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FL-2020-000038, FL-2021-000011,
FL-2022-000009, FL-2022-000023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (CH D)

13 February 2024

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

VARIOUS CLAIMANTS **Claimants**

-- and –

STANDARD CHARTERED PLC **Defendant**

- -

MR SHAIL PATEL and **MR WILLIAM HARMAN** (instructed by **Brown Rudnick LLP)** appeared on behalf of the Claimants.

MR DOMINIC KENNELLY (instructed by **Herbert Smith Freehills LLP**) appeared on behalf of the Defendant.

Hearing date: 8 February 2024

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30 am on 13 February 2024 by circulation by email to the parties or their legal representatives and by release to the National Archives.

Mr Justice Leech:

I. Introduction

1. On 5 October 2023 Michael Green J made an order in this action directing that a Disclosure Guidance Hearing should be listed with a time estimate of 1 day (the "**Order**"). On 8 November 2023 he also handed down judgment (the "**Judgment**") in this action dealing with a number of applications including an application to strike out certain allegations in the Particulars of Claim: see [2023] EWHC 2756 (Ch). In this short judgment, I adopt the defined terms and abbreviations which the judge used in both the Order and the Judgment. I also assume that the reader of this judgment will have read the introductory sections of that judgment: see [1] to [38].

2. Although Michael Green J is the designated judge for this action, he was unavailable for the DGH and I heard it in his place on 8 February 2024. Mr Shail Patel and Mr William Harman appeared on behalf of the Claimants instructed by Brown Rudnick LLP ("**BR**") and Mr Dominic Kennelly appeared on behalf of SC plc instructed by Herbert Smith Freehills LLP ("**HSF**"). The parties produced an agenda of 13 items for the hearing and the procedure which counsel invited me to adopt was to hear from them on each issue one by one but not to give a decision until hearing submissions on all of them. In the event, it was only possible to deal with five issues in one day. The parties invited me to hand down a reserved judgment dealing with those issues and to re-list the balance of the DGH for a further hearing. In this judgment I therefore deal with agenda items 1 to 5.

3. Mr Patel opened the first issue and I summarise his submissions on that issue below and Mr Kennelly then followed. However, in dealing with that issue he made the following six general submissions:

    (1) Collectively, the Claims in this action. They span 12 years and involve allegations against 62 individuals. SC plc has already embarked on disclosure and unless restraint is shown, it will get out of hand. It is necessary, therefore, to look at the expansion requested by the Claimants critically and ask whether it is justified.

    (2) SC plc has already undertaken a very substantial exercise which is likely to cost

£7 million at least.

(3) There is a common theme in relation to the Claimants' approach to the various issues. They seek very wide disclosure without considering what it will cost and whether it is worthwhile.

(4) By contrast, the Claimants themselves have shown an unwillingness to discharge their own obligations. They have failed to serve reliance questionnaires in accordance with the judge's order dated 16 January 2024 and originally asked for an extension of time until after CMC2. Moreover, 12 Claimants have still failed to serve document preservation questionnaires. Finally, there are extensive criticisms of the Particulars of Standing served on 15 December 2023.

(5) There is no evidence as to the total value of the Claims which would inform the Court's approach to proportionality. 26 Claimants assert Claims of £286 million which are described by BR as "non-netted, rescisionnary [sic] damages first-in-first out basis" and they have declined to explain how those claims are quantified.

(6) The disclosure exercise which SC plc has undertaken involves extensive use of "Continuous Active Learning" software ("**CAL**").

4. Mr Patel did not accept any of these criticisms. In particular, he submitted that the Court had to take at face value the quantum of the Claims. I do not necessarily accept that submission. However, I am prepared to accept that on any view this is substantial litigation and should either be treated as group litigation or analogous to group litigation. I also accept that in cases of this kind, it may be proportionate to make more extensive orders for disclosure than in cases involving only one or two parties.

II. The Disclosure Issues

A. The DRD, Section 1

(1) Issue 11

5. The first issue on which the parties sought guidance was whether a new IFD11 should be included in the DRD: "*Were members of the Group Executive who were not de jure directors de facto directors of SC during the Relevant Period?*". Mr Patel submitted

that it should be since this was an issue which Michael Green J refused to strike out: see the Judgment at [70]. Mr Kennelly submitted that this issue was not properly pleaded and he took me to the Claimants' Response to the Defendant's Second Request for Further Information dated 13 January 2023. He did not oppose the inclusion of IFD11 on any other basis.

6. I am satisfied that IFD11 has been pleaded in the responses to request 2, paragraphs 2.3.4 and 2.3.5. Although the judge was critical of inconsistences in the definition of the term "Group Executive" he clearly expressed the view that the allegation was adequately pleaded at this stage. Whatever views I might have taken about the adequacy of the pleading, this issue has now been determined against SC plc and this decision can only be challenged on appeal. If SC plc is successful, then the parties may have to revisit not only IFD11 but other disclosure issues. I therefore order that IFD11 should be included in the DRD, Section 1.

(2) Disclosure model for IFDs 8, 10 and 11

7. Mr Patel submitted that it was appropriate to order Model E for IFDs 8, 10 and 11. He accepted that Model E disclosure is only to be ordered in an exceptional case and he cited the judge's own decision in *Ras Al Khaimah IA v Azima* [2022] EWHC 1295 (Ch) as authority for the appropriate test and the way in which it should be applied. In particular, he relied on the judge's decision that a deliberate policy of document destruction or lack of candour in a party's approach to disclosure were sufficiently exceptional to justify disclosure. He also relied on the judge's decision to order Model E disclosure even though he was unable to determine whether that allegation was made out on the disclosure application: see [70], [71] and [80]. Mr Patel also took me to the Re-Amended Particulars of Claim dated 12 January 2024, paragraphs 22 and 71.1.3 and submitted that SC plc had admitted allegations of a similar nature to those which tipped the balance in *Ras Al Khaimah v Azima* (above).

8. Mr Kennelly took me through the authorities preceding *Azima* in greater detail. He placed particular reliance upon the decision of Gloster J in *Berezovsky v Abramovich* [2010] EWHC 2010 (Comm), which pre-dates Practice Direction PD 57AD (and before it the Disclosure Pilot). He submitted that Gloster J had identified three conditions at [12] (iv) to (vi) which had to be satisfied before Model E disclosure is ordered: (1) the

disclosure should be focussed or directed at an identifiable category or class of documents, (2) it should be linked to specific issues and (3) the reviewer should have a clear idea of what documents will fall within the scope of the Order and what the relevant trains of inquiry might be.

9. Mr Kennelly also relied on the decision of Cockerill J in *Qatar v Banque Haviland SA* [2020] EWHC 1248 (Comm) as authority for the proposition that the same approach should be adopted under PD 57AD. In particular, he relied on the following passage at [22] to [25]:

> "22. We then move on to the individual categories and issues. I am just going to literally go through the list of issues for disclosure, knocking off the points as we go. I do that against the following background, because one of the major issues which we have to grapple with is the question of Model E versus Model D. In relation to that it is clear from the disclosure pilot that Model E is exceptional. It is, as I have already noted, the case that the disclosure pilot is designed to try to produce something which is more limited than might have been the case in the past; and so it is plainly not enough to say that this is a serious case involving conspiracy and therefore Model E must follow. That is not the approach which the disclosure pilot indicates.
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> 23. On the basis of *Berezovsky* which was pre-disclosure pilot and the fact that Model E is now supposed to be more rare, we would expect to get Model E being ordered in fewer cases and in more demanding circumstances than in *Berezovsky*.
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> 24. That it seems to me is supported by the decision in *McParland* and there is also a very interesting decision of Master Kaye a few weeks ago refusing Model E disclosure and following at a similar analysis. So bearing in mind that *Berezovsky* indicated that the approach that one should be taking is to look for effectively Model E disclosure where there has been an application which has focused attention on an identifiable category or class of document and linked to the specific issues and that then some explanation should be provided as to the nature of the inquiry envisaged (that is sub-paragraph (4) of paragraph 12). Gloster J (as she then was) also indicated that at sub-paragraph (6):
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> > "The court before whom the application is being made should have an appropriately clear idea as to what documents are likely to fall within the scope of the order, to what specific issues the relevant documents to be searched on an enhanced basis relate and what the relevant trains of inquiry might be."
>
> 25. So that forms the background to the inquiry which I have to look at in relation to Model E versus Model D. That of course is important because without the trains of inquiry, as Mr. Quest pointed out, how is the defendant to know the difference between Model D and Model E?"

10. Finally, Mr Kennelly relied on the subsequent decision in *Qatar* in which Mr David Edwards QC (sitting as a judge of the High Court) ordered Model E disclosure for a limited category of documents: [226] to [232]. He also submitted that in other cases where Model E disclosure has been ordered, the Court has limited it to defined categories of documents. He submitted that Model E disclosure for IFDs 8, 10 and 11 would be of a completely different order and neither reasonable nor proportionate. He relied on the fourth witness statement of Mr Rupert Lewis dated 1 February 2024 in support of this submission.

11. Mr Lewis is the partner leading the team at HSF. He gave evidence that SC plc has already collected 670,000 documents for review for the section 90A custodians and 430,000 documents for review for the section 90 custodians on the basis that Model D disclosure will be given. It was also his evidence that even with the use of continuous active learning tools, the overall cost of the disclosure exercise was likely to be £7 million. Mr Lewis stated that BR had not identified any particular train of inquiries which should be followed and that he and his team had not costed Model E disclosure. However, he also expressed the view that in circumstances where the searches would apply to at least 12 custodians over many years, he expected the time and costs to be substantial.

12. Mr Patel submitted that the relevant issues had been identified but accepted that he could not identify any particular categories of documents or any particular train of inquiry which SC plc should follow at this stage. He submitted that this was inevitable without access to documents all of which are in SC plc's power, custody or possession. He also submitted that the Court should apply PD 57AD without the gloss in *Berezovsky* on the basis that the three conditions which Mr Kennelly had extracted from that decision were not in the practice direction itself and if the rules committee had intended them to form part of the test for Model E disclosure, it would have said so.

13. I am not persuaded that it is either reasonable or proportionate to order Model E disclosure at the present time for the three issues which Mr Patel identified. In my judgment, it is both reasonable and proportionate for the parties to adopt a staged approach to disclosure and to order Model D disclosure for IFD8, IFD10 and IFD11. However, I leave the door open for the Claimants to apply for train of inquiry documents once SC plc has given Model D disclosure for those issues. I am not

prepared to order Model E disclosure at this stage for the following reasons:

(1) I accept Mr Patel's submission that the three "conditions" which Mr Kennelly extrapolated from *Berezovsky* do not form part of the test to be applied by the Court in determining whether to order Model E disclosure under PD 57AD. However, the width of the categories of documents, the scope of the issues and the ability to identify the inquiries to be undertaken by the reviewers are clearly important matters to be taken into account in deciding whether it is reasonable and proportionate to order Model E disclosure.

(2) In the present case, the three issues for disclosure are very wide indeed. They relate to the knowledge of 12 named custodians and other members of the Group Executive over a period which, in some cases, may be more than a decade. They are far wider than the issues on which David Edwards QC ordered Model E disclosure in *Qatar*. The issues in *Azima* (above) were wider than in *Qatar* but did not require disclosure on the scale which Mr Patel invites the Court to order in the present case. In *Azima* the two critical issues related to the steps taken by a number of government authorities to obtain information about Mr Azima and another individual over a 20 month period.

(3) Mr Patel did not challenge Mr Lewis's evidence about the costs which SC plc will incur in carrying out disclosure even if Model D disclosure is ordered for issues IFD8, IFD10 and IFD11. Nor did he challenge Mr Lewis's informed view that Model E disclosure for the three relevant issues would significantly increase those costs.

(4) I am not satisfied that it is either reasonable or proportionate to require SC plc to incur those additional costs now. The Order required SC plc to give disclosure by 30 September 2024. If it complies with that order, there is sufficient time for the Claimants to make a targeted application for specific disclosure or even to make a further application for Model E disclosure before trial (even allowing for some slippage).

(5) But in any event, the critical point of distinction between *Azima* and the present case is the burden which Model E disclosure will impose on individual reviewers. As Gloster J pointed out in *Berezovsky*, it is essential that a party ordered to give

disclosure should know what documents are likely to fall within the disclosure order and whether they have complied with it. It is also essential that the Court can decide whether that party has complied with that order. I am not satisfied that HSF and FTI will be able to devise detailed guidance for reviewers to ascertain with any confidence which documents fall within an order for Model E disclosure and those which do not.

(6) In *Azima* reviewers would have known whether a particular document might have led to a train of inquiry which would establish what steps one of the government authorities had taken in relation to Mr Azima. Indeed, disclosure of all documents in which his name or the name of the other individual featured might have been sufficient to comply with the order. In the present case, the Claimants allege misconduct on "an industrial scale" and I do not see how any reviewer could say with confidence that a document circulated to one of twelve custodians might not lead to a train of inquiry which would show that the relevant custodian knew about that misconduct. For example, a diary entry in which custodian A went to a meeting with custodians B and C might be said to fall within Model E disclosure.

(7) I accept that IFD8, IFD10 and IFD 12 are key issues in the claims. I would also have been prepared to accept that the nature of the Relevant Misconduct might well justify Model E disclosure on a targeted basis. However, I am not satisfied that it is appropriate to order Model E until after a first round of disclosure has taken place. Once it has taken place, the Claimants may be in a position to make an application for specific classes of documents on the basis of the disclosed documents. They may also be in a position to seek Model E disclosure on the relevant issues on the basis of gaps or deficiencies in SC plc's Model D disclosure.

B. The DRD, Section 2

(3) Additional Custodians

14. Mr Patel also applied for an order that the Defendants should search documents for 34 additional custodians in three categories: (A) 6 individuals who were implicated in the Relevant Misconduct under the terms of the 2019 Settlements; (B) 20 individuals identified by job title or anonymised who were also implicated in the Relevant

Misconduct under the terms of the 2019 Settlements; and (C) 8 additional individuals identified in the Brutus Complaint. Mr Patel submitted that SC plc's searches should be extended to categories (A) and (B) on the basis that this would contextualise the Relevant Misconduct and show the extent to which it permeated SC's business. He submitted that SC plc's searches should be extended to (C) because the Brutus Allegations were denied and it was necessary for the Claimants to prove the Relevant Misconduct unless or until it was admitted.

15. With some encouragement from the Court Mr Kennelly offered to extend the searches in category (B) to two further individuals Mr H and Mr K. Mr Patel was not content with this limited extension and renewed his application for the additional custodians in all three categories. He identified this as a very important issue for disclosure. For his part, Mr Kennelly opposed the application on the basis that the burden was on the Claimants to establish that it was necessary to extend the searches to these 34 custodians and the costs which the extension of those searches would involve far outweighed the utility of the exercise.

16. Mr Kennelly relied on Mr Lewis's evidence that the costs of reviewing one year's worth of data for the additional custodians would be £515,000. He also made a number of points about the individuals identified in Categories (B) and (C):

    (1) Mr Kennelly submitted that there was a significant overlap between the 12 custodians whom SC plc had already identified and the individuals in Category (B). He submitted that it was disproportionate to require SC plc to search the documents of over 20 additional custodians simply to plug the gaps in the disclosure of the original 12 custodians.

    (2) He also submitted that the application relating to the Brutus Allegations was indiscriminate and speculative. He drew my attention to the language used in paragraph 109 of the second witness statement of Mr Neill Shrimpton dated 1 February 2024 in support of the application. He also took me to the transcript of the hearing before the judge in which leading counsel for the Claimants appeared to concede that their case in relation to the Brutus Allegations was limited to the discrete allegations in paragraph 24 of the Particulars of Claim.

    (3) Mr Kennelly also submitted that SC plc has already agreed to search the

documents of three of the individuals who are alleged to have been involved in Project Green and it is unclear that extending the searches will produce any new material. In support of this submission Mr Kennelly took me through HSF's letter dated 1 February 2024 in which they explained the role and relevance of each of the individuals.

(4) Finally, he submitted that the Court ought to approach disclosure through the "PDMR lens". The critical allegations which the Claimants have to prove are that the PDMRs had knowledge of the Relevant Misconduct and it was proportionate to focus on disclosure relating to their knowledge at this stage. He also took me to the Bank Knowledge Representations and submitted that the Claimants were attempting to cast the net wider than was necessary by pleading the knowledge of SC's management.

17. It would not be appropriate for me to express a view about the apparent concession made by counsel. I am not the designated judge and counsel's comments were not made in a hearing before me. Likewise, it would not be appropriate for me to express any views about the scope of the Bank Knowledge Representations. It is sufficient at this stage for me to say that Mr Patel did not satisfy me that it was reasonable or proportionate to order searches to be undertaken of the 34 additional custodians and I am not prepared to make an order to that effect now. I agree with Mr Kennelly that Mr Shrimpton's evidence on this issue is speculative. It also rings rather hollow for him to suggest that SC plc should carry out a raft of further searches when their own conduct has been the subject of criticism: see the Judgment, [171].

18. Although I have yet to be convinced that this is not a tactical attempt to place as much pressure on SC plc and to drive up the costs of the disclosure exercise, I am prepared to reconsider this issue at the resumed hearing and I give the parties the following additional guidance:

(1) *Category (A)*: There was no real argument addressed to me in relation to the 6 named individuals in this category. However, having looked at their job descriptions in Appendices 1 to 4 of SC plc's response to the Claimants' request for further information, they all held important senior positions. I invite the parties to reconsider this category and, if necessary, they can address it at the

resumed hearing (below).

(2) *Category (B)*: I am prepared to order SC plc to carry out searches of the documents of Mr H and Mr K in relation to this category. I might be prepared to order that a further one or two additional custodians should be added if the Claimants are able to make a strong case for doing so at the resumed hearing (below).

(3) *Category (C)*: Again, I might be prepared to order SC plc to carry out searches of a small number of additional custodians in this category if the Claimants are able to make a strong case for doing so at the resumed hearing. I also make it clear that I consider there to be difference between Categories (A) and (B) on the one hand and Category (C) on the other because the Brutus Allegations are denied and it is necessary for the Claimants to prove them.

(4) *Categories (A) to (C):* I expect the Claimants to identify in correspondence one or two named individuals in each category and to explain the basis on which they should be added as custodians. It may be that their selection will only be informed by their job title. If SC plc is not prepared to add the additional custodians I expect them to provide a reasoned explanation setting out why they do not have relevant documents or why their documents will be duplicated by the existing searches and, if it is necessary to do so, what the costs of restoring their data will be.

(5) *The Claimants' attitude:* Finally, I take on board Mr Patel's submission that this is a very important issue for the Claimants. However, my willingness to have regard to its importance may depend on the Claimants' willingness to engage with important issues for the Defendants and, in particular, their willingness to answer the additional queries raised by SC plc in relation to the Particulars of Standing and to provide cleaned trading data for the remaining two thirds of the Claimants.

(4) Date Range

19. The parties were able to agree an overall date range in principle. They have agreed that the default start date will be 1 January 2007 and the earlier date of 9 April 2019 or the

date on which the custodian who is alleged to have been a PDMR ceased to hold the relevant role. The remaining issue between them was whether the date range for individual custodians should begin with the date on which the custodian is alleged to have become a PDMR or the date on which he or she became an employee of SC plc or a Group company. Mr Patel submitted that the information or knowledge which an individual acquired before he or she became a PDMR would inform the knowledge which they held or acquired when they became PDMRs.

20. Mr Kennelly opposed the application on the basis that it would considerably increase the costs. He relied on Mr Lewis's evidence that this would require SC plc to extract data from back up tapes and carry out searches over an additional 123 months for four custodians who became employees after 28 November 2006 (which was the Claimants' original default start date). On this basis, he estimated that it would cost an additional £325,000 to carry out those searches. Mr Kennelly also told me on instructions that it was not even clear whether it would be possible for SC plc to extract the data from the relevant back up tapes.

21. I accept Mr Patel's submission that the knowledge which a PDMR acquired before he or she became a PDMR is potentially relevant to the Claims and in an ideal world ought to be disclosed. For instance, it is possible that a PDMR might have known that a representation in SC plc's annual report was false because of information which he or she acquired whilst an employee. Moreover, a PDMR who knew this and omitted to correct the statement might well be held to have the relevant state of mind to give rise to a claim under section 90A. On the other hand, it is a bit unlikely that such a PDMR would have acquired knowledge of Relevant Misconduct years before becoming a PDMR or approving the relevant published information.

22. For this reason, therefore, I propose to impose a cut off date of 4 months before each of the custodians is alleged to have become a PDMR. In my judgment, this is likely to capture any key information which an alleged PDMR acquired before he or she became a PDMR and might have been relevant to the decision to approve any actionable statements under section 90 or section 90A. Although this is an arbitrary date, this would not prevent the Claimants from making a specific disclosure application in the future. For example, if it were shown that an executive promoted to be a PDMR approved published information immediately after the promotion, then these facts

might justify a wider date range.

23. Further, I am not satisfied that this will impose a burden on SC plc which would make the additional exercise disproportionate. Based on Mr Lewis's figures, this would require HSF and FTI to search an additional 16 months of data. Given the overall scale and cost of the disclosure exercise, I do not consider the additional costs to be unreasonable or disproportionate. However, if this exercise does involve significantly greater time and costs than currently anticipated (e.g. because it proves to be very difficult to restore the data), I will give permission to SC plc to apply to vary my order.

(5) Employment Contracts

24. Finally, I can deal with this category of documents very quickly. Mr Patel submitted that SC plc should search for the employment contracts of those employees alleged to be PDMRs. Mr Kennelly resisted this application on the basis that their contracts will say little about the de facto role and responsibilities of each of the custodians either because they are simply generic employment contracts or because they are out of date. I disagree. In my judgment, this category of documents is disclosable. A custodian's contract may describe him as a "director" and may set out roles, responsibilities and reporting lines which will assist the Claimant. On the other hand, an employment contract which contains none of this information may assist SC plc to show that he or she is not a de facto director at all.

25. I will, therefore, order that SC should carry out a search for employment contracts of the 12 custodians who are alleged to be de facto directors. I make it clear that on production SC plc will be permitted to redact irrelevant material to protect the personal data of the individuals concerned. If there is a dispute about the scope of the redactions, the Court can resolve that issue.

III. Disposal

26. Although PD 57AD, paragraph 11.7 provides that the outcome of a Disclosure Guidance hearing should be recorded in a note to be approved by the Court, the Court may, where it considers it appropriate to do so, make an order. In the present case, I consider that it is appropriate to make an order which reflects the individual rulings which I have made in relation to Agenda items (1), (2), (4) and (5) (above). I will also

direct that the DGH should be listed again for one day before the end of term and I will dispose of the remaining items. I also direct that the parties should attempt to agree the form of order for approval at the resumed DGH.

27. If the parties consider that a note of the Disclosure Guidance should be prepared after the resumed hearing has taken place, then they can consider whether it is necessary to include in it any specific guidance in relation to Agenda items (1) to (5) and, in particular, item (3). I also confirm that, time permitting, I will hear SC plc's application requiring the Claimants to rectify the defects in their Further Particulars of Standing and for orders that they give Particulars of Standing in relation to the section 90 claims and provide cleaned trading data. However, I will not hear those applications unless SC plc has issued and served a formal application notice setting out precisely what relief it requires and the relevant provisions of the Civil Procedure Rules under which the application is made.