassé* it will often be very difficult for a court to assess the weight to be given to a claim to confidence without seeing the documents. SC said that it was unable to disclose the documents even to the court. While that is not a problem of its own making, SC nonetheless carries the burden of satisfying the court that it should depart from the default position, viz. the disclosure of relevant documents.

133. As I have said, the focus of the arguments before the judge was the risk of criminal prosecution or other adverse action. However, the judge did refer to the broader arguments of comity in paras 38 and 39. He addressed it by saying at para 40 that it could be taken into account when deciding whether any restrictions should be placed

on the Documents. He also separately considered the potential materiality of the CSI documents to the issues in the case. He concluded at para 41 that requiring the relevant documents to be placed into a confidentiality ring was sufficient protection for the regulators. In my judgment that was a rationally supportable conclusion and it did not involve any error of principle.

134. For these reasons I would dismiss ground 3.

Disposal

135. I would dismiss the appeal. After a draft of this judgment was circulated to the parties, they reached a settlement of the entire action. We decided nevertheless to hand down the judgment in accordance with the guidance in *Barclays Bank v Nylon Capital* [2011] EWCA Civ 926.

Lord Justice Snowden:

136. I agree.

Lord Justice Newey:

137. I also agree.