CLAIM NO. FL-2017-000001
CLAIM NO. FL-2016-000019

Neutral Citation: [2019] EWHC 109 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 25/01/19

Before:

THE HON MR JUSTICE HILDYARD

BETWEEN:

OMERS ADMINISTRATION CORPORATION & ORS
(the "SL Claimants")

Claimants

and

TESCO PLC

Defendant

AND BETWEEN:

(1) MANNING & NAPIER FUND, INC.
(a company incorporated in the United States of America)
("the SL Claimants")
(2) EXETER TRUST COMPANY
(a company incorporated in the United States of America)
("the MLB Claimants")

Claimants

and

TESCO PLC

Defendant

Mr Neil Kitchener QC and Mr Andrew Lodder (instructed by Stewarts Law) appeared on behalf of the SL Claimants

Mr Peter de Verneuil Smith and Mr Dominic Kennelly (instructed by Morgan Lewis & Bockius UK LLP) appeared on behalf of the MLB Claimants

Ms Victoria Wakefield and Ms Emma Mockford (instructed by the Government Legal Department) appeared on behalf of the Serious Fraud Office

Mr Michael Watkins (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendant

Approved Judgment

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

This is the final public form of the judgment provided in unredacted form confidentially in December 2018 and contains redactions to protect third party confidentiality.

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MR JUSTICE HILDYARD

Nature of the Issues to be considered

1. The Defendant has in its possession and control certain documents obtained by the Serious Fraud Office ("the SFO") for the most part pursuant to (or in anticipation of) the exercise of its powers under section 2 of the Criminal Justice Act 1987 ("the CJA 1987"). The SFO provided the Defendant with these documents ("the SFO Documents") for the purpose of negotiations (actual and prospective) about a deferred prosecution agreement ("the DPA") eventually concluded between the SFO and the Defendant's subsidiary, Tesco Stores Limited ("TSL") in 2017. These documents are, in the view of the Defendant and its advisers, relevant to the matters in issue in the present proceedings. However, in circumstances where most of the documents had been obtained by or in the anticipation of compulsion, the SFO imposed strict restrictions on the Defendant as to the use that could be made of such documents to protect the persons from whom they were obtained. The Defendant is thus caught between its obligations to the parties to the litigation as regards to disclosure, and its obligations to keep the SFO Documents confidential and private, unless otherwise directed by the Court.

2. The question now to be considered is whether, having regard to (a) the terms on which the SFO obtained the SFO Documents and (b) the terms on which the SFO provided the SFO Documents to the Defendant, such documents should be disclosed to the Claimants, and if so, whether any restrictions should be stipulated in relation to their retention and use.

3. As I shall explain, the case law reveals many situations which are suggested to be nearly analogous, but no exact precedent: and both the proper test to be adopted and its application raise issues of some novelty, difficulty and importance.

4. As it happens, there was no real contest between the parties, the Defendant being ready if so directed to disclose the SFO Documents, and the Claimants being broadly agreeable to appropriate restrictions in respect of their retention and deployment. However, a number of third parties (for convenience and anonymity together "the Third Party Objectors" or "the TPOs") from whom the SFO had obtained documents or information objected to any further disclosure.

5. In such circumstances, Mr Kitchener QC (leading Mr Andrew Lodder) on behalf of the SL Claimants and Mr Peter de Verneuil Smith (leading Mr Dominic Kennelly) have diligently advanced submissions from slightly different perspectives to illuminate the difficulties and their possible resolution. Further, although the Defendant (represented by Mr Michael Watkins) has been studiously neutral, the SFO (represented by Ms Victoria Wakefield and Ms Emma Mockford) has provided valuable further assistance both in addressing the legal principles involved and in drawing to my attention, and where necessary elaborating, the various objections received, in effect as a self-appointed *amicus curiae.* I am very grateful to them all, and their teams, for their very considerable assistance.

Structure of this judgment

6. I propose to deal with the issues thus canvassed before me under the following headings:

   (1) The context in which these issues arise and the nature of the SFO Documents in question.

(2) The circumstances in which the SFO (a) obtained the SFO Documents from third parties (including the TPOs) and (b) thereafter disclosed them to the Defendant.

(3) The process preceding this hearing to enable the issues to be adjudicated on notice to potential objectors.

(4) The nature of the TPOs' various objections to being permitted or directed to disclose the documentation onwards to the Claimants.

(5) The debate as to the applicable legal principles, and my views in that regard.

(6) The application of the legal principles as I perceive them to be to the objections.

(7) The question whether, and if so what, further restrictions should be imposed in respect of any disclosure directed.

(8) Summary of Conclusions.

(1) Context of the issues arising and nature of the SFO Documents

7. As will be apparent from my previous decisions in this matter, in these proceedings the two sets of claimants ("the SL Claimants" and "the MLB Claimants") seek compensation under the Financial Services Act 2000 ("FSMA") in respect of the losses they contend they suffered as a result of the Defendant's false and misleading statements to the market and its omissions from those statements. It is contended that these statements wrongly reported the Defendant's commercial income and very materially overstated its trading profits, and were designed to and did conceal a serious downturn in the Defendant's business. The Defendant is a well-known high street retailer with publicly listed shares ("Tesco shares").

8. The two claimant groups differ in that (amongst other things) one is comprised of some 77 institutional investors who dealt in Tesco shares between April 2013 and 22 October 2014 and the other is comprised of two claimants bringing claims on behalf of investors for whom they purchased and/or retained Tesco shares between October 2009 and 19 September 2014. However, the broad thrust of their respective claims is similar enough that an exegesis of their differences in detail is not required for present purposes.

9. What is of more direct import is that the circumstances which have given rise to the claims of both sets of Claimants also led the SFO to pursue a criminal investigation ("the TSC01 investigation") into the Defendant, its subsidiary TSL and certain associated individuals, which in turn led first to the conclusion and approval (by The President of the Queen's Bench Division, Sir Brian Leveson), under section 45 of and Schedule 17 to the Crime and Courts Act 2013, of the DPA referred to in paragraph 1 above, and secondly to the commencement of criminal proceedings against three individuals (one of whom was a director of TSL). Those criminal proceedings were at the date of the hearing being re-tried at the Crown Court at Southwark against two of the three original defendants, but have now entirely been concluded.

10. The SFO Documents comprise (a) documents provided to the SFO by third parties and (b) documents containing information provided to the SFO by third parties (including, in particular, transcripts of interviews with third parties and their witness statements).

11. I return to the relevance of the documentation in more detail later: for the present suffice it to say that there can be no real doubt, and (although the SFO was careful to emphasise that it could not "comment on the probative value of the underlying documents") there was no dispute, as to the likely relevance of the SFO documentation in the context of these proceedings. The Defendant's solicitors, having reviewed them at least twice, accept that they are such as would be required to be

disclosed, leaving aside the confidentiality undertaking given by acceptance of the terms of the SFO's letters. Counsel for the SL Claimants put it this way in their skeleton argument for this hearing:

> "The SFO investigation concerned how the [alleged] fraud was carried out, by whom and who knew about it. The material is therefore not merely relevant to these proceedings, it goes to the very heart of the Claimants' pleaded case against Tesco under section 90A of FSMA."

(2) The circumstances in which the SFO (a) obtained the SFO Documents from third parties (including the TPOs) and (b) thereafter disclosed them to the Defendant

12. This material had been obtained by the SFO during and for the purposes of its TSC01 investigation, generally by the use or prospective use of the SFO's powers to compel the production of information and documents conferred by and pursuant to section 2 of the CJA 1987.

13. Such powers are effected through a production notice (a "section 2 notice"). Specifically:

    (1) Under section 2(2) CJA 1987, the Director of the SFO may:

    > "*by notice in writing require the person whose affairs are to be investigated … or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to an investigation at a specified place and either at a specified time or forthwith*".
    >
    > Interviews conducted by the SFO pursuant to section 2(2) CJA 1987 are referred to below as "section 2 interviews".

    (2) Under section 2(3) CJA 1987, the Director of the SFO may:

    > "*by notice in writing require the person under investigation or any other person to produce … any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him to so relate*".

    (3) Unlawful non-compliance with a section 2 notice is a criminal offence. By section 2(13) CJA 1987 it is provided that:

    > *"Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or to both."*

14. Save for information and documents protected by legal professional privilege, and in the absence of a "reasonable excuse", the obligation to provide documents or information of the type demanded in a section 2 notice overrides common law obligations of confidence, most statutory obligations of secrecy (see section 3(3) CJA 1987) and the privilege against self-incrimination (see section 2(8) CJA 1987). However, documents thus obtained by the exercise of such powers of compulsion

may, without the consent of the person against whom the powers were exercised, only be used for those purposes for which the relevant legislation contemplated they might be used (sometimes referred to as "the compulsion principle"): and see *per* Sir Christopher Slade in the Court of Appeal in *Marcel and Others v Commissioner of Police of the Metropolis and Others* [1992] Ch 226 at page 262 C-E. Further, the documentation and information obtained is confidential, though (as will later be developed) that is subject to the overriding interests of justice.

15. Notices under section 2(2) or 2(3), as applicable, were issued to 21 of the 25 TPOs. Of the remaining four third parties:

    (1) One individual was interviewed on a voluntary basis (TPO14).

    (2) The three objectors who were defendants in the criminal proceedings ongoing at the time of the hearing and now concluded (two of whom are currently on trial in the Crown Court) were all interviewed under caution as suspects in the criminal investigation in accordance with the Police and Criminal Evidence Act 1984 and its Code of Practice (rather than pursuant to section 2 CJA 1987).

16. Each section 2 notice contained a note in the following terms:

> "*NOTE: Any document or information obtained by the Serious Fraud Office (SFO) under Section 2 of the Criminal Justice Act 1987 may be disclosed by the SFO for the purposes of any criminal investigation or criminal proceeding or for any other permitted purpose. The SFO's principal gateway for disclosing information is Section 3(5) of the Criminal Justice Act 1987. Notice of any disclosure will not necessarily be given to the provider of the document or information or to any other person*."

17. Section 3(5) CJA 1987 provides:

> *"Subject to subsections (1) and (3) above and to any provision of an agreement for the supply of information which restricts the disclosure of the information supplied, information obtained by any person in his capacity as a member of the Serious Fraud Office may be disclosed by any member of that Office designated by the Director for the purposes of this subsection—*
>
> *(a)to any government department or Northern Ireland department or other authority or body discharging its functions on behalf of the Crown (including the Crown in right of Her Majesty's Government in Northern Ireland);*
>
> *(b)to any competent authority;*
>
> *(c)for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere; and*
>
> *(d)for the purposes of assisting any public or other authority for the time being designated for the purposes of this paragraph by an order made by the Secretary of State to discharge any functions which are specified in the order."*

18. In this case, the SFO Documents (and certain other materials) were provided to TSL and to the Defendant (its 100% parent company) in two stages. The first stage of disclosure, which did not comprise all the material, was disclosed in May 2016 in advance of negotiations for the DPA, to enable TSL and the Defendant to take advice on the desirability of entering into negotiations for a deferred prosecution agreement.

It is the SFO's position that it was under a duty to make advance disclosure in this context: see *R v Director of Public Prosecutions, Ex p Lee* [1999] 1 WLR 1950, 1962.

19. The second stage of disclosure took place in 2016 and 2017 after negotiations for the DPA had begun but before the conclusion of the DPA, to enable TSL and the Defendant to take advice on the desirability of entering into the DPA which was proposed and eventually concluded. Mr Raymond Neal Emson in his fifth witness statement on behalf of the SFO, dated 19 October 2018, has explained that the second stage of disclosure was required by, and made in accordance with, the relevant provisions of the DPA Code of Practice issued under paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 which stipulates that information is to be provided for the purposes of negotiation and also that an undertaking of confidentiality must be required by the SFO. The SFO contends (and it is not disputed) that confidentiality was stipulated by two letters written by the SFO to the solicitors for TSL and the Defendant in May 2016, and that this applies to all the material supplied by the SFO to them, at whatever stage.

20. The first of the two letters (dated 24 May 2016) stipulated that the advance disclosure material was being provided to the legal representatives of the two companies "*in confidence for the purpose only of providing legal advice in relation to the criminal investigation being conducted by the [SFO]"*. A second letter the next day (dated 25 May 2016) clarified (and narrowed) the extent of the confidentiality prescribed in the following terms:

> "*Confidentiality*
>
> *The advance disclosure material is provided to the legal representatives of Tesco PLC in confidence for the purpose only of providing legal advice in relation to the criminal investigation being conducted by the UK Serious Fraud Office. The material must under no circumstances be disclosed voluntarily to any third party for use in any civil, disciplinary, employment or ancillary proceedings of whatever nature. If Tesco PLC becomes aware that it is, or may be, compelled by law or Court order to disclose the documents to a third party, it will promptly give the SFO written notice so as to enable the SFO to make representations or intervene prior to disclosure.*"

21. Plainly, the Defendant is thus bound by two potentially conflicting obligations: the obligation of confidentiality as thus expressed (and subject to the limitations stated) on the one hand, and the obligation to give full and proper disclosure in these proceedings to enable their fair trial and disposition. For its part, the SFO naturally considers that the confidentiality assurances given to those who responded to section 2 notices are coextensive with the confidentiality obligations imposed on TSL and the Defendant: but that too needs consideration. Before turning to that, however, it is necessary to describe the process adopted to enable these matters to be determined, which has been multi-layered and complex.

(3) The process preceding this hearing to enable the issues to be adjudicated on notice to potential objectors

22. By application notice dated 9 October 2017, the Defendant applied for permission to review the SFO Documents for the purposes of (a) ascertaining whether they were relevant and (b) listing them for disclosure in these proceedings. In response to that the SFO indicated that it was amenable to the application provided that a process was devised to enable it to notify relevant individuals about the proposed disclosure and inspection of the documents as it had stated it would in the section 2 notices.

23. By my order sealed on 6 December 2017 ("the Tesco/SFO Documents Order") the Court set down a timetable for the Defendant's relevance review and the SFO's notification process, stipulating as part of the same order that the SFO should identify whether any public interest immunity or legal professional privilege was considered to attach to any of such documents.

24. The Defendant complied with that order and identified SFO Documents as being relevant for the purposes of disclosure. There was then something of a hiatus whilst the SFO considered the position and put before the Court (in July 2018) its concerns as to potential prejudice to the criminal proceedings (which had been expected to have ended by then but for which a re-trial had in the event been directed) if it consulted with third parties who were or might become witnesses in the criminal proceedings.

25. This occasioned a fairly long hearing also concerned with other matters of case management after which I determined that the SFO should proceed to notify all persons whose evidence or documents were proposed to be disclosed in a form approved, on an amended timetable (thus varying the Tesco/SFO Documents Order). That determination is encapsulated in my order of July 2018 (sealed on 20 July 2018, "the 20 July Order"). My reasons are set out in my approved oral judgment and postscript (for which the neutral citation is [2018] EWHC 2358 (Ch)).

26. Further to the 20 July Order, in late July 2018, each affected third party was contacted by the SFO, provided with a copy of all of the SFO Documents relating to them, informed of the risk of disclosure of that material in these proceedings and told that any objections would be determined at a hearing ("the Objections Hearing") to be held on or after 15 October 2018. Third parties were required to submit any responses by 14 September 2018.

27. On 19 October, the SFO served the fifth witness statement of Raymond Neal Emson ("Emson 5", to which I have referred earlier, see paragraph 19 above). This set out in the exhibit written responses from TPOs which, at least in the view of the SFO, amounted to third party objections for the purposes of paragraph 3F of the Tesco/SFO Document Order as varied by the 20 July Order.

28. Then, at a second Case Management Conference ("CMC 2") heard on 23 to 25 October 2018, the Court ordered that, should the TPOs wish to file written representations to be considered at the Objections Hearing, they should do so by 4pm on 30 October 2018. At CMC 2, I heard preliminary submissions as to the conduct and ambit of the Objections Hearing, and as to the likely relevant factors to be taken into account. It appeared to me that TPOs having particular or private objections (personal to them, in other words, as distinct from issues as to the public interest) should be given an opportunity to state them.

29. Accordingly, following CMC 2 and at the Court's invitation, the Government Legal Department ("the GLD") on behalf of the SFO sent a letter to the TPOs on 26 October 2018 stating (amongst other things) that:

> "*The Court would be particularly assisted if objectors were to set out precisely what, as a matter of fact, they would wish the Judge to weigh in the balance against disclosure. For example, you might wish to draw the Court's attention to specific personal concerns to you, or to some particular prejudice to you that you anticipate or fear might result from disclosure*".

30. A number of TPOs responded to the GLD's letter of 26 October 2018, and these responses have been included in the 14 files relating to objections provided to me at the hearing to which this judgment particularly relates. It was submitted by the Claimants, and I think it is fair to say, that those responses broadly reiterated the

general concerns the TPOs had outlined in previous correspondence but did not further particularise "*specific personal concerns … or particular prejudice"* that might result from disclosure of the SFO Documents.

31. I should also mention that amongst the orders made at CMC 2 (sealed on 2 November 2018) was a direction for the Defendant to provide all the SFO Documents to the Claimants' respective external lawyers and their technical or administrative employees or agents within what was referred to as an 'Enhanced Confidentiality Club' to be held on terms as to strict confidentiality set out in Part C of the Schedule to a further order ("the Additional Confidentiality Order") dated 25 October 2018. (I gave an *ex tempore* judgment setting out my reasons for that course which I shall amend and approve in due course; but, put shortly, it seemed to me to be necessary in order for the Claimants to be able to put forward focused argument.)

32. Indeed, the purpose of all these orders and directions was to enable informed submissions at the Objections Hearing without foreclosing the issue as to the use that could be made outside the protection of a very restricted confidentiality ring.

33. The Objections Hearing itself was for the most part in public. However, in order to preserve individual privacy, a key was provided to enable the Court and those present to avoid naming individuals and disclosing personal details; and for a limited time I directed the hearing to be in private to deal with matters which I was persuaded were best thus dealt with.

(4) The nature of the TPO's objections

34. In the skeleton argument for this hearing Counsel for the SFO gave an overview of the objections received as follows:

"…most of the third party objectors who have (to date) set out their position in any detail, appear to be objecting to the disclosure of their documents on principle, taking into account the fact that the information and/or documents in question were provided under compulsion and in the reasonable expectation that they would be kept confidential."

35. Most of the TPOs who set out their position in any detail had the benefit of legal advice and representation, although none in the end appeared before me either by an advocate or in person. The numbers or appellations attributed will not make much sense for the present but are shown by the following breakdown:

    (a) TPOs 1, 8, 13 and 22 are all represented by Linklaters and advanced common arguments.

    (b) TPO 2 is represented by Jenner & Block.

    (c) TPOs 3 and 20 are both represented by Osborne Clarke and advanced common arguments.

    (d) TPO 5 is represented by Brown Rudnick.

    (e) TPO 6 is unrepresented.

    (f) TPO 10 is represented by Barnfather Solicitors.

    (g) TPO 12 was represented by Skadden Arps but is now unrepresented.

    (h) TPO 18 is represented by Stephenson Harwood.

(i) TPOs 4, 11, 14 and 21 are all represented by White & Case and made common arguments.

(j) TPOs 9, 7, 15 and 16 are all represented by Herbert Smith Freehills and made a number of common (plus some individual) arguments.

(k) TPOs 17 and 19 are represented by CMS and make common arguments.

(l) Three others (TPOs 23, 24 and 25) are also represented but neither TPOs 23 nor 24 advanced any particular position.

36. The SL Claimants and the MLB Claimants sensibly and constructively divided between themselves the task of further analysing the TPOs' objections for the benefit and determination of the Court. For that purpose, they divided the TPOs into two main categories, with sub-categories as follows:

    (1) Category 1 comprised individuals who: (i) "*neither consent nor object*" to disclosure/inspection in these proceedings; (ii) have raised objections that are not supported by any reasons, or that raise objections that are wrong in principle; or (iii) have objected to disclosure/inspection on the basis that they provided information and documents to the SFO under compulsion and with an expectation of confidentiality, but without raising any specific concerns about privacy/confidentiality or the relevance of the SFO Documents.

    (2) Category 2 comprises individuals whose objections raised concerns (i) about privacy / confidentiality that are specific to that individual and/or (ii) as to the relevance of the SFO Documents.

37. The common feature of all TPOs in category 1 is their reliance on the expectations they had by virtue of the SFO's section 2 notices and the fact that they provided evidence and documents under compulsion, rather than on any specific concerns about privacy or confidentiality, or any reservations as to relevance. Category 2 TPOs relied on objections based on some specific individual concern, whether as to privacy and confidentiality or as regards relevance.

38. I address the positions of each of the numbered TPOs later. For the present, however, I need to consider a point made by the Claimants as to what I should treat as an "objection" such as to invite and require determination.

39. The Claimants submitted (correctly, in my view) that third party consent is not a requirement for the disclosure through a 'gateway' prescribed by section 3(5) CJA 1987 of documents containing material confidential to that third party and obtained by the SFO in the exercise of its powers under the CJA 1987. All that is required is that the third party must be notified properly and given the right to advance and elaborate representations in support of an objection to disclosure: see *R (Kent Pharmaceuticals Ltd) v Director of the SFO* [2005] 1 WLR 1302 at [25], [27], 36] and [42].

40. However, the Claimants went on from this to submit that disclosure of relevant material is the default position unless a third party puts forward a legitimate objection to such disclosure: in other words, in default of adumbrated objection, disclosure should follow (being an incident of the proceedings and express directions for disclosure made in the course of them). Alternatively, the Claimants submitted that the "objection" of a person who refuses to state on what basis he or she objects despite being invited to do so should be given little if any weight.

41. In the present case, the Claimants contended, the procedure (to which I have more generally referred above) provided for notification and afforded ample opportunity for objection. Thus, paragraph 3D of the 20 July Order provided that:

> *"The notification letter shall invite the third parties in question to state by 14 September 2018 whether they object to disclosure and inspection of the relevant SFO Document(s) and, if so, to set out the grounds for that objection in writing."*

42. The SFO was then required by paragraph 3E of the 20 July Order to notify the parties of any third-party objections. In the absence of any written objection, paragraph 3F provided that:

> "*As soon as reasonably practicable following receipt of the Third Party Notice, and in any event by 12 October 2018, Tesco shall provide disclosure to the SL Claimants and the MLB Claimants (and shall permit simultaneous inspection, subject to appropriate redactions for irrelevance and/or privilege) of all SFO Documents … in respect of which no third party objections have been received pursuant to paragraphs 3D and 3E above.*"

43. The Claimants urged the conclusion that at least as regards all of the TPOs who had expressly stated in correspondence that they were neither consenting nor objecting and/or were "content for the matter to be determined by the Court" (TPOs numbered 1, 2, 3, 8, 13, 20, 22, 23, 24, 25), all of whom were legally represented and who the Claimants placed in a sub-category 1(a)), the Court should proceed as if they had made no material objection.

44. The SFO, on the other hand, submitted that these TPOs were thereby evincing "implicit objections" such as to necessitate the Court adjudicating as to whether the documents they had provided should be disclosed or not.

45. For my part, and as I indicated at the hearing, I consider this to be something of a storm in a tea-cup which I have felt necessary to address only out of deference to the tenacity with which it was pressed, especially by Mr Kitchener QC on behalf of the SL Claimants. In my view, both as a matter of pragmatism and because this seems to me to be consistent with what I interpret to be the position and desire of category 1(a) TPOs, the Court should adjudicate upon the matter, in a context in which documents have in fact been obtained by the use of compulsive powers by an emanation of the state, unless the relevant third parties have actually expressed their consent. As I remarked during the hearing, the difference between non-objection and consent is frequently noted, not least in the context of interlocutory relief, and is as valid here as it is in those albeit rather different contexts.

46. For similar reasons, I likewise consider that an explicit but unreasoned objection (advanced in the case only of TPO 12, to whom the Claimants ascribed a category 1(b)) must be adjudicated as an objection in principle. So too must objections expressly by reference to generic private or public interest confidentiality interests based on the fact that the documents were obtained under compulsion and/or in circumstances giving rise to a reasonable expectation of confidentiality. (TPOs numbered 4, 5, 6, 11, 14 and 21 were in this category, denominated category 1(c) by the Claimants, of whom all but TPO 6 additionally relied on analogies with the restrictions on collateral use prescribed by CPR 31.22 and/or section 17 of the Criminal Procedure and Investigation Act 1996 (which I address below)).

47. The Claimants also sub-divided TPOs in category 2 into two categories. Category 2(a), comprised of TPOs numbered 7, 9,10, 15, 16 and 18, raised objections based on matters specific to their personal positions. TPOs numbered 17 and 19 each raised objections based on the propositions that (a) SFO transcripts attract litigation privilege; (b) the SFO transcripts should not have been disclosed to the Defendant or,

if disclosed, should have been subject to a tighter confidentiality undertaking; and (c) there is no reason or sufficient justification for disclosure of transcripts which they would not have been compelled to give but for the existence of a parallel criminal process.

48. Before dealing with these objections (in all categories) I turn to discuss the general principles to be applied when doing so, which were the subject of extended argument.

(5) Submissions on the applicable legal principles

49. I start with three preliminary points. First, I think it is important to re-emphasise at the outset of this part of this judgment that, though for the purposes of analysis I may depict the arguments of the SFO on the one hand and the Claimants on the other as being opposing, the SFO stressed that its role was as a "self-appointed *amicus*", though with a brief also to ensure that the Court was aware of the substance of and any strength in the objections (both implicit and express) that it had been sent. My references to 'competing' submissions should be read as a shorthand and understood accordingly.

50. Secondly, the SFO distinguished (as, in my view, is necessary and appropriate) between *"public interest"* and *"private interest"* confidentiality. Both the SL Claimants and the MLB Claimants were broadly content to adopt the distinction, but the SL Claimants further defined the terms as follows (I consider accurately):

    (1) "*Public interest confidentiality*" refers to the public interest in maintaining the confidentiality of individuals who provide information under compulsion to prosecuting authorities such as the SFO;

    (2) "*Private interest confidentiality*" refers to the private interest of individuals in maintaining the confidentiality of information related to them in the SFO Documents and their right to privacy and family life pursuant to Article 8 of the European Convention on Human Rights ("the Human Rights Convention").

51. Thirdly, and before summarising the arguments put forward on behalf of the SFO and the Claimants, it is convenient to set out the parts of the CPR which were referred to by analogy, though all concerned agreed that the particular circumstances of this case mean that none seems to be plainly and exclusively engaged. Those rules are:

    (1) Where (as here, in respect of the SFO Documents) an order for standard disclosure has been made, CPR 31.6 stipulates that documents in the control of a party (as defined in CPR 31.8) are to be disclosed (that is, both listed and, subject to any claim of privilege, produced for inspection).

    (2) However, the Court is also and has always concerned itself with the protection of other rights, including confidences, where such protection is possible without compromising the objective of disclosure, being to make available the documentation necessary for a full and fair trial and its fair disposition. CPR 31.19 recognises such a right and sets out how it may be asserted (CPR 31.19(3) and (4)) and challenged (CPR 31.19(5)).

    (3) CPR 31.12 provides that the Court may make an order for specific disclosure or for specific inspection. CPR 31.12, unlike CPR 31.17 (see below), and unlike the RSC Order 24 rule 13 which preceded it, does not specify the test to be applied: in particular, it does not expressly state, as did RSC Order 24 rule 13, that no order for production of any documents could be made unless the

Court was of the opinion that the order was "necessary for disposing fairly of the [claim][matter] or for saving costs".

(4) In the case of documents which are not in the control of a party to the proceedings, but rather are in the control of a third party, CPR 31.17 provides for a party to make an application requiring that third party to disclose and produce such of the documents as are identified by the applicant as being 'necessary' in order to fairly dispose of the case or to save costs (see CPR 31.17(3)(b)). Again, the Court is always concerned to protect legitimate third-party rights insofar as it is able to do so without compromising the objective of a fair trial.

(5) CPR 31.22 (which, as I explain later, is invoked by certain of the TPOs) stipulates that documents disclosed in proceedings may be used only for the purpose of such proceedings and not for any collateral purpose, unless (a) the documents have been read in or referred to in open court (CPR 31.22(1)(a)); or (b) the Court gives permission (CPR 31.22(1)(b)); or (c) the party who disclosed the document and the person to whom it belongs both agree (CPR 31.22(1)(c)). As I elaborate upon later, but as was common ground, the Court is for obvious reasons (and not least the promotion of full disclosure) vigilant to prevent misuse of disclosure; and the authorities in the context of CPR 31.22, suggest that the burden on the applicant is a heavy one which can be discharged only by *"special circumstances which constitute a cogent reason for permitting collateral use"* (see *Rawlinson & Hunter Trustees v SFO* [2014] EWCA Civ 1409 ("*Tchenguiz No 2"*) at [66]).

(6) The specific wording of these rules is supplemented, however, by "the overriding objective" as adumbrated in CPR 1.1(1) and (2).

52. The difficulty in this case is the product of the fact that the SFO Documents are only in the control now of the Defendant further to (a) the exercise of powers of compulsion in which obligations of confidence were given and relied upon and (b) the release of such documents (despite such obligations) through an established gateway but on the express basis of confidentiality and privacy. It is at least arguable that the differentiation in the CPR between (a) documents held by a party (b) documents held by a third party and (c) documents held subject to the prohibition against collateral use does not fairly reflect the position in this case where it is argued that though the documents are in the possession of a party, they were provided by a third party on terms as to confidentiality and were (as to the most part) generated in a context where it was understood that no collateral use should be made of them. Thus, looking at the realities, it is arguable that none of these rules quite fits the circumstances. I turn to the 'competing' arguments as to how these difficulties should be resolved.

SFO submissions

53. The SFO's helpful skeleton argument, provided to the Claimants (and to the Court) in advance of their own, summarised the propositions it submitted should be derived from its review of the law as follows:

(1) Where production is sought of documents accepted to be relevant, but obtained through or pursuant to the exercise of powers of compulsion and held subject to obligations of confidentiality or restrictions as to their use the Court must conduct a balancing exercise.

(2) On the one hand, weighing against disclosure, the Court should take into account:

(a) The public interest in maintaining the confidentiality of those who provide information to the police or the SFO (or any other body with a criminal investigatory function). This confidentiality arises by virtue of the relationship between the individual (or body) providing the information and the criminal investigatory authority, and is not dependent on the particular sensitivity of the information given. It is class-wide. (It is this type of confidentiality which the SFO referred to as "public interest confidentiality".)[1]

(b) Any particular fact-specific privacy, confidentiality or sensitivity concerns raised by the affected third party. This will necessarily vary between objectors. (The SFO referred to this as "private interest confidentiality".)

(3) On the other hand, weighing in favour of disclosure, the Court should take into account the public interest of ensuring that, as far as possible, civil trials are conducted on the basis of all relevant material and the private rights of the parties to the civil proceedings to a fair trial. Assessing the weight that should be attributed to this consideration will (it was suggested) depend on an assessment of each document (or part of a document), including not only how probative it is, or appears to be, but also the extent to which its contents would otherwise be available (for example, through non-confidential documents).

(4) When it comes to the balancing exercise, the cases are, unsurprisingly, heavily influenced by the test for disclosure in each particular case; and according to which of the CPR rules referred to above is applicable.

(5) In striking the balance, and in the event of disclosure being thought appropriate, any measures which might either avoid or limit the extent of the disclosure of confidential or sensitive information should be taken, although the public interest in open and transparent justice must also be taken into account. Such measures might include making redactions before disclosure or imposing restrictions on the *use* of the information in the proceedings (for example, a requirement that no reference be made to it in open court) if disclosure is required.

54. Very broadly, the SFO summarised the TPOs' preponderant view as to the test to be applied in striking the requisite balance in the present case as being closest to an application for release from an undertaking against collateral use such as that found in CPR 31.22(1) (in which case, the balancing exercise is less inclined in favour of disclosure).

55. However, the SFO suggested that the Court "might think it strange" if the documents were to be better protected by dint of their disclosure as part of the DPA process than they would have been if they were in the hands of a third party and CPR 31.17 applied. CPR 31.17 stipulates a more conventional balancing exercise or judgment (such as that required in *Frankson v Home Office* [2003] 1 WLR 1952); the necessity of disclosure in order to dispose fairly of the claim is weighed against the public and private interests in confidentiality, with the former to override the latter where the necessity is clear and substantial.

56. Although Counsel for the SFO was careful to explain fully, but not to espouse strongly, any particular argument, it seemed to me that ultimately the logic of its

[1] To be clear, this is not public interest immunity. No public interest immunity is asserted in this case.

position was that the SFO favoured and recommended to the Court the same approach in essence as in the context of CPR 31.17 as explained in *Frankson (supra)*, thus importing the test of 'necessity'. However, Counsel for the SFO floated the possible rider, which became a focus of dispute, that in that case necessity was established because the documents in question were "potentially critical evidence", from which might be extrapolated a test requiring the documents in question to be central to the case, or at least such that a trial would be skewed if they were not disclosed.

SL and MLB Claimants' submissions

57. There were differences in emphasis as between the SL Claimants and the MLB Claimants in the way they formulated their submissions.

SL Claimants

58. In summary, the SL Claimants placed greater emphasis on characterising this case simply as one of *inter partes* disclosure, where (unlike strangers to the suit) the parties were under a "fundamental obligation" to give disclosure; CPR 31.17 had no application, since this was not an application against a third party; and still less did CPR 31.22, since this was not an application for the subsequent use of disclosed documents.

59. On their behalf Mr Kitchener QC described his "essential proposition" as being "that the disclosure of documents in the possession of a party that are relevant and that are or may be adverse to its case is necessary for dealing with a case justly". As to what is "necessary", he submitted that "…necessity sounds like it may be a high test, but it is not": if the documents in question could confer a 'litigious advantage', or their non-disclosure result in a 'litigious disadvantage' (phrases culled from the authorities as elaborated later), then the test was satisfied, and the documents should be disclosed and produced.

60. He submitted further that "[t]here is no elevated test…[which]…applies to disclosure where rights of confidence are possessed by third parties." In any event, he submitted that the documents in question "are prima facie of key significance"; and in the context especially of allegations of fraud, they should plainly and obviously be disclosed. The only exception might be if the person in possession of the documents in question could show that materially the same document or information was readily available from another non-confidential source.

61. These submissions were elaborated by reference to the case law as follows:

    (1) Since the SFO Documents are in Tesco's possession and control, and have been identified by Tesco as disclosable in accordance with the test for standard disclosure under CPR 31.6, the starting point is that such documents must be listed and should be disclosed and made available for inspection in these proceedings.

    (2) That said, and though not of itself a ground for protection, the Court has recognised that confidences, particularly of and asserted by third parties, *"ought, if possible, in the interests of justice, to be respected…"* (see *per* Lord Wilberforce in *Science Research Council v Nassé* [1980] AC 1028 at 1067B-C). In addition to confidences, there are a number of other matters which the Court must take into account in exercising its discretion in respect of production/inspection, and which may weigh against it. These include the following:

(a) The public interest in maintaining the confidentiality of those who provide information to the SFO and other prosecuting authorities, which has been recognised by a line of authority commencing with *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 and *Taylor v SFO* [1999] 2 AC 177;

(b) The right of third parties to respect for their private and family life under Article 8 of the Human Rights Convention.

(3) Thus, mere relevance of the documents in question, according to the broad test ordinarily applicable, will not of itself be sufficient to warrant their disclosure in breach of an obligation of confidence (see *ibid.*); and the Court or tribunal always has a discretion (*ibid.*) to refuse production.

(4) Sometimes it will appear that the information in a document, or even another version of the document itself, may be available from another non-confidential and unrestricted source. In such circumstances, production may not be 'necessary'. But unless that, or some strong reason to suppose that disclosure would (for example, because of the sheer volume of documentation) be so oppressive as to outweigh any litigious advantage, is demonstrated (the onus being on the party from whom disclosure of the relevant documentation is sought) neither public nor private interest confidentiality, nor any private right, would exempt disclosure which a party to the proceedings would otherwise be required to give of documents assessed to be not merely relevant but necessary for the fair disposition of those proceedings (see again the *Nassé* case at 1065 to 1066 (*per* Lord Wilberforce) and 1071 (*per* Lord Salmon)).

(5) In that regard, there is no requirement that the documents of which production is sought should be "potentially critical": Scott Baker LJ in *Frankson* was simply describing the position in that case, not laying down a standard.

(6) Rather, the test is that prescribed by Lord Bingham MR in *Taylor v Anderton* [1995] 1 WLR 447 at 462 as follows:

> "The crucial consideration is, in my judgment, the meaning of the expression "disposing fairly of the cause or matter". These words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."

(7) Mr Kitchener also cited the Court of Appeal decision in *Wallace Smith Trust Co Ltd v Deloitte Haskins & Sells* [1997] 1 WLR 257 ("the *Wallace Smith* case"), where Simon Brown LJ (as he then was), went on (at page 272D) to emphasise that the test renders wholly unnecessary or inappropriate a:

> "weighing of loss of confidentiality on the one hand against litigious disadvantage on the other [which] is, obviously, difficult enough at the best

of times: these are wholly disparate interests not readily matched against one another. Such a task is, of course, necessary if and when a prima facie claim to public interest immunity is made out. It is not, however, desirable to introduce this difficulty in some diluted form into the present type of rule 13 proceedings…"

(8) Although, in the case of confidential or restricted documentation the court will consider whether some form of other restriction or protective measure, such as redaction, confidentiality ring, anonymity, or limits on publicity or collateral use, may be available, the interests of justice in there being available in evidence any documentation which may adversely affect one side or benefit another must prevail; and see *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 per Sir Christopher Slade at 265 F-G and 266 D-F. The right to a fair trial under Article 6 of the Human Rights Convention is also relevant in this context.

(9) Even in gauging protective measures with a view to protecting confidences so far as is may be done, there is Court of Appeal authority to the effect that the burden, which is a heavy one, is on the party claiming exemption from disclosure, which can be discharged only by showing that the exemption, or if practical a limitation or restriction is "strictly necessary": see *Dunn v Durham County Council* [2013] 1 WLR 2305 at [23].

(10) The Court accepts the consequence that, as Lord Wilberforce put it in the *Nassé* case at 1067B:

"confidences, except between lawyer and client, may have to be broken however intimate they may be."

MLB Claimants

62. The MLB Claimants urged the same conclusion as the SL Claimants that the documentation in question in this case should all be produced. But Mr de Verneuil Smith on their behalf adopted a more nuanced approach, accepting that the case could not be characterised so simply, given the nature of the documents, their source, and the conditions under which they had been generated and then subsequently passed on to the Defendant.

63. He submitted that even if (as indeed he contended) neither CPR 31.17 nor CPR 31.22 was applicable (for the reasons given by the SL Claimants), the test of proportionality and the requirement to exercise all judicial discretions under the rules in pursuance of the overriding objective set out in CPR 1.1(1) and (2) required consideration of all these factors and a balancing exercise accordingly.

64. Mr de Verneuil Smith's overarching point was that since the introduction of the CPR, the test of 'necessity' was subsumed within the test of proportionality, and that whether or not a particular part of CPR 31 referred to the 'necessity test' (contrasting CPR 31.12 which does not and 31.17 which does) it is always likely to be a factor where the disclosure sought may impact on other interests and the Court's task is to strike a just and proportionate balance between the competing interests involved.

65. Mr de Verneuil Smith referred me in this regard to the decision of the Court of Appeal in *National Crime Agency v Abacha and others* [2016] 1 WLR 4375, which concerned an application under CPR rule 31.14 (which contains no express reference to a 'necessity' standard) for specific inspection of a document referred to in witness statements. He cited in particular the following passages (at [31] to [32]) in the judgment of Gross LJ (with whom Hamblen LJ and Sir Colin Rimer agreed):

> "…it was not argued before us and there is nothing to suggest that the RSC approach to *confidentiality* has changed under the CPR…Accordingly, while disclosure and inspection cannot be refused by reason of the confidentiality of the document in question alone, confidentiality (where it is asserted) is a relevant factor to be taken into account by the court in determining whether or not to order inspection. The court's task is to strike a just balance between the competing interest involved – those of the party asserting an entitlement to inspect the documents and those of the party claiming confidentiality in the documents. In striking that balance in the exercise of its discretion, the court may properly have regard to the question of whether inspection of the documents is necessary for disposing fairly of the proceedings in question: see…[the *Nassé* case]…
>
> ….
>
> …differing from the judge, I am not persuaded that that there is some freestanding "necessity" case which needs to be satisfied before permitting inspection where CPR 31.14 is otherwise satisfied. In this regard, the CPR differ from the previous regime contained in RSC Order 24, though, as already demonstrated, the question of whether inspection is "necessary to dispose fairly" of the application or case is not rendered irrelevant – and may well arise in the context of proportionality or that of confidentiality. On this analysis "necessity" is or may be (depending on the facts) *a* relevant factor in striking the just balance; it is not a free-standing hurdle to be considered and surmounted in isolation before inspection may be permitted."

66. Consistently with his acceptance of the discretionary nature of the Court's jurisdiction, and the need to balance competing considerations by reference to the overriding objective (including proportionality, and within that "necessity"), Mr de Verneuil Smith acknowledged the need to look at the facts relevant to each objection; but he emphasised four points which he submitted were relevant across the board, as follows:

    (1) The importance and magnitude of the claims, and the broader public interest underlying them: £490 million being claimed by the SL Claimants and £364 million by the MLB Claimants, together with interest, further to the admitted overstatement of profit by a leading supermarket in which a very large number of shareholders were adversely affected;

    (2) The nature of the SFO's investigation in the criminal proceedings and the substantial (and unusual) overlap with the factual inquiry required by this civil case;

(3) The enhanced likelihood that the interviews conducted in the latter would be very relevant in the former, and likely to assist in determining the issue of fraud which is central to the civil case: especially contemporaneous evidence on issues as to the inner workings of the Defendant, the mindset of and relationships between its directors and managers, and the pressures to present a rosy picture of its financial position;

(4) The inequality of arms between the Claimants and the Defendant (which already has them) if the documents are not disclosed: the documents may well confer a strategic advantage on the Defendant (including, for example, in helping it to decide what witnesses to call, or who may be called against it, and to assess the weight of both): and only disclosure can level the playing field.

67. Thus, put shortly, the MLB Claimants favoured a more balanced, and fact-sensitive approach, more in line overall with that of the SFO; whereas the SL Claimants favoured an almost binary approach: if relevant and material in terms of being likely to confer a litigious advantage then confidentiality could provide no answer and disclosure should be ordered.

Wallace Smith and two following cases

68. Nevertheless, as I have stated, both sets of Claimants urged the same conclusion, and before turning to my own conclusions as to the applicable principles, I should address a line of authorities they all relied on (despite the MLB Claimants warning that they were pre-CPR) as being of special closeness to the position in this case, and as thus offering particularly apposite guidance.

69. The cases concerned are the *Wallace Smith* case (which I have already mentioned above) and two further cases which appeared to adopt its approach. These decisions were submitted by the Claimants to support strongly what they contend should be the result in this case.

70. The *Wallace Smith* case involved an application by the claimant (an insolvent bank acting by its liquidators) against the defendant accountancy firm (the insolvent company's auditors) for the production and inspection of SFO transcripts and tapes of interviews with a partner and an employee of the defendant firm. These interviews had been conducted under section 2 CJA 1987 as part of an investigation into the insolvent bank and, in particular, as to whether its business was being fraudulently conducted. The application was for inspection (rather than discovery) of the tapes and transcripts and was brought under RSC Order 24 rule 13, which prescribed that no order should be made unless the Court "is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

71. The defendant firm contended that the test was not satisfied and that the application was misconceived: the liquidators had already been provided with witness statements of two of the bank's directors (Mr Davies and Mr Ginsberg) and the actual evidence given at an earlier criminal trial of its chairman and managing director (Mr Wallace Duncan Smith), as well as other evidence previously disclosed and produced, and it was submitted that although "[t]he liquidators might be curious about the contents of the tapes…that was not enough" [page 266G]. The defendant firm also claimed that the tapes and transcripts were protected from production by the principles of public interest immunity. The liquidators denied the claim to public interest immunity; and, rejecting the suggestion to the contrary, contended that the tapes and transcripts, which were plainly and accepted to be relevant, were equally plainly 'necessary' in that they were: (a) fuller and more contemporaneous than the witness statements; (b) likely to contain frank and unedited answers to questions posed by experienced investigators who had by then acquired a detailed knowledge of the case, and insights

and expressions of opinion which the witness statements would not contain; and (c) likely to contain also some information as to what Mr Duncan Smith had told the SFO (of which they had no statement or other record): see page 265.

72. At first instance, Carnwath J (as he then was) dismissed the application, essentially on the basis that he was not satisfied that the production of the documents was "'necessary' for the fair disposal of the cause or matter" (though he did not himself inspect them). He rejected the claim to public interest immunity. The Court of Appeal reversed the decision on the first point and remitted the matter back to the judge for him to inspect the documents, whilst upholding the decision as to public interest immunity. All three members of the Court concluded (without inspecting the documents) that the tapes and transcripts were "undoubtedly likely to contain material necessary for the fair disposal of the action" (*per* Neill LJ at page 268C) for all the reasons advanced by the liquidators. In such circumstances, despite the fact that they came into being under statutory compulsion, and should be treated as confidential, any interest (public or private) in confidentiality was likely to give way to the overriding public interest in the production of all material in the control of a party which was 'necessary' for disposing fairly of the proceedings at trial. The Court of Appeal also stated that production of documents which were accepted to be relevant should not be denied unless "the court has examined the documents and considered them in the light of the material already in the applicant's possession" (pages 267H to 268A). I asked Counsel whether in the end, when remitted to him for inspection of the documents, Carnwath J ordered production: but though their supposition was that he did, none could say for sure.

73. The *Wallace Smith* case is obviously of considerable import in the circumstances of this case. It is of note also in that the documents were, as in this case, produced after the event: they were not source material in the usual sense; and they would not have existed or been available but for the SFO investigations.

74. The two further cases where its reasoning was followed and on which both sets of Claimants relied are *British and Commonwealth Holdings plc (in administration) v Barclays de Zoete Wedd Ltd and others* [1999] 1 BCLC 86 and *Real Estate Opportunities v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197; [2007] Bus LR 971.

75. The *B&C Holdings* case also concerned an application under RSC Order 24 rule 13, this time for production on the application of a defendant in proceedings brought by B&C of transcripts of evidence given to Department of Trade Inspectors which were in the possession of other parties to such proceedings. The applicant itself had transcripts of evidence given to such Inspectors by its own employees. It was a feature of the case that all the parties to the proceedings had some of the transcripts and one or two parties had all of them: so that as Neuberger J (as he then was) accepted there was "considerable force in the argument…on behalf of [the applicant] to the effect that it is desirable to have a 'level playing field' with all parties to the litigation having all the transcripts" (see page 100*d*). In acceding to the application and ordering production Neuberger J stressed also: (a) the risk of unfairness to the applicant and all parties, and the litigious disadvantage of denying production; (b) the likely advantage of contemporaneity (the interviews the subject of the disputed transcripts having taken place some two to (a maximum of) four years after the crucial events, whereas the witnesses at trial would be giving evidence some 12 years after such events (see page 102*a-c*)); and (c) although itself costly and time-consuming a requirement for production could not plausibly be characterised as oppressive (see page 105*c*).

76. The *Real Estate* case concerned transcripts or records of statements made to the Financial Services Authority ("the FSA") in the course of an investigation under FSMA. It was accepted that the documents were subject to strict confidentiality

restrictions under section 348 FSMA. Nevertheless, the Court of Appeal upheld the decision at first instance to order production. It is not, with respect, altogether easy to discern from the judgment of Arden LJ (as she then was) what parts are recitation of argument and what parts constitute her own conclusions; but it appears that she agreed with the submissions of the applicant to the effect that neither the fact of compulsion nor the confidentiality restrictions were such as to prevent production. (Mr Sumption QC, for the applicant, had argued that the elements of compulsion and confidentiality were not relevant.)

77. It is right to note at this stage that against all this, the SFO suggested that none of the cases is really on all fours with this one, principally because (so Ms Wakefield submitted on its behalf) in each of those other cases, the disputed documentation was, as it were, the respondent's own (directly or via its employee(s)): she suggested that it had not obtained the document from the SFO, the FSA or the DTI, in contrast to the position in the present case. That, Ms Wakefield suggested, makes this case "perhaps closer to a third-party style case rather than a standard party/party case". However, I am not convinced she is right about either the factual premise or her suggested conclusion from it. It is not entirely clear from any of the cases how in each case the respondent to the application had obtained the documents; but, to my mind, it seems likely that they came from the person who had undertaken the interviews at the request of the respondent, as in this case.

My conclusions as to the applicable legal principles

78. I turn to my own conclusions as to the applicable legal principles in the circumstances of the present case.

79. In my view:

    (1) CPR Part 31 addresses at least three very different circumstances: (a) the position as between parties to the litigation (see especially CPR 31.6, 31.12); (b) the position as regards third parties holding relevant documents (see especially CPR 31.17); and (c) the position as to the use of documents disclosed in the litigation otherwise than in the litigation itself (CPR 31.22).

    (2) Of these, CPR 31.22 is rather different in nature from the others. The collateral purpose rule which CPR 31.22 now in effect codifies relates to documents already disclosed and produced, not to the preceding process of disclosure and production, and is based on different policy considerations. CPR 31.22 is a regime and restriction which is intended to promote compliance with the disclosure obligation and prevent its abuse; and to which all litigants are taken to subscribe as the price of disclosure. As emphasised at [66] in Jackson LJ's judgment in *Tchenguiz No 2* (see paragraph 51(5) above), the:

        > "collateral purpose rule exists for sound and long established policy reasons. The court will only grant permission…if there are special circumstances which constitute a cogent reason for permitting collateral use."

    (3) CPR 31.17's express test of necessity reflects the fact that third parties, being strangers to the suit, can have no expectation of reciprocal advantage from the usual rule that all relevant documents must be disclosed; and, as the word 'only' in CPR 31.17(3) serves to emphasise, ordering disclosure against non-parties is the exception rather than the rule: see *Frankson* at [10]. CPR 31.17(3) stipulates that not only must the documents sought be likely to "have a potentially relevant bearing on one or more live issues in the case" (*per* Scott Baker LJ in that paragraph in *Frankson*) but also that their disclosure is "necessary" for the defined purposes of disposing fairly of the claim or to save

costs. In determining that, the Court must bear in mind that the order sought, being against a non-party, is unusual, and that a degree of caution is accordingly appropriate; and the more so according to the "weight" of the public or private interest in maintaining confidentiality which disclosure would negate.

(4) Where, as in this case, applicant and respondent are both parties (a "party/party case"), relevance is the *prima facie* test. The rules as to the process and obligations in respect of disclosure and production as between parties are based on the premise that such disclosure and production is a fundamental feature of the way contentious litigation is conducted in this jurisdiction and is of reciprocal advantage to all parties. That does not mean that in such a case the public interest or a special private interest in maintaining confidentiality are not to be taken into account: just as confidentiality is not of itself a ground for protection, relevance is not of itself enough to override other interests, public or private, whether under the Human Rights Convention, or by reference to the public and/or private interest in maintaining confidentiality, and confidentiality must always be assessed when considering an application for production of documents in respect of which a duty of confidentiality to a third party is owed. Nothing in the CPR overrides or dilutes the Court's obligation to consider fairly what in the *Nassé* case Lord Wilberforce (at page 1067B-D) described as:

> "the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it".

But as Lord Wilberforce also made clear in the same passage of his speech, confidentiality of itself offers no ground for protection: and in a party/party case such a fundamental feature and pre-condition is only ordinarily to be restricted in its application in circumstances where its rigorous and/or unadjusted application is not required in order to deal with the case justly and at proportionate cost. Put another way, in this context the question becomes whether the overriding objective of dealing with the case justly and at proportionate cost can be secured without production of the relevant documents.

(5) As was made clear in the *Abacha* case (see paragraph 65 above), in answering that question the court may properly have regard to the test of necessity, though that is no longer in this context a free-standing or exclusively determinative test. The Court must consider whether the same information is available from another source; it must consider also whether a restricted form of disclosure will suffice. But if production of a document would be likely to be of litigious advantage to the applicant, or if its non-disclosure would result in the applicant being potentially at a litigious disadvantage, that may well outweigh or take precedence over other considerations: indeed, at least where the confidentiality asserted is purely private and engages no wider considerations as to the public interest, it is almost certain to do so, subject to devising suitable protections to minimise the intrusion: Counsel were unable to identify any case where it had not.

(6) The position where there is a wider public interest in the maintenance of confidentiality is not as clear or predictable. That is especially so in a case where the documentation of which production is sought was initially obtained or produced pursuant to the exercise of powers of compulsion where confidentiality has been promised or is implicit. Important policy objectives are in play in the context of the use that may be made of documents obtained

pursuant to the exercise by the relevant authorised body of powers of compulsion for the purpose of a regulatory investigation and/or criminal prosecution. As noted in *Tchenguiz No 2*:

> "There is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of the information otherwise than in the resultant prosecution."

(7) In the *Real Estate* case (*supra)*, Arden LJ posed and answered the question as to the object of that protection and its basis in the public interest in the similar context of an investigation by the FSA (at [31]), though it is to be noted that under the relevant section 348 FSMA the consent of the information provider is required unless a gateway is available:

> "What is the apparent object of preserving confidentiality in information provided to the FSA? The preservation of confidentiality appears to serve a number of purposes. First, it ensures respect for the private life of the person who was the subject of information…Secondly, restrictions on the disclosure of confidential information…are likely to assist in the process of regulation because of the encouragement that it is likely to give…to disclose timeously information which may be of importance to the regulator for the purpose of exercising its regulatory functions."

(8) The Court may, I would say must, in such a context take into account those considerations, and the impact beyond the particular case of giving primacy to the interests of the parties to the litigation. It may also take into account factors such as the following:

(a) even though CPR 31.22 is not itself engaged, where the documents in question have been obtained for one purpose (a criminal investigation and use in any subsequent criminal trial) but, if produced by a party in civil proceedings into whose possession they have come, are likely to be deployed for another, there are obvious possible echoes of or analogies with the collateral purpose rule;

(b) where the document is an interview or statement prepared in consequence of a section 2 notice (or some other process of compulsion) and but for the promise of confidentiality the document would probably not exist at all, or at least would not be in the possession and control of the person from whom production of the document is sought;

(9) What weight should be given to such factors depends on all the circumstances, and involves a difficult exercise in judicial judgment. Lord Wilberforce's explanation of the position in his speech in *Nassé* (at page 1067B-D) seems to me still to be the true guide in assessing the judgment to be made where confidentiality is asserted:

> "…there are many examples of cases where the courts have recognised that confidences, especially those of third persons ought, if possible, in the interests of justice [and, I would interpolate, in order to safeguard in a regulatory context the objects for which it was promised], to be respected…
> …

> It is sometimes said that in taking this element 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 the 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."

(10) The aversion to the weighing of factors which are not really commensurable has had to yield in some ways to the balancing of different interests so often required under the Human Rights Convention. However, the point that the balance is a judgment still remains. The fact that it is an exercise of judicial judgment that is required also clarifies that the Court must approach the matter by reference to all the circumstances of the case and without any presumptions one way or the other. In that context, I do not accept the argument floated by the SFO that *Frankson* should be read as suggesting that to outweigh the public interest in maintaining the confidentiality of statements made (in that case, to the police) in the course of a criminal investigation the statements or transcripts in question should be assessed to be "potentially critical evidence". Nor does Article 8 of the Human Rights Convention require any different or separate balance to be struck or judgment made either, although Convention jurisprudence has (as Munby LJ, as he then was, put it (at [50]) in *Dunn v Durham County Council)* served to emphasise that:

> "…disclosure is never a simply binary question: yes or no. There may be circumstances…where a proper evaluation and weighing of the various interests will lead to the conclusion that (i) there should be disclosure but (ii) the disclosure needs to be subject to safeguards."

(11) Nevertheless, the trend of the decisions confirms that it is probably only in circumstances where the judge is not only persuaded of strong or 'weighty' considerations against disclosure (whether by reference to confidentiality or 'the compulsion principle') but also unpersuaded of there being any litigious advantage to be gained by disclosure which could not be obtained in some other less intrusive way that the Court will refuse production in a party/party case. Furthermore, if provisionally thus unpersuaded, a judge should ordinarily inspect the underlying material to satisfy himself further: and see *per* Neuberger J in *B & C Holdings* at page 109 *a-b.*

(12) Generally, or by way of summary, in the case of an application by a party for production of documents from another party which accepts that the documents are relevant the balance is very likely to favour production, unless the same information is available from another source without disproportionate difficulty; but the Court will seek to impose appropriate protections insofar as compatible with the needs of justice, including the public interest in a transparent and open process, and the interests of litigants in having their disputes conducted on the basis of all relevant materials.

Application of these principles in the present case

80. It is then necessary to determine how these principles should be applied in the present case in light of the objections put forward.

81. In agreement with the Claimants, and I think the SFO as a quasi-*amicus*, this case does not (subject to paragraph 82(10) below) in form or substance fall within or engage the test prescribed by, and the cases decided in relation to, CPR 31.22.

82. Nor, strictly, is CPR 31.17 engaged. Disclosure and production are sought from an existing party to the proceedings. Accordingly, the test of necessity, which (as noted above) is expressly retained in CPR 31.17(3)(c), but not in CPR 31.6 or 31.12, is not expressed to apply. The question is therefore whether in the particular circumstances the objective of dealing with the case justly and at proportionate cost can be achieved without disclosure of the relevant documents.

83. I address first the issue of public interest confidentiality in the context of the fact that the documents in question were obtained or created under compulsion. As to this:

    (1) The SFO was plainly entitled and in the event obliged to release to the Defendant the documents it had obtained from the TPOs and others by compulsion and on terms of confidentiality. Every TPO must be taken to have accepted that the SFO was entitled to make available such documents through and for purposes within the 'gateways' provided by section 3(5) CJA 1987: negotiations for and then conclusion of the DPA opened such a gateway.

    (2) The duty of confidentiality imposed on Tesco in the SFO's letters of 24 and 25 May 2016 (see paragraph 20 above) was expressed to be subject to being compelled by law or Court order to disclose (which I interpret to mean, and I consider would plainly have been taken to mean, disclose and produce). The Defendant gave notice accordingly having regard to its legal obligation to disclose.

    (3) The fact that the documents were only brought into existence because of the criminal proceedings, and are only in the possession of the Defendant through what the Solicitors acting for TPOs 7, 9, 15 and 16 have described in correspondence with the GLD as "'windfall' disclosure via the DPA process", does not relevantly impact on the question whether their disclosure is, in the events that have happened, 'necessary' for the fair disposition of the proceedings.

    (4) The documents in question undoubtedly are likely to contain material 'necessary for the fair disposal of the action', at the very least in terms of the approved test: the Claimants are likely to gain a litigious advantage by their production, and furthermore, since the Defendant already has the documents in its possession and control the Claimants would suffer an unfair disadvantage if they were denied material documents which the Defendant already has. In particular:

        (a) the evidence taken by the SFO from individuals it chose to interview for the purpose of investigating alleged criminal acts committed by the Defendant, TSL and their executives seems likely to include accounts from persons who may not give evidence at the civil trial about meetings of which there are thought to be no contemporaneous notes, and who were key personnel;

        (b) a preliminary review of the SFO Documents has suggested that relevant documents may well have been deleted or fabricated as part of the alleged fraud within TSL, in which case it is obviously important that contemporaneous material (such as the SFO Documents also include) be made available to the Claimants and the Court;

(c) in the round the SFO Documents were such as to persuade TSL to enter into the DPA after being warned by the SFO that it considered *"that we have sufficient evidence for a realistic prospect of conviction against [them] for the offences set out in the draft indictment"*;

(d) further, the transcripts of interviews offer a considerably more contemporaneous record than witness statements now can;

(e) it appears from the preliminary review undertaken by the Claimants that many of the exhibits to the witness statements comprised in the SFO Documents consist of internal documents from the relevant period between April 2013 and September 2014. Such documentation is not only likely to be relevant: it is also difficult to see any sustainable basis on which internal Tesco documents should be protected by confidentiality.

(5) I further accept that each of the interviews, witness statements and exhibits in the SFO Documents forms part of an entire investigative process that must be looked at as a whole and may not be capable of being fully and fairly understood in part. As in the *Wallace Smith* case, the documentation as a whole is "undoubtedly likely to contain material necessary for the fair disposal of the action".

(6) In such circumstances, the public interest in confidentiality, though usually of particular weight in the context of documents obtained by compulsion, must yield to the public interest in ensuring (to quote Scott Baker LJ in *Frankson* at [13]) that

> "as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result."

(7) In reaching that judgment, I confirm that I have taken into account not only the weight to be attributed to the fact of compulsion, but also the other arguments put (most cogently perhaps in an Annex to a letter written by the Solicitors to TPOs 7, 9, 15 and 16) as to (a) the expectation of privacy and confidentiality (b) the public interest in encouraging witnesses to cooperate and speak freely and openly to those investigating fraud and other criminal acts (c) the possibility that disclosure leading to use otherwise than by the prosecuting authority such as is proposed may discourage such free and open co-operation and possibly undermine public confidence in the criminal justice system and (d) the enhanced risk of invasion of privacy in a case with so many claimants.

(8) In view of that judgment, there is no need for me to inspect the documents: the general description provided is sufficient for these purposes, and such an exercise would not be useful or warranted.

(9) All this said, I shall require restrictions to protect privacy and confidentiality to the extent practical: I address the details later.

(10) For completeness, I should confirm that, even if (contrary to my own view and analysis) CPR 31.22 were applicable by analogy, the importance of the documents would, in my view, be sufficient to warrant release of the undertaking against collateral use to the extent necessary to enable production in these proceedings, subject to the restrictions later elaborated. In the language of the rule, there are, in the special circumstances of this case, "cogent and persuasive reasons for permitting collateral use of the documents", subject to such restrictions. There is force also in the SFO's observation that in this case, if the Defendant did not currently have the

disputed documentation in its possession, the Claimants, being aware of their existence at least as a class, could have sought them from the SFO pursuant to a third party disclosure order under CPR 31.17, and it would be strange if the documents were better protected by dint of their disclosure as part of the DPA process than they would have been were this alternative course to have been taken.

TPOs' particular objections

84. Before considering whether any protections may be provided for to seek to reduce any invasion of privacy or breach of confidentiality, I confirm that in reaching these conclusions I have had in mind and taken careful account of the more particular objections floated or advanced on behalf of specific TPOs.

85. In that regard, I can state first my views in respect of TPOs who I have taken to object but who do not rely on any personal confidence or special privacy:

    (1) Certain of the TPOs (1, 4, 5, 8, 11, 13, 14, 21, 22, 23, 24 and 25) have referred to and appear to rely on the possibility that production in the manner envisaged of the SFO Documents could prejudice the continuing criminal proceedings. I do not consider there to be any real likelihood of this. I accept the Claimants' submission that the Additional Confidentiality Club Order (see paragraph 31 above), the purpose of which is to ensure that documents disclosed in these proceedings (including any Third Party Documents as defined in the Additional Confidentiality Club Order) remain confidential and do not enter the public domain until after the conclusion of the criminal proceedings, provides a sufficient barrier against and adequate resolution of these concerns. Further:

        (a) the relevant SFO Documents relating to the auditors are relevant, indeed critical, to the fair disposal of the civil proceedings. They give factual and technical evidence going to the false statements and fabricated audit evidence that were allegedly used to hide 'pull forwards' from the audit team. They also explain what they discovered in the course of their investigation of TSL after 22 September 2014;

        (b) the vast majority of the SFO Documents that relate to TPOs 1, 8, 13 and 22 are contemporaneous internal Tesco documents that were collected by the auditors in September 2014 as part of their investigation and identified as "*super-hot docs*". I accept the submission that there is no basis for an assertion of confidentiality in this material, which is a repository of key contemporaneous documents that was collected from Tesco and TSL immediately after the fraud was discovered; and that the disclosure of this material is particularly important in circumstances where the documents allegedly show that there was a practice of deleting and fabricating documents to deceive the auditors and avoid leaving a paper trail;

        (c) more particularly, the transcripts of the SFO's interviews with TPOs 23, 24 and 25 (conducted in July 2015), and the witness statement of TPO 25 (in July 2015), are likely to be of central importance: as it was put in the MLB Claimants' skeleton argument, "A key issue in the criminal proceedings is the extent to which those individuals knew that Tesco's profits were overstated. Accordingly, there is an obvious overlap with these proceedings… The transcripts of those interviews, and the witness statement of TPO 25, constitute the most closely contemporaneous witness evidence that is available for events which

are at the heart of these civil proceedings, and which was provided by individuals who appear to have been central to those events."

(2) Certain of the TPOs (TPOs 1, 8, 13 and 22) contended that the Defendant should have been required to explain the perceived relevance and materiality of the documents before the Court should be required to rule on the matter: I have rejected this argument previously and would do so again. Relevance has never been in issue.

(3) TPO 5 refers to the fact that the MLB and SL Claimants could approach him to provide evidence on a voluntary basis, and may also be able to obtain his evidence through a witness summons: so there are other ways of obtaining the information without undermining confidentiality. As to this, I accept the MLB Claimants' contention that even if they could obtain evidence in these ways, that would not be an adequate substitute for the SFO's interview transcript, which is the most closely contemporaneous record of TPO 5's evidence that is available.

86. Lastly certain TPOs (TPOs 7, 9, 10, 15, 16, 17, 18 and 19) have suggested personal reasons based on private interests for their objections: I deal with these under headings below, both to explain why I have not been persuaded that any is such as to tip the balance against production, and also with a view to assessing whether any, and if so what, protective measures might be proportionate and effective.

TPOs 7, 9, 15 and 16

87. TPOs 7, 9, 15 and 16 were represented by the same highly regarded City solicitors' firm. TPOs 9, 15 and 16 have all consented to their witness statements being disclosed in these proceedings, but they object to disclosure of their SFO interview transcripts. In the case of TPO 9, objection is also taken to disclosure of an exhibit to his witness statement. (TPO 7 has not prepared a witness statement.)

88. I accept the MLB Claimants' argument that the evidence of each of these TPOs is important:

(1) TPO 7 was a direct report of xxxxx and worked as an accountant in the department of Tesco's UK business responsible for negotiating with suppliers (which as noted above is where the majority of the profit overstatement is thought to have arisen). I am told that TPO 7's interview transcript includes evidence regarding: (i) the practice of recording income in the wrong accounting period, and the extent to which this practice was known about within Tesco and (ii) his involvement in the preparation of the legacy paper, which led to the profit overstatements coming to light.

(2) TPO 9 worked in the same team as xxxxx and was also a direct report of xxxxx. TPO 9's evidence concerns, *inter alia*: (i) the practice of recording income in the wrong accounting period, and the extent to which this practice was known about within Tesco; and (ii) his involvement in the preparation of the legacy paper, which led to the profit overstatements coming to light.

(3) The exhibit to TPO 9's witness statement is a notebook that was referred to in TPO 9's interviews, suggesting that without it the interviews would be incomplete.

(4) TPOs 15 and 16 were xxxxx. Their evidence is to the effect that the practice of pulling forward income (i.e. recognising income in the wrong accounting period so as to inflate profits) was widespread (and was widely discussed) in the department of Tesco's UK business responsible for negotiating with suppliers.

(5) I am told that the interview transcripts for the interviews with TPOs 9, 15 and 16 are voluminous and cover over 650 pages of text: it is apparent on the face of the documents that the interview transcripts are much more expansive than the witness statements, and (given the purpose of the interviews) it is therefore likely that they contain additional detail and nuances that are important to the case.

89. Nevertheless, and in addition to objections based on public interest confidentiality which I have already taken into account, along with expectations of privacy and confidentiality, each objects to disclosure on the basis that the interview transcript is said to contain personal information which is irrelevant to the civil proceedings, including information about: (a) their professional history, external career opportunities and aspirations, family life and situations, financial position and prospects, and mental and physical health; and (b) their several opinions about the business, their colleagues, and their mental health. It is also suggested in a detailed annex to a letter to the GLD from the solicitors acting for these TPO that the transcripts in question:

> "generally, contain discursive and in some cases slightly confused evidence, as our client made their best attempts to respond to the SFO's choice of questions in respect of events from years earlier in the context of a compelled interview, with limited documents."

90. In the same annex the point is also made that the SL Claimants in particular are very numerous and that:

> "disclosure of the Transcripts in the Civil Proceedings would therefore represent a wide dissemination of information that was given in confidence and contains private details about the lives of our clients, their thoughts, opinions and feelings."

91. However, these TPOs' objections are stated without identifying particular passages and without proposing any redactions which would alleviate these concerns. The solicitors acting for the three TPOs have confirmed by letter to the GLD that each of their clients would maintain their objections even if limited redactions were made, and that in any event they were not in a position to advise on any redactions for want of funding. In view of the latter point, they have proposed that if disclosure is required by the Court, "the defendants in the first instance redact the material to remove any information which is (i) not strictly relevant; and (ii) personal and/or sensitive". In the last resort, they leave the matter to the Court:

> "If the Court is not minded to order that the Transcripts not be disclosed, we would ask that any sections of the Transcripts which are not directly relevant to the Civil Proceedings be redacted. That is on the basis that the Transcripts are confidential…, and in any balancing act undertaken between the public interest in their continued confidentiality on the one hand, and the public interest in the fullest possible evidence being available in the Civil Proceedings on the other, the former must prevail in respect of any and all information which is not strictly required to be disclosed in the Civil Proceedings."

92. That proposal to remit the task of redaction to the Court or the Defendant puts the Court in some difficulty. If discrete passages can be identified in the transcript which can be redacted without materially affecting the sense or substance of the evidence relevant to the issues in the proceedings, I agree that such redactions should be made as a condition of disclosure. However, and though I appreciate that funding constraints may have dictated this course, leaving the task of redaction to the Court or the Defendant, as is proposed, is less than satisfactory. Neither the Court nor the Defendant can realistically identify every particular or peculiar sensitivities which may seem obvious to the person whose privacy is sought to be protected, especially where the sensitivity arises in more general circumstances or in a context of which the Court or the Defendant cannot reasonably be expected to be aware.

93. I should add that the difficulties seem to me to be particularly acute in the case of the documents in question, since after a brief review of them, I have found it difficult to identify matters of real personal sensitivity; as I put it at the hearing, there are passages which simply provide what might be described as domestic, sometimes hum-drum, context but:

> "It's not the sort of stuff which is a window into their souls or private lives or families or work or anything like that…"

94. I consider that it must be left to the relevant TPOs to identify what they regard as truly private, confidential passages that may be redacted without undermining the substantive content of the document in terms of the issues in the proceedings. I am prepared to give some additional time to enable these TPOs to identify any specific text which they consider to be seriously prejudicial, but not to exercise my discretion against production, nor to agree to deletions or redactions which erode the potential value of the document in terms of the fair disposition of the case.

TPO 10

95. TPO 10 (who, unlike TPOs 9, 15 and 16, has not prepared a witness statement) objects to the production of his SFO interview transcript on two grounds:

    (1) He says that "*he had little direct knowledge of the financial side of the business and no knowledge of the alleged practices that form the basis of these claims*", and that, accordingly, "*a fair trial of the Claims could take place without disclosure* [of TPO 10's interview transcript]";

    (2) In addition to relying generally on public interest confidentiality, he also refers to the "*considerable embarrassment and discomfort which would be caused to* [TPO 10] *if the fact that he was called to attend a s2 interview and the contents of that interview were to enter the public domain*"**.** However, TPO 10 does not explain the reasons for such embarrassment/discomfort, nor does he identify any specific concerns about private or sensitive information in the interview transcript.

96. From a limited review of his transcript it appears that:

    (1) TPO 10 refers to awareness at board and audit committee level that commercial income was "*an area of risk*".

    (2) He also refers to awareness at board level during 2014 that if Tesco's profits fell below a certain level, Tesco may lose its credit rating, which would adversely affect Tesco's ability to raise debt funding. The relevance of this is that it provides a potential motive for persons with direct management

responsibility ("PDMRs") to permit the publication of untrue or misleading profit information.

97. As in the case of TPOs 7, 9, 15 and 16 I shall allow a limited time to TPO 10 to identify any specific text which he considers to be seriously prejudicial to his private interests, but not to exercise my discretion against production, nor to agree to deletions or redactions which erode the potential value of the document in terms of the fair disposition of the case.

TPO 18

98. TPO 18 objects to disclosure and inspection in these proceedings of: (a) the transcripts of his interviews with the SFO conducted under s.2 CJA 1987; (b) the witness statement that he provided to the SFO; and (c) the exhibits to that witness statement.

99. As the Claimants were quick to point out, and as must colour my approach very significantly, TPO 18's evidence is of central importance to this case. TPO 18 is the whistle-blower whose actions led to Tesco's profit overstatements being revealed to the market, and whose team compiled the legacy paper that was central to that process. He was the chief witness for the prosecution at the first criminal trial. He is a senior accountant who reported directly to TPO 25 (the UK Finance Director and an alleged PDMR), and who attended a number of meetings with TPO 23 (the UK Managing Director and an alleged PDMR) that were relied upon by the prosecution in the first criminal trial as establishing knowledge of the overstatements on the part of TPO 23. His interview transcripts and witness statement deal extensively with these matters.

100. TPO 18 raises the following objections to disclosure in these proceedings:

(1) In addition to general reliance on public interest confidentiality, and especially his expectation that the information he provided to the SFO would be used only by the SFO and only for the purposes of the criminal investigation, he particularly relies on his status as a whistle-blower.

(2) TPO 18's solicitors (another highly respected firm of City Solicitors) have in that regard especially emphasised (in a letter to the GLD dated 14 September 2018) "the clear public interest in protecting the rights of whistle-blowers" and his "special role".

(3) They have also suggested (in the same letter) that "it is clear that a substantial body of evidence exists in the possession of Tesco which will be duplicative of evidence provided by [him] to the SFO."

(4) He also refers to his human rights, particularly his right to privacy. However, he does not identify any particular information that is said to be private or particularly sensitive, nor does he suggest that disclosure will cause him any specific prejudice.

101. The MLB Claimants, supported by the SL Claimants, stress the following points:

(1) TPO 18 was the key prosecution witness in the first criminal trial and gave oral evidence over the course of some four weeks. TPO 18's oral evidence was given in open court and to that extent is already in the public domain, albeit that reporting restrictions have been in place pending the conlcuion of the criminal trial which prevented any further dissemination of that evidence. Such restrictions have now fallen away The information in TPO 18's documents is no longer confidential, alternatively, the confidentiality interest

is of much less weight than that which applies to, for instance, a business secret.

(2) Moreover, the exhibits to TPO 18's witness statements all appear to be documents that were already in Tesco's possession before they were provided by the SFO, and which have been disclosed as part of Tesco's disclosure.

(3) Even if the information that TPO 18 provided to the SFO does remain confidential, the balancing exercise that the Court is required to undertake favours disclosure, because the vital importance of TPO 18's evidence for these proceedings outweighs the public interest in maintaining that confidentiality.

(4) TPO 18 is not entitled to additional protection by reason of his having acted as a whistle-blower internally within Tesco. His position is the same as that of any other person who provides information to a prosecuting authority, i.e. there is a public interest in maintaining his confidentiality, but that public interest is not immutable, and on the facts of this case it must give way to the public interest in a fair trial on full evidence in these civil proceedings.

(5) TPO 18 does not identify (otherwise than entirely generically) the "*duplicative*" evidence he has in mind, making it impossible for the Claimants to test this point by reference to specific documents. In any event, the documents in Tesco's possession would not be an adequate substitute for TPO 18's interview transcripts and witness statement, which include oral explanations of documents and are likely to represent the fullest and most closely contemporaneous account of events that is available for TPO 18.

102. I enquired of the SFO at the hearing whether there were any special protections for whistle-blowers in such a position. Ms Wakefield told me that, there being no public interest immunity interest or concerns, there was no specific or special protection of which the SFO was aware. Very fairly she put it this way:

> "[He] doesn't fall within particular statutory protection for whistleblowers and so on. We're not aware of any particular case saying that there's any particular body of rights held by a whistleblower. However, your Lordship may well think it relevant that he was a whistleblower, in that he came voluntarily, [and there is] the chilling effects argument that we've been discussing earlier in respect of public interest confidentiality…"

103. Although Mr de Verneuil Smith submitted that "when we get to probative value there's an embarrassment of riches in respect of this particular objector", I have had to consider whether there is anything in the transcripts which cannot be expected sufficiently to emerge from the documentation and from the evidence he has already given, and weigh that against what I would be minded to accept is a particularly "weighty" factor of safeguarding a whistle-blower's privacy and confidentiality. In my judgment, however, the transcripts are likely to offer a plain and obvious litigious advantage to the Claimants; whilst their non-disclosure would put the Claimants at a litigious disadvantage to the Defendant. The identity of the whistle-blower is no secret; and the confidentiality argument has been considerably eroded by the fact of his previous evidence in Court. I would be disposed to permit TPO 18 an opportunity to suggest redactions for entirely private material: but not such as to erode the substantive value of the transcripts; and subject to that I would not prevent disclosure.

TPOs 17 and 19

104. TPOs 17 and 19 object to disclosure on the basis that: (a) the contents of their SFO transcripts attract litigation privilege; (b) the SFO transcripts should have been disclosed to Tesco subject to a confidentiality undertaking; and (c) they would not have been compelled to give such extensive evidence in the context of the civil proceedings.

105. I agree with the Claimants that none of these points is such as to prevent disclosure:

(1) There is no privilege in the transcripts, as Counsel for the SFO accepted.

(2) The SFO transcripts were disclosed to the Defendant on terms of confidentiality; but that is outweighed by the factors I have discussed at length above.

(3) Whether or not TPOs 17 and 19 could have been compelled to give such extensive evidence in the civil proceedings is irrelevant. The question is whether or not they have any private interest and/or public interest confidentiality that could potentially override the disclosure of relevant materials in the civil proceedings.

106. TPOs 17 and 19 have not otherwise articulated any grounds for private interest confidentiality nor for public interest confidentiality not previously addressed. I would accept that their SFO transcripts are likely to contain material of considerable potential relevance for the reasons stated by the SL Claimants, being:

(1) TPO 17 was xxxxxx. He was a direct report to TPO 25, one of the individuals facing criminal charges in relation to that accounting overstatement. He says he also had regular contact with TPO 18 (the whistle-blower) and TPO 23 (the Managing Director of the Defendant's UK business). His transcript describes what the Claimants contend are important communications in which he was involved, and which bear importantly on the issues in the case. TPO 17 did not provide a witness statement in the criminal proceedings and, unless he is called to give evidence, his SFO transcript is the only record of his contemporaneous evidence that is likely to be available in the civil proceedings.

(2) TPO 19 was the xxxxxx**.** He gives important evidence on the importance Tesco attached to avoiding a credit rating downgrade. TPO 19 gives evidence on a number of what the Claimants consider to be crucial documents in which the "*legacy"* (i.e. the black hole caused by the manipulation of commercial income through accruals) is alleged to have been reported to senior management within TSL and Tesco. I am told by Tesco that in his evidence he states that he was unaware of the manipulation of commercial income and accepts that, xxxxx, he "*should have known"* about it because it should have been escalated to him. I understand from the Claimants that he also gives extensive evidence on what other xxxxx knew at the time. As with TPO 17, TPO 19 did not give a witness statement and his SFO transcript is likely to be the only record of his contemporaneous evidence available in the civil proceedings.

107. There was some suggestion that TPOs 17 and 19 might have made witness statements which they were prepared to disclose (though they had not yet done so) and which might enable part of the information to be conveyed in that way consensually. I take this into account; but I do not attach great weight to it, in view of the likely comprehensiveness and greater contemporaneity of their SFO transcripts.

108. In the circumstances, I accept the Claimants' argument that TPO 17 and 19 have not raised any private interest and/or public interest confidentiality that would give

any grounds to refuse disclosure of their SFO transcripts in circumstances where their evidence is clearly necessary for the fair disposition of these proceedings.

(6) Should any further restrictions be imposed?

109. I have indicated above that those of the TPOs who have raised personal concerns and a general wish to redact discrete parts of their evidence should be afforded a reasonable (but short and finite) opportunity to identify them, subject to the constraints I have sought to state.

110. In that interval, it will be necessary for the SFO Documents in question to be kept tightly confidential on the same conditions as at present. That does not apply to SFO Documents not subject to such special considerations. But then the question arises what if any further restrictions might be imposed in order to protect confidentiality as far as practicably possible notwithstanding disclosure, as is required (as emphasised in *Frankson,* especially at page 1968 A-B).

111. In *Frankson* the judge at first instance imposed extensive restrictions (which were apparently approved by the Court of Appeal in dismissing the appeals), to protect confidentiality and with a view to maintaining the court's control over what use could be made of the material at trial, including the following (see page 1959 F-H):

(1) The documents were to be used solely for the purposes of inspection, drafting of witness statements and preparation for trial;

(2) No one provided with the transcripts was to disclose their content to anyone save for the above purposes;

(3) There was a strict limitation on the persons to whom copies of the transcripts could be provided;

(4) The transcripts were not to be treated as coming into the public domain, and no use was to be made of them that would result in their coming into the public domain without the consent of the interviewees or the court;

(5) The SFO has suggested a further possibility, which is for permission to be given only for review of documents in the first instance, with the parties coming to a view on what they wished to use in the proceedings (over a rather longer time frame than has been possible in preparation for the present hearing) and an application to be made to court to enable such use at the relevant time;

(6) I consider that this is an area on which I need further assistance. I took it to be agreed that any disclosure would be into the Additional Confidentiality Club; and there was some discussion also as to whether any documents shown to be of particular sensitivity might be subject to the additional protections of the Enhanced Confidentiality Club. I should like further assistance as to whether the latter is necessary, and also as to whether now is an appropriate time for any further order pursuant to CPR 31.22(2) (by analogy with the case of *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 WLR 2253).

Summary of conclusions

112. In conclusion, therefore, I do not consider that any of the objections to disclosure of the documents in question is such as to warrant what would be an unusual, and it may be in the context of an application by one party against another, unprecedented, order preventing their production.

113. Subject to the possibility of imposing restrictions, I am firmly of the view that it would not be just to deny the Claimants production of the documents which the Defendant

has, and which are likely to be of considerable litigious advantage to such Claimants (and may well also have been of litigious advantage to the Defendant itself).

114. However, I should like to consider further whether there may be means of mitigating the adverse consequences. It may be that this may be done by further written submissions, but I think it likely that a short further hearing may be required.