Neutral Citation Number: [2022] EWHC 3054 (Comm)

Case No: CL-2019-000127 and others

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2022

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

THE REPUBLIC OF MOZAMBIQUE	**Claimant**
- and -	
CREDIT SUISSE INTERNATIONAL AND OTHERS	**Defendants**

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- -

Jonathan Adkin QC, Charlotte Tan, Ryan Ferro, Akash Sonecha and Edward Gilmore (instructed by Peters & Peters Solicitors LLP) for the Republic of Mozambique

Andrew Hunter QC, Sharif Shivji QC, Andrew Scott and Tom Gentleman (instructed by Slaughter and May) for Credit Suisse

Rupert Butler and Natasha Jackson (instructed by Leverets Group) for the CS Deal Team

Duncan Matthews QC (instructed by Signature Litigation LLP) for the Privinvest Defendants and Mr Iskandar Safa

Duncan Bagshaw and Luke Barden Delacroix (instructed by Howard Kennedy LLP) for Ms Maria Isaltina Lucas

David Railton QC, Timothy Howe QC, Adam Sher and Ian Bergson (instructed by Freshfields Bruckhaus Deringer LLP) for VTB Capital Plc and VTB Bank (Europe) SE

Laura Newton (instructed by Enyo Law LLP) for BCP, UBA and BIM

Timothy Lau (instructed by Boies Schiller Flexner) for Beauregarde Holdings LLP and Orobica Holdings LLP

Hearing dates: 3 March 2022

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Judgment 4

Judgment Approved by the court for handing down
(subject to editorial corrections)

Robin Knowles J:

Introduction

1. At times material to the issues in this litigation, a number of individuals with a position of employment or responsibility in the government or administration of the claimant state ("the Republic") used personal email accounts and devices routinely to receive and send electronic communications for the Republic.

2. The Republic's position, as summarised by Mr Jonathan Adkin QC, is that the system for correspondence within the Republic's organs involves written, hard copy, documents recorded in log books. The position of Credit Suisse as one of the Defendant groups, as summarised by Mr Andrew Hunter QC, is that the Republic's arrangements include a large proportion of its electronic communications through its officials, being conducted using devices or email accounts in personal names.

3. The Disclosure Review Document ("the DRD") in this litigation indicates where some individuals have agreed to give some access to the Republic to electronic communications. Indeed, part of the approach commended in Mr Adkin QC's argument was that the process of developing this area of the DRD should continue before the Court considers whether further steps should be taken.

4. For its part, Credit Suisse has listed 33 names of individuals said to have a position of employment or responsibility in the government or administration of the Republic. It seeks several orders. First, an order that the Republic identify each individual from that list from whom the Republic has already sought consent to search and give disclosure in this litigation of relevant documents on that individual's personal email accounts or devices. Credit Suisse then seeks a second order, that the Republic identify the response of each such individual to the request where made.

5. The litigation is of major scale and involves very serious allegations on all sides. As CPR PD51U para 2.1 records, "[d]isclosure is important in achieving the fair resolution of civil proceedings". Disclosure exists as a feature of litigation because "there is a public interest in ensuring that all relevant evidence is provided to the court" in litigation: Tchenguiz v SFO [2014] EWCA 1409 at [56] per Jackson LJ, with whom Sharp and Vos LJJ (as they then were) agreed.

6. In the present litigation, on all sides, a number of potential sources of disclosure have met with challenges which are still being worked on. In the result, each source of disclosure that is available has particular value.

7. The list of names prepared by Credit Suisse comprises present and past employees or holders of office in the government or administration of the Republic. It includes very senior figures.

8. Some of those listed are parties to the litigation in their own right. Mr Adkin QC said that some were employees of the Bank of Mozambique rather than the Republic, and some were dead. Others, he said, were being prosecuted, and some were in prison. Mr Adkin QC urged that these points undermined the value of the list.

9. In my view some of these points may reduce its value but others do not. I add that there is nothing disproportionate about the length of the list in the context of this litigation. Overall, the list may not be perfect but it is designed to tackle the use of personal email accounts and devices routinely employed to receive and send electronic communications for the Republic.

10. If the two orders presently sought are made, Credit Suisse has already indicated that it would then go on to seek a further (third) order that the Republic should request consent (to secure access to relevant documents on that individual's personal email accounts or devices) from individuals from whom it has not previously sought consent. Of course, and materially, Credit Suisse might in addition seek orders against the Republic where consent has been sought from and given by the individual. And it will be able to consider its position where consent has been sought and refused or not given. If the two orders presently sought are made the Court and the parties would be able to see first how many, and which, individuals would be involved in any further order, if made, and how many, and which, should be involved.

11. But the Republic's position is that there is no jurisdiction to make either of the two orders sought by Credit Suisse. The Republic argue that this is the effect of a recent and reported decision of Mr Peter Macdonald-Eggers QC, sitting as a Deputy Judge of the High Court, in Various Airfinance Leasing Companies v Saudi Arabian Airlines [2021] EWHC 2904 (Comm); [2022] 1 WLR 1027.

12. It is important to be clear that the orders sought are sought against a party to the litigation, although they concern what that party should do towards persons who are not parties to the litigation. The orders are not sought against those other persons, and do not concern the areas of the Court's jurisdiction that allow, in certain circumstances, orders to be made directly against persons who are not parties to the litigation.

"Control"

13. The litigation is litigation to which Practice Direction 51U to the Civil Procedure Rules applies. The definition of "control" in Appendix 1 to Practice Direction 51U is in these terms:

> "Control" in the context of disclosure includes documents: (a) which are or were in a party's physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies."

"[T]he concept of "control", as defined, fixes the universe of documents from which, by one or other or a combination of means, a party's Extended Disclosure is to be generated": Andrew Baker J in Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm); [2020] 1 WLR 2582 at [13].

14. In Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627 the House of Lords considered the meaning of the words "possession, custody or power" which determined the scope of discovery under Order 24 of the then Rules of the Supreme Court (the

predecessor to disclosure under the Civil Procedure Rules). At pages 635-636, Lord Diplock said:

> "… in the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future …".

15. Although concerned with the then Rules of the Supreme Court, the passage informs the definition of "control" in Practice Direction 51U to the Civil Procedure Rules. It makes it clear that the fact that for physical reasons it may not be possible for the person entitled to a document to obtain immediate inspection of it does not mean that there is no right to possession (or inspection) of the document. What is required is that the right to possession (or inspection) is enforceable without the need to obtain the consent of anyone else.

"Control": the relationship between a party and a non-party

16. In North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11 at [40], Toulson LJ (with whom Pill and Arden LJJ agreed) said this in relation to CPR 31.8, in a passage equally applicable to PD 51U:

> "In determining whether documents in the physical possession of a third party are in a litigant's control …, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of "right to possession" … covers a situation where a third party is in possession of documents as agent for a litigant. … But even if there were on a strict legal view no "right to possession", for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party …".

17. The passage shows that in the context of disclosure a right to possession is not confined to the situation where the right exists on a strict legal view but can extend further. That said, the situation referred to in the passage from North Shore might be analysed as one where, as against the third party (the person who is not a party to the litigation), the party to the litigation had a legal right to possession but enforcement of that legal right would be precluded by the laws of a jurisdiction. Whether or not that is the or an analysis of that situation, Males J (as he then was) was later to describe as "sufficient practical control", "an existing arrangement which, in practice, has the effect of conferring [free access to the documents of the third party]": see Ardila Investments v ENRC [2015] EWHC 3761 (Comm) (at [10]).

18. In BES Commercial Electricity Ltd v Cheshire West and Chester Borough Council [2020] EWHC 701 (QB), Turner J ordered a party to litigation to request an employee (who was not a party to the litigation) "to produce to it all books, correspondence and documents (including emails and other electronic material) under his control relating to the defendant's affairs", to "thereafter use its best endeavours to secure [the employee's] compliance with such request", and to file and serve a witness statement identifying what steps have been taken to comply with the above order "exhibiting thereto the request together with any response thereto and subsequent correspondence" (at [78]).

19. Turner J made these orders recognising (at [74]) that the employee might have "sources of electronic information outside that which may be recorded on work issued devices". He took (at [77]) Toulson LJ's observation in North Shore that "[t]he concept of "right to possession" … covers a situation where a third party is in possession of documents as agent for a litigant", and went on (at [76]) to approve and apply the formulation at Article 50 of Bowstead & Reynolds on Agency (21st ed.), that it is the duty of an agent:

> "… to produce to the principal upon request, or to a proper person appointed by the principal, all books, correspondence and documents (including emails and other electronic material) under his control relating to the principal's affairs."

20. The Court of Appeal in Fairstar Heavy Transport v Adkins [2013] EWCA Civ 886 was a case where, between the parties to litigation, there had been a former relationship of principal and agent. Mummery LJ (with whom Patten and Black LJJ agreed) said at [53]-[56]:

> "53. … as a general rule, it is a legal incident of that relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal.
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> …
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> 55. … materials held and stored on a computer, which may be displayed in readable form on a screen or printed out on paper, are in principle covered by the same incidents of agency as apply to paper documents. The form of recording or storage does not detract from the substantive right of the principal as against the agent to have access to their content.
>
> 56. … Quite apart from the existence or non-existence of property in content, Mr Adkins was under a duty, as a former agent of Fairstar, to allow Fairstar to inspect emails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship."

21. The Phones 4U litigation (Phones 4U (in administration) v EE Ltd and Others [2020] EWHC 1921 (Ch) (Roth J) and [2021] EWCA Civ 116 (Court of Appeal)) involved a standalone competition claim. Phones 4U, the claimant, considered that some relevant electronic communications between individuals and the defendants may have been made on their personal electronic devices, and not necessarily using their work email or mobile devices, and considered that these should be included in any search for documents. Phones 4U sought provision that the defendants should secure the agreement of their respective individuals to access their personal devices for the

purpose of conducting searches. At first instance Roth J noted that "many – and perhaps most – of the relevant custodians apparently deny that any emails or SMS messages relating to the affairs of their employer were made or received on their personal devices."

22. Roth J (at [47 to 48]) explained:

> "Mr MacLean [of Counsel] … explained that at this stage, P4U requested that the Defendants should write to their custodians to ask them, as he put it: "Will you please give us access to your mobile phone and personal email accounts for the purpose of conducting searches in relation to the issues in this action." He said that if any should refuse, P4U can then consider what steps it might take. Mr MacLean made clear that the relief sought was therefore narrower than in P4U's draft order, which would require the solicitors acting for the relevant Defendants to "take reasonable measures to secure and obtain access to" the various devices.
>
> The Defendants strongly resisted this application. Their submissionsin summary, were that:
>
> > i) The court has no jurisdiction to make an order for searches of such personal devices. They were the personal property of the custodians, some of whom were indeed no longer employed by the relevant Defendant.
> >
> > …
> >
> > ii) The approach of P4U seeks to circumvent the established procedure for third party disclosure. If P4U wanted disclosure from a particular individual, it should make an application under CPR rule 31.17, in which case the individual would in the usual way get his or her costs of meeting the application, which could include the costs of taking legal advice.
> >
> > …".

23. Roth J decided to make an order (at [55]), saying:

> "In my judgment, it is prima facie reasonable that in the first instance they should request that their present or former employees or agents should make the devices available for inspection. I note that it was on this basis that an order was made in similar terms in *BES Commercial Energy Ltd v Cheshire West and Chester Borough Council* [2020] EWHC 701 (QB): see at [74]-[79]."

24. The Judge (at [52]) went on to say this:

> "… If and insofar as an employee of a company, however senior, sends or receives emails or SMS messages in relation to the business of the company, I think it is clear that they are doing so in the course of their employment. Accordingly, the employer (or in the case of an agent who is not an employee, the principal) has a right to require production by the employee of those 'documents', including after the termination of the employment or agency: *Bowstead & Reynolds on Agency* (21st edn), para 6-093. Hence, in *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886, the Court of Appeal held that the appellant company was entitled

> to an order requiring its former CEO (the respondent), after termination of his appointment, to give it access to the content of emails relating to its business affairs which were stored on his personal computer. As Mummery LJ stated in his judgment (with which Patten and Black LJJ agreed) at [56]: …"

Roth J then set out most of the extract from paragraph [56] in Fairstar already cited above.

25. Roth J noted that it was not suggested in Fairstar that it made any difference that the appellant was a Dutch company and that Mr Adkins was engaged not by a contract of employment but through a service agreement governed by Dutch law. Of Phones 4U he said (at [54]):

> "while the principle is one of English law and some of the Defendants operate abroad, none of them advanced a case that any relevant foreign law was materially different in this regard."

26. Roth J (at [54]) added:

> "I emphasise that the principle here engaged does not depend upon there being any particular term in the contract of employment (or in Mr Adkins' case, his contract of services) giving the employer or principal an express right of inspection or access to personal devices."

27. And in an observation that brings home the practical significance of the subject, he said (at [54]):

> "…I would add that the principle will become increasingly important as employees work more from home, where they may not have a separate work computer or an additional mobile phone provided by their employer."

28. Males J (as he then was) was dealing in Ardila Investments (above) with the case of documents held by two subsidiaries of the defendant parent company, ENRC. He said:

> "10. It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party …. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access.
>
> …
>
> 13. The position can, therefore, be summarised for present purposes in this way. First, it remains the position that a parent company does not merely by virtue of being a 100 [%] parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request, although

> it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.
>
> 14. Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

29. Addressing the facts in Lonrho itself, Lord Diplock said, continuing from the passage quoted at paragraph 14 above:

> "For the reasons already indicated Shell Mocambique's documents are not in my opinion within the "power" of either of Shell or B.P. within the meaning of R.S.C., Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Mocambique, which Order 24 does not require them to do; or (2) by obtaining the voluntary consent of the board of Shell Mocambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and B.P. are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."

30. The passages remind us that a subsidiary will not necessarily be an agent of its parent (although see further Prest v Petrodel Resources [2013] 2 AC 415, Vedanta Resources plc and another v Lungowe and others [2019] UKSC 20 at [55], and HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another [2021] UKSC 3; [2021] 3 All ER 191, valuably discussed, with other cases, by Chief Justice Allsop of The Federal Court of Australia in an address at the 38th Annual Conference of the Banking & Financial Services Law Association, 26 August 2022).

Jurisdiction: Phones 4U in the Court of Appeal

31. The decision of Roth J in Phones 4U was appealed to the Court of Appeal. There the Court recorded that leading counsel for Telefonica accepted that an employer had a right to production of documents from an employee relating to its business. But his argument was that the court did not have jurisdiction to order a defendant to disclose documents under control of employees relating to their personal affairs; and "… if the defendants could not be compelled to deliver up the Custodians' personal devices and emails, because they were not in the defendant's control, they could not be obliged to ask the Custodian to do so voluntarily."

32. Giving the judgment of the Court (Sir Geoffrey Vos MR, Asplin and Green LJJ), the Master of the Rolls (at [22]) said:

> "On jurisdiction, the parties proceeded on the common assumption that the personal devices themselves were not in the control of the defendants. That question seems to us to be a complex one, which does not need to be answered for the purposes of our decision in this case. First, as Toulson LJ explained at [40] in *North Shore Ventures Ltd v. Anstead Holdings Inc* [2012] EWCA Civ 11: "[i]n determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR r 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant". In this case, the judge did not investigate the details of those relationships, assuming at [54] that the Custodians were employees or agents of the defendants for whom they worked. Secondly, there may be a wide variety of situations ranging from a device owned by the Custodian but used mainly for work purposes on the one hand, to a device used almost exclusively for personal matters, save for an isolated work email perhaps sent in error from the wrong device. Thirdly, whilst the definition of "document" in CPR Part 31.4 and in paragraphs 1 and 5(3) of PD31B is wide, it is not immediately obvious from those provisions that it is intended to include the device itself or the chip within it. It may do in some circumstances, but in the absence of full argument, we prefer to express no opinion on the point. It may be noted in this connection that many documents are, in the modern world, not actually stored on the device at all, but in cloud storage."

33. The Court (at [1]) described the appeals in these terms:

> "These appeals raise questions as to the jurisdiction and the discretion of the court in relation to disclosure provided under CPR Part 31, where senior officers, employees and ex-employees of companies have or may have used their personal electronic devices to send and receive work-related messages and emails."

34. The Court of Appeal (at [4]) recorded:

> "… It is common ground that (a) Phones 4U is ultimately seeking to obtain disclosure of work-related emails and messages that were sent to or received by the Custodians on their personal devices, and that (b) such emails and messages (if they exist) are to be regarded in English law as being in the relevant defendant's control for the purposes of CPR Part 31.8. This statement of the position applies as much to employees as to ex-employees."

35. The first main issue on the appeal was formulated (at [54]) in these terms:

> "i) Whether the judge had jurisdiction to order a party to request third-party Custodians voluntarily to produce personal devices and emails stored on them (the "jurisdiction issue")."

36. The Court (at [6]) summarised the argument. So far as material for present purposes, the Court said:

> "The essential vice that the defendants identify in the judge's order is that it, in effect, gives the court's blessing to a request to third parties to deliver up to an agent of the defendant (the IT consultant) their personal devices and personal documents, to which the relevant defendant can have no possible right. The defendants rely first on Lord Diplock's *dicta* in *Lonrho v. Shell* [1980] 1 WLR 627 ("*Lonrho v.*

> *Shell*") at pages 635-6: (a) that "in the absence of a presently enforceable right [to obtain the document from whoever actually holds it] there is … nothing in [RSC] Order 24 to compel a party … to take steps … to acquire one in the future", and (b) that, even if consent were likely to be obtained from the third party, the defendants were not "required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person". Secondly, they rely on Glidewell LJ's *dictum* in *Bank of Dubai Ltd v. Galadari* The Times 6 October 1992 ("*Galadari*") that there is "no general provision in the rules for the discovery of documents which are not in the possession, custody or power of a party, but are held by a Third Party". The judge ought not to have contemplated delivery of private devices and documents to the defendant, or to its agent, the IT consultant. …"

The Court of Appeal (at [7]) continued:

> "Phones 4U contends that the defendants misunderstand the limited nature of the order that the judge made. The order in *Galadari* was objectionable because the documents which the court ordered the party to recover were **not** in the defendant's control. Here they are. Moreover, the order only requires a request to be made. Such a mechanism is permitted by CPR Part 31.5(8) as being "directions as to how disclosure is to be given" …"

37. The Court of Appeal accepted (at [24]):

> "… that the court has no jurisdiction under CPR Part 31 to order a defendant to disclose or allow inspection of documents that are not within its control. Save that the House of Lords was concerned with documents in the "possession, custody or power" of the defendant under RSC Order 24, that was what *Lonrho v. Shell* decided. That, however, in our judgment, is the limit of the jurisdictional point."

38. Thus the jurisdictional point does not extend far, including for this present case. There is jurisdiction under Practice Direction 51U if a party has control. It will have that if it "has or has had a right to possession" or "a right to inspect or take copies". In this, "right to possession" has a relatively broad meaning.

Airfinance Leasing: the application and the circumstances

39. In Airfinance Leasing disclosure was sought from the defendant, Saudia, in respect of the data held on personal devices, in particular mobile telephones, owned or used by two individuals, Mr Al Jasser and Mr Altayeb.

40. The Judge (at [12 to 13]) described the orders sought in these terms:

> "The application notice … was for an order to vary the Extended Disclosure already ordered by the Court requiring Saudia to disclose documents relating to the Issues for Disclosure held on the personal devices of Mr Al Jasser and Mr Altayeb. Immediately prior to the hearing … [the parties seeking disclosure] had formulated their application for alternative orders, namely that (a) an order that Saudia use

> "best endeavours" to secure the production of the documents held on the mobile telephones by Mr Al Jasser and Mr Altayeb, and to file witness evidence explaining what steps have been taken in this respect, and/or (b) an order that Mr Al Jasser or Mr Altayeb produce their devices to independent IT consultants to be searched for documents.
>
> Therefore, during the hearing … [the parties seeking disclosure] had essentially restricted their application for an order that Saudia request, or use best endeavours to request, Mr Al Jasser and Mr Altayeb to produce the documents or data held on their mobile telephones, which might well include providing their mobile telephones for review by a nominated IT consultant. I shall refer to this as a "best endeavours" order."

41. The Judge (at [11]) defined the central issue on the application as:

> "whether the Court should grant an order for disclosure against Saudia in respect of the data held on Mr Al Jasser's and Mr Altayeb's mobile telephones and in this respect whether such data are within the control of Saudia".

It is the latter question in this issue that goes to jurisdiction.

42. The two individuals were described by the Judge (at [4]) as follows:

> "(1) Mr Saleh Al Jasser who is now the non-executive Chairman of Saudia's board of directors and had been Director General of Saudia when the Lease Agreements were concluded. Since October 2019, Mr Al Jasser has been and is currently the Transport Minister of the Kingdom of Saudi Arabia.
>
> (2) Mr Abdulrahmen Altayeb who had been Vice President of Fleet Management and Engineering of Saudia from 2014 to 2017 and Vice President of Corporate Communications from 2017 to 2018. It is said that Mr Altayeb was a senior aide to Mr Al Jasser when Mr Al Jasser was Director General."

43. The Judge recorded that the parties seeking disclosure maintained that Mr Al Jasser and Mr Altayeb were critical figures in the negotiation, execution and performance of certain Lease Agreements. Saudia's Disclosure Review Document had identified them as custodians in respect of various documents and identified mobile telephones as data sources.

44. Mr Al Jasser had a work mobile telephone and a personal mobile telephone. Of these the Judge (at [6]) said:

> "The personal mobile telephone is not generally used for work purposes, although it might be used for work purposes exceptionally. Mr Al Jasser does not believe that the personal mobile telephone contains any relevant material which should be disclosed.
>
> Mr Al Jasser's work mobile telephone which he used when he was Director General of Saudia was owned by Mr Al Jasser but paid for by Saudia. Since October 2019, when Mr Al Jasser became Minister of Transport in the Kingdom of Saudia Arabia, Mr Al Jasser retained ownership of his mobile telephone (and kept the same

> telephone number), but the Ministry took over responsibility for paying for the mobile telephone. Every time Mr Al Jasser receives a new mobile telephone by way of upgrade, he deleted the data in the handset to be replaced, transferred the data to his new handset, and provided the old handset to a member of his family."

45. The Judge recorded that Saudia accepted that Mr Al Jasser's work mobile telephone might contain material relevant to Issues for Disclosure set out in the Disclosure Review Document. This might include relevant email exchanges (which the Judge said "should also be found on Saudia's email server") and in addition instant messaging communications.

46. Turning to Mr Altayeb, who was no longer employed by Saudia, the Judge said that he used a mobile telephone belonging to him to access his email account to conduct business in relation to Saudia's dealings with the parties seeking disclosure, including the matters in issue in the case. The Judge (at [9]) said that "all relevant material on his mobile telephone of which he is custodian should be found on Saudia's email servers".

47. The two references by the Judge to availability of email exchanges on Saudia's email servers might well have provided a reason why the orders sought were not necessary and should be refused as a matter of discretion, but in the event that was not the basis of the decision.

Airfinance Leasing: the decision and its limits

48. The Judge was provided with contested expert evidence of Saudi Arabian law. He clearly examined that expert evidence carefully, and he reached the conclusion that, under Saudi Arabian law, he was "not satisfied that" Saudia had a right to take possession or to access or to inspect documents held on Mr Al Jasser's and Mr Altayeb's mobile telephones. This conclusion went to jurisdiction.

49. The parties seeking disclosure had also argued that by reason of the fact that Mr Al Jasser currently held and had held senior positions within Saudia's organisation, and Mr Altayeb had held senior positions within Saudia, there were fiduciary or equivalent obligations on Mr Al Jasser and Mr Altayeb to afford assistance to Saudia for the purposes of disclosure in the proceedings. As the Judge explained (at [41]), the case of the parties seeking disclosure was that:

> "… unless there is a contrary provision in their respective employment contracts, there is at least a presumption that Saudia has a right of access to such documents and therefore the data held on Mr Al Jasser's and Mr Altayeb's mobile telephones are within Saudia's control".

50. Of this the Judge (at [42]) said:

> "I can address this submission relatively briefly. I would be sympathetic to this submission if the employment relationships were governed by English law. However, the employment relationship between Saudia on the one hand and Mr Al Jasser and Mr Altayeb on the other hand are governed by the law of the Kingdom of Saudi Arabia. This is common ground.

> In those circumstances, I do not consider that there is any place for the presumption proposed … especially in circumstances where the Court has had the benefit of detailed expert evidence on Saudi law (see by way of comparison *Pipia v BGEO Group Ltd* [2021] EWHC 86 (Comm), para. 88)."

51. The Judge also held (at [47]) that the Court had no jurisdiction to make an order requiring a party to "exercise best endeavours" to obtain or request a third party to produce documents for disclosure which are not already in the party's control (leaving aside the Court's power under CPR rule 58.14 "*in proceedings relating to a marine insurance policy*"). The Judge (at [54]) said:

> "There is no authority of which I am aware which allows the Court to require a party to exercise best endeavours to obtain or to request a third party to provide documents for disclosure under [PD 51U] or generally under CPR Part 31. Such an order might well be made if the requisite "control" is established (*Phones 4U (in administration) v EE Ltd* [2021] EWCA Civ 116; [2021] 1 WLR 3270). Indeed, even if the relevant party does not have control of a document, the Court has a separate power to make orders requiring a third party to provide disclosure of that document (at least to the extent that the Court has jurisdiction over that third party) (under CPR rule 31.17, which is expressed to be applicable to CPR Practice Direction 51U by para. 1.9 and Section II). However, where a party to the relevant proceedings has no relevant control over the documents in question, absent any specific provision in the CPR permitting such an order, the Court does not have the power to make such a "best endeavours" order by way of an extension of the powers allowed it by the CPR, because the Court's jurisdiction is derived exclusively from statute or delegated legislation, namely the CPR (*Vinos v Marks & Spencer plc* [2001] 3 All ER 784, para. 26), and because the CPR makes no provision for such a power in a case such as this."

52. What then did Airfinance Leasing decide? It reached a conclusion of fact. This was that that under Saudi Law there was no control (as defined, i.e. right to possession or right to inspect or take copies). It followed that if there was no control there was no jurisdiction, including to require a party to exercise best endeavours to obtain or to request a third party to provide documents for disclosure under PD 51U.

Phones 4U: the decision

53. As the Judge in Airfinance Leasing recognised, in Phones 4U Roth J "was not suggesting that the Court could extend the jurisdiction to order disclosure of documents which are not in a party's control". Rather, Roth J (at [59]) was considering:

> "an order against the relevant Defendant that it takes reasonable steps towards providing 'documents' within its own control, having regard to its position as employer or principal".

54. Roth J said (at [61]):

> "… I consider that an order that the Defendants should disclose documents held by their present or former employees on their personal devices could be made under

> the rules. The order now sought is for a step towards the practical exercise of that established jurisdiction, by seeking to identify documents that fall under the Defendants' control. It falls within the broad power under CPR rule 31.5(8) for the court to give directions as to how disclosure should be given. As P4U points out, the writing of letters to agents to gain access to documents for disclosure was ordered by the court in *Bank St Petersburg PJSC v Arkhangelsky (No 2)* [2015] EWHC 2997: see at [45] [where Hildyard J had ordered that letters be written to agents to gain access to documents for disclosure].”

55. The Court of Appeal concluded (at [30]) that:

> “For the reasons we have given, and subject to the question of proportionality and the GDPR, we do not think there was any jurisdictional impediment to the order that the judge made. He was entitled, as a part of directing how standard disclosure was to be given, to direct the defendants to request their own Custodians voluntarily to produce to IT consultants both their personal devices and all the emails stored on them.
>
> …
>
> The order the judge made was, as he said at [61], a step towards the practical exercise of an established jurisdiction "by seeking to identify documents that fall under the Defendants' control".

56. The Court of Appeal said (at [25]) this of CPR Part 31, and this should in my view also guide the use of PD 51U:

> “Disclosure is an essentially pragmatic process aimed at ensuring that, so far as possible, the relevant documents are placed before the court at trial to enable it to make just and fair decisions on the issues between the parties.
>
> [The Rule] is expressly written in broad terms so as to allow the court maximum latitude to achieve this objective. It is not a straitjacket intended to create an obstacle course for parties seeking reasonable disclosure of relevant documents within the control of the other party. Some of the defendants' submissions seemed to us to have an air of that unreality. … In this case, the judge has made it as clear as can be that he considered it at least reasonably possible that the work-related documents on the Custodians' personal devices would be relevant to the issues. Accordingly, he must have thought that a reasonable search should be made for them so that they could, if relevant, be disclosed. The documents included within the process are, as we have said, those within the control of the defendant …”.

57. Of third parties (non-parties), the Court of Appeal said (at [28]):

> “It will be noted that there are no limitations in CPR Part 31.5 (or elsewhere) on who can be asked to participate in the search process. It is obvious that third parties can only be compelled to do anything by an order under CPR Part 31.17 or another procedure to which they are made a party. But that does not, in our judgment, mean that the court cannot, as a matter of principle, require the parties to the proceedings to make requests of third parties by way of making a search for relevant documents. We will deal with the proportionality of making such requests below.”

58. At the same time, Roth J was concerned to ensure that the order interfered with the individuals' rights of privacy as little as possible and was proportionate. On the facts of that case, and among other measures, he considered that it was reasonable and proportionate that the individuals who were requested to provide their personal devices for inspection were limited to four custodians for each Defendant or Defendant group.

59. Where disclosable documents were mixed with others, the Court of Appeal said (at [29]):

> "We note that there has not, thus far, been much authority dealing with a situation where disclosable documents are mixed with non-disclosable confidential documents. Colman J was faced with that situation in *Yasuda Ltd v. Orion Underwriting Ltd* [1995] QB 174 where he said, at page 191 in relation to mixed underwriting records, that it was: "not open to the defendants to rely on the inseparability of irrelevant material as a basis for declining to permit inspection, extraction and copying of relevant material".

60. Sir Geoffrey Vos MR continued (at [37]):

> "Any order relating to the disclosure of business materials mixed with personal materials engages a number of potentially conflicting interests. The need for the due and efficient administration of justice has to be balanced against the individuals' article 8 rights of privacy. In balancing these interests, the court will seek within the bounds of the CPR and the overriding objective to find a workable solution; such a solution should not be excessively costly, time-consuming or complex. In other words, the solution must itself be reasonable and proportionate."

61. On the facts, the Court of Appeal said (at [36-44]):

> "Whilst we accept that the vast majority of the documents on the devices in question will be potentially highly personal, it was the Custodians that will themselves have chosen to use them for business purposes in the first place.
>
> …
>
> … [I]t was the choice of at least some of the Custodians to use their personal devices for work purposes. " [36 - 44]

Standing back

62. Thus the question of "control" goes to jurisdiction as the decision of the Court of Appeal in Phones 4U illuminates.

63. For the purposes of the disclosure obligation on a party to litigation, where that party to litigation is a company, institution or (as here) a state, and English law is the applicable law of the relevant relationship between that party and a non-party who is a present or past employee or holder of office who used personal email accounts and devices routinely to receive and send electronic communications for the party, the Court will readily find that the party has "control", in the form of a right to possession or to inspect or take copies of documents, as against the non-party.

64. In Airfinance Leasing, English law was not the applicable law of the relationship. The Judge was presented with expert evidence of a particular foreign law (there the law of Saudi Arabia) and reached a factual conclusion based on that evidence. This he was fully entitled to do.

65. But the Judge then appears to have taken things further and concluded (in the passage quoted at paragraph 50 above) that where there was no expert evidence (either way) there would no place for a presumption that a foreign company had a right of access to documents and data held on an employee's personal email account or device (unless there was a contrary provision in the relevant employment contract).

66. On this point, I must respectfully disagree with a judgment to which I otherwise pay tribute. The point is significant because the Judge's conclusion would have the consequence, especially for international or cross border litigation, and absent agreement between the parties, of requiring positive evidence on the existence of control under the relevant foreign law before the disclosure obligation of a foreign company would extend to personal email accounts and devices routinely used by an employee to receive and send electronic communications for the company.

67. Applications to adduce expert evidence might become routine, given the number of foreign or international parties in cases in the Commercial Court and in the Business and Property Courts of England & Wales generally and whose employees may be employed under contracts of employment that are governed by laws other than English Law, and given the use of personal devices to make business communications, including now (see Roth J's point, quoted at paragraph 27 above) the increase of working from home. This would be unfortunate as the issue of control in disclosure is a satellite one in the litigation as a whole.

68. Although they may not be described in the same way where the jurisdiction is not a common law jurisdiction, employees of foreign companies will have duties which are of materially the same content as those found in English law. For all sorts of reasons, from tax to contract and record keeping, from sustainability to training and succession planning, and from regulation to governance and more, where personal email accounts or devices are used to undertake work in employment then the employer will need access to the documents and data and that will be well understood and agreed by employer and employee. Business could be unworkable otherwise. More still where the working method used by the employee is a principal method. This is "control". The more so when account is also taken of the fact that control in the North Shore sense of "sufficient practical control" (to use Males J's term) is sufficient.

69. Further, as will be well understood, save where there is good reason to think that the applicable foreign law is different in a material respect from English law there is an evidential rule in English Law allowing a Judge to assume that foreign law is the same as English Law unless the contrary is alleged and shown (see generally FS Cairo (Nile Plaza) LLC (Appellant) *v* Lady Brownlie [2022] UKSC 996; [2022] AC 995 at [122]-[126] per Lord Leggatt).

This litigation

70. In light of the above, the existence of the Airfinance decision does not mean that there is no jurisdiction to make the orders sought by Credit Suisse.

71. However the Republic is then left to maintain the allegation that under Mozambique law specifically there is no control, and therefore no jurisdiction. This would be to contend that Mozambique law provides an exception to the general position I have sought to explain in the previous section of this judgment.

72. The Republic says that to permit expert evidence of Mozambique law on the question of control has to be the next step before any of the orders sought by Credit Suisse could be made. Yet a prior answer to the first two orders sought by Credit Suisse would help illuminate what would and would not be just and proportionate in dealing with the litigation. The cost and time of preparing and considering expert reports on Mozambique law, or even simply submissions (see Commercial Court Guide 11th edition para H3.3(c) and (d)), could be appreciable.

73. As is well known, the parties are "required to help the court to further the overriding objective" (CPR 1.3), which is to enable the Court "to deal with cases justly and at proportionate cost" (CPR 1.1(1)) and that "includes, so far as is practicable, … saving expense" (CPR 1.1(2)(b)). By para 2.3 of PD51U:

> "The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible."

CPR 1.4 (1) provides that: "The court must further the overriding objective by actively managing cases." Credit Suisse also referred to CPR 3.1(2)(m) which gives the Court powers to "… take any other step or make any other order for the purpose of managing the case and furthering the overriding objective …".

74. It is in this vein that Mr Hunter QC for Credit Suisse described the first two orders sought by Credit Suisse as amounting to pragmatic case management through steps towards the practical exercise of the Court's jurisdiction. Credit Suisse points out that in Phones 4U information was sought, and ordered, to find out whether individuals had documents.

75. Mr Hunter QC summed up orally:

> "It seems to us that the court's powers in relation to disclosure and the court's jurisdiction in relation to disclosure do permit the court to do everything it can to ensure that we don't end up in that position, and in this instance what we are asking for is for the court to take what are plainly proportionate measures in order to inform the parties as to what the position is in relation to these valuable repositories of documents before we embark on what would be quite a substantial dispute about de jure and de facto control which will require, at least in the first part of it, de jure control, contested expert evidence on Mozambican law.".

76. Mr Adkin QC for the Republic distinguishes the position in Phones 4U, as a case where English law governed the relationship and therefore control was present: if the documents did exist then those documents were under the control of a party. By contrast, he argues, in the present litigation information is proposed to be sought by Credit Suisse when control might not exist. The Republic says that even the first two orders sought by Credit Suisse are preparatory to the third, and the third is simply not available if there is no control.

77. Given the important case management provisions referred to, in appropriate cases the parties can be expected to resolve many of the types of point under discussion in this judgment. And of course, often a party may not take the point that the Republic has taken. In this instance however, the Court will need to rule.

78. I do so as follows:

(1) I have to accept that as control is the basis of jurisdiction, where control is put in issue then whether there is control needs to be established at a first stage. CPR 3.1(2)(m) is not sufficient to supply jurisdiction for the third order that Credit Suisse would seek.

(2) The Republic says that even the first two orders sought by Credit Suisse are preparatory to the third, and the third is simply not available if there is no control. However, that is not the end of the matter. It is possible to approach the matter from a different angle and one that is particularly relevant to the Court's responsibilities to serve the overriding objective.

(3) The first order sought by Credit Suisse can readily be supported under CPR 3.1(2)(m), not by assuming jurisdiction based on control but as a means of case managing the risks where Credit Suisse simply does not know whether the Republic has already asked for consent. If Credit Suisse does not know who on the list has already been asked and makes a request to all on the list, the risk is that those who are not parties to the litigation are troubled twice. A request from Credit Suisse of a party or a non-party that repeats a request already made by the Republic may ultimately increase costs, as well as take the Court's time in a way that affects other users.

(4) I emphasise that no issue of legal professional privilege has been raised in connection with the first order sought. If there is one it can be considered on its merits.

(5) Where consent from a listed individual with documents has been sought and given, then control is sufficiently established for the purposes of disclosure: see situation (2) described by Lord Diplock in Lonrho in the passage quoted at paragraph 29 above. That may in fact be consistent with the approach commended in Mr Adkin QC's argument and summarised at paragraph 3 above. But I cannot be sure because the Republic has resisted in full the first two orders sought and Mr Adkin QC also argued that information about consent, the subject of the first two orders sought, does not necessarily mean there is control. That argument is answered against him by the passage from Lord Diplock's speech. I think it desirable in the interest of certainty and transparency that the position be dealt with by an order in this case at this stage.

(6) Thus, in my judgment Credit Suisse is entitled now to the first order sought (an order that the Republic identify each individual from the list from whom the Republic has sought consent (to search and give disclosure in this litigation of relevant documents on that individual's personal email accounts or devices)). It is also entitled to know now where the response of each such individual to the request was to give consent (that is, part of the second order sought).

(7) This will mean in practice that Credit Suisse will also learn which of the listed individuals have not given consent. This will be by a process of deduction and therefore Credit Suisse will not know whether a reply was not given or whether consent was specifically refused, and if refused on what grounds. It is open to the Republic to provide this information voluntarily and it may be in its interests, or simply sensible, to do so.

(8) As will be clear I am not able at this point to accede to the remainder of Credit Suisse's application, and in particular to grant the third order sought.

(9) Where after Credit Suisse has considered the Republic's responses in compliance with the orders that I am prepared to make now, and has considered if and where it still needs to pursue the third order sought (or any other appropriate order) then, if I remain satisfied on proportionality and relevance, I expect to make appropriately confined directions for expert evidence and other factual evidence to enable the remainder to be dealt with as efficiently as possible.