Neutral Citation Number: [2019] EWHC 3315 (Ch)

Claim No. FL-2017-000001
Claim No. FL-2016-000019

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 3rd December 2019

Before:

THE HONOURABLE MR JUSTICE HILDYARD

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Between:

THE PERSONS IDENTIFIED IN SCHEDULE 1 OF THE CLAIM FORM (the "SL Claimants")	**Claimants**
- and –	
TESCO PLC	**Defendant**

And Between:

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

-and-

TESCO PLC **Defendant**

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RICHARD MOTT and SIMON GILSON (instructed by **Stewarts**) appeared on behalf of the SL Claimants

PETER DE VERNEUIL SMITH QC and DOMINIC KENNELLY (instructed by **Morgan Lewis & Bockius UK LLP**) appeared on behalf of the MLB Claimants

DAVID MUMFORD QC, MICHAEL WATKINS and NIRANJAN VENKATESAN (instructed by **Freshfields Bruckhaus Deringer LLP**) appeared on behalf of the Defendant.

Hearing dates: 5th November 2019 – 7th November 2019
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Approved Judgment

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

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MR JUSTICE HILDYARD:

Scope of this judgment and my rulings

1. In these two actions, the Claimants in FL-2017-000001 ("the SL Claimants") and the Claimants in FL-2016-000019 ("the MLB Claimants") claim against the Defendant company ("Tesco") under section 90A and Schedule 10A of the Financial Services and Markets Act ("section 90A", "Schedule 10A" and "FSMA" respectively) to recover substantial losses in respect of their investment decisions in relation to shares in Tesco which they made in alleged reliance on information published by Tesco and falling within Schedule 10A.

2. These are my rulings on the matters in dispute at the fourth CMC ("CMC4") in these proceedings, which are fixed to come on for trial commencing in June 2020.

3. I do not address any of the numerous matters which were to be debated but which were sensibly agreed by the parties, either before the hearing of CMC4 or in some cases during it; but I record my thanks for the co-operative manner in which these issues were addressed. Even with that assistance, CMC4 occupied the Court for three sitting days and one reading day. The 24 bundles prepared for the hearing amounted to well over 7,000 pages; and two files of authorities were also provided. This is indeed litigation on a grand scale. But even in such a context, proportionality and an appreciation of finite resource, and what is possible at this stage in the proceedings without dislocating preparations for trial and indeed the trial itself, must temper the natural wish of the parties not to leave any stone unturned; and those considerations have informed my approach, as will be apparent.

Issues in dispute at CMC4

4. In broad terms, the issues in dispute at CMC4 can be described as follows:
    (1) the SL Claimants' specific disclosure applications so far as have not been agreed;
    (2) Tesco's specific disclosure application so far as it has not been agreed;
    (3) Tesco's application to strike out part of the SL Claimants' pleadings;
    (4) the case management of the Rathbones claimants' claim in the SL Proceedings;
    (5) Tesco's two applications for Letters of Request;
    (6) the adequacy of the current trial time estimate; and
    (7) other matters.

Preliminary observations as regards applications for specific disclosure

5. I would make four preliminary points in relation to the applications for specific disclosure. First, and most fundamentally, a new pilot scheme for disclosure in the Business and Property Courts has been introduced (as CPR PD51U), and (having commenced as and from 1 January 2019) is applicable in the Financial List and to these proceedings (except that pre-existing orders for disclosure are left undisturbed unless varied or set aside). It is not disputed that wide search-based disclosure under Model E of PD51U, rather than any other model, is appropriate now as it has been in the past in a case of this magnitude and complexity. But it is of importance to note that the pilot provides that extended disclosure can only be justified if it is necessary for the

fair resolution of an "Issue for Disclosure" as set out in a Disclosure Review Document or identified by the court, and will only be given if it is reasonable and proportionate having regard to the Overriding Objective and its specific factors adumbrated in paragraph 6.4 of the PD.

6. Secondly, and as emphasised by Mr David Mumford QC on behalf of Tesco, it is relevant and complementary to both the above points that the disclosure exercise thus far undertaken by Tesco has been in intended compliance with a basic scheme and architecture set out in a document entitled "Defendant's Proposals for Defendant's Disclosure" to which all the parties contributed and in effect agreed. Mr Laurence Rabinowitz QC on behalf of Tesco described this as a "top down" approach, the central objective being disclosure of documents which in the *RBS* case I described as going to the "real stuff of the case", rather than disclosure of every document relating to the myriad accounting transactions whatever the degree of granularity. Whatever else, the pilot does not introduce or encourage a more generous or less focused disclosure regime than previously; and at this stage of proceedings departure from the agreed architecture is liable for obvious reasons to be disruptive and thereby disproportionate and inefficient.

7. Thirdly, in accordance with the scheme or architecture described in the preceding paragraph, Tesco has already carried out a very substantial disclosure exercise in these proceedings. As at September 2019, it had searched over a total population of some 7,500,000 documents (before the application of search terms and date ranges) involving 86 custodians, reviewed over 1,000,000 documents and produced some 30,000 documents to the Claimants across 22 tranches over 20 months. Any further disclosure needs to be justified taking into account the detail already provided.

8. Fourthly, the only issues as to disclosure arise between the SL Claimants and Tesco. No such issues arise between the MLB Claimants and Tesco. Whilst there are differences between the two proceedings, there is much more that is common to them than separates them, especially as regards the need for the Claimants in both to prove (a) the nature and extent of the overstatements of profit and expected profit on which the Claimants rely and (b) that the alleged PDMRs had knowledge of them, which is the focus of almost all the disclosure issues. Whilst I must and do consider necessity and proportionality by reference to the particular proceedings, the fact that in one set no further specific disclosure has been considered necessary is of some relevance in the general consideration of necessity and proportionality.

SL's applications for specific disclosure

Application for documents held other than by custodians

9. Turning then, with those factors in mind, to the particular areas of dispute, I shall deal first with the SL Claimants' application for documents for the period 19 September 2014 to 22 April 2015 "relevant to the knowledge of…individuals at the level of Category Director or above in the UK Commercial Function" (disclosure already having been given or agreed to be given in respect of the knowledge of some 33 persons nominated as disclosure custodians by reason of their pleaded involvement in the accounting practices said to have resulted in overstatements of trading profit).

10. On behalf of the SL Claimants, Mr Richard Mott's essential justification for seeking disclosure of documents going to the knowledge of individuals beyond the existing custodians and lower (as it were) in the hierarchy was that they would or might demonstrate what he described as the "endemic" knowledge "throughout the UK commercial and commercial finance functions within Tesco'' and/or a "corporate culture" of practices alleged to constitute wrongful accounting. If, for example, even the "large number of the members of buying teams beneath the category directors" had such knowledge, that would demonstrate it to be such common knowledge as must have been shared by those higher in the hierarchy, and especially the pleaded PDMRs.

11. Mr Mott referred also to a report dated 15 March 2017 (referred to as "the Remediation Report") prepared by Tesco's new management to provide a better understanding of what had gone wrong in Tesco and to assist a "process of renewal and change" and the strengthening of Tesco's compliance framework to ensure that the overstatement revealed "can never happen again". The Remediation Report does record that one of the matters that had become apparent was "that there was evidence of involvement in the practices that led to the overstatement at a more junior level within the Company" which Mr Mott prayed in aid as supporting enquiry at a lower level in the corporate structure than the scheme of disclosure previously agreed had envisaged.

12. Mr Mumford on behalf of Tesco objected to this extension of the ambit of disclosure. He characterised the plea of "endemic" practices and knowledge as "inherently vague" and disclosure of documents going to the knowledge or involvement of buyers or more junior employees as an enormous task which could not be justified: the documentation would be insufficiently relevant; the search would be disproportionate; "endemic" practices or knowledge is not of itself a central issue; and the proposed laborious exercise would be a departure from the basis scheme of agreed disclosure referred to above. Such a departure was not justified by the Remediation Report: the same report stated that others more senior had "driven the conduct" and it was documentation relating to their knowledge which had been disclosed.

13. I can see that proof of pervasive knowledge of improper practice could have an evidential bearing and purpose in terms of the fundamental allegations. But otherwise I agree with Mr Mumford. In my judgment, the disclosure sought would be very likely to require a huge and disproportionate search of transactions and their circumstances at a granular level which cannot be justified. The disclosure already agreed should be well sufficient to enable the issue of PDMR knowledge to be fairly tried; or at any rate, this additional layer of disclosure cannot be said to be necessary for the fair disposal of the real issues. I consider that the departure from the scheme previously agreed is unwarranted, especially at this stage before the trial.

14. I am not persuaded that the Remediation Report justifies the SL Claimants' application in this regard either; the fact that junior persons might have participated at the direction of those more senior is not sufficiently likely to tell one anything more about the knowledge of the PDMRs to warrant the exercise.

Application for documents referred to in the Remediation Report

15. That leads on to the second category of documents of which the SL Claimants sought specific disclosure: documents referred to in the Remediation Report constituting or evidencing Tesco's reviews of "the emails of specific Commercial and Finance employees from the period 1 June 2014 to 19 September 2014… [to determine] … whether any further disciplinary steps were required."

16. Tesco's position in this regard moved closer to that of the SL Claimants in the course of CMC4, and it agreed to disclose the outcomes and to identify and search the files of the "specific Commercial and Finance employees" recorded in paragraph 14 of the Remediation Report as having been investigated in determining possible disciplinary proceedings, but subject to a disputed restriction that this should apply only "insofar as they relate to any of the individuals identified in Schedule 1" (the list of custodians). Similarly, Tesco agreed to disclose documents constituting or evidencing Tesco's consideration of and/or the outcome of reviews to that end undertaken by Tesco, but again subject to the above restriction.

17. The SL Claimants sought the removal of that restriction in each case. Their argument was that the searches, reviews and disclosures should extend beyond documents relating to those named in Schedule 1 to "individuals at the level of Category Director or above in the Commercial Function" and also to "documents constituting or evidencing Tesco's consideration of, and decision on the "evidence of involvement in the practices that led to the overstatement at a more junior level within [Tesco]" referred to at paragraph 15 of the report." Thus, the SL Claimants sought in this context also to move further down the hierarchy to the Category Directors and possibly beyond.

18. Again, I do not consider the broader search and disclosure sought by the SL Claimants to be proportionate in the circumstances I have described. I would adopt the limiting words proposed by Tesco. Whilst there is some real prospect of documents relating to the individuals identified in Schedule 1 throwing evidential light on the persons to whom they reported and above, if that light does not reveal knowledge at their level or such a "culture" as the SL Claimants assert, I am not persuaded that illumination of those further down will be likely materially to assist.

Application for search of the Shared File Store

19. Thirdly, the SL Claimants sought an order requiring Tesco to image an electronic repository or shared network drive referred to as the "Shared File Store" and to carry out what they described (somewhat ominously perhaps in terms of the ultimate extent of the process thus sought to be commenced) as "preliminary word searches".

20. The background to this part of the application is a complaint by the SL Claimants that until they sought specific disclosure Tesco had not searched any central repository of electronic documents: its searches were confined to email accounts and other custodian-specific locations. Then, in correspondence in July 2019, Tesco agreed to search parts of another document sharing platform known as SharePoint, which was in use in various divisions and teams within Tesco during the relevant period. Tesco had made it plain in its original disclosure proposal that it considered it unlikely to be a source of relevant material since none of the alleged PDMRs used it; but acceded to search a sub-set of over 900 SharePoints, and in particular those relating to

departments which it thought might be most relevant, namely Corporate Secretariat, Group Commercial Finance – Insight, Internal Audit, UK Balance Sheet Governance, UK Central Finance, UK Finance Balance Sheet Control, Group Food HR, Group Food Finance, UK & Group Food Legal and Grocery, amounting to some 27GB of data. Tesco continued, however, to take the view that it would not be likely to be productive, and was not reasonable or proportionate, to process and search data from Shared File Store, which contained some 60TB of data.

21. The SL Claimants have dismissed as inherently unreliable the alleged PDMR's assurance that they did not use the Shared Drive Store, and made the point that others beneath them in the corporate hierarchy, including commercial directors, and their personal assistants (as well as those of the alleged PDMRs) would have done so. They have pressed for at least some review of Shared File and seek an order that Tesco:
    (1) index the shared file store;
    (2) run 8 keyword searches; and
    (3) provide the number of responsive hits to the SL Claimants for each directory and sub-directory / folder.

22. Tesco in turn have continued to resist this, on the same grounds as before, being that the Shared Filed Store was used predominantly if not exclusively by junior employees to store documents whilst they created and worked on them, and would be unlikely to throw up final documents not available from another searched source, even if a search was feasible without disproportionate time and expense (given the enormous size of the resource).

23. In the course of the hearing the SL Claimants further restricted their request; and in his reply Mr Mott suggested that what he presented as a much confined search be undertaken using only eight key words over just the selected file areas (out of a total of 1,276). He supported this course as "hopefully" focusing on "the real stuff of the case" and in particular "the plea that these wrongful practices were common knowledge at the layers of Tesco that we identify." However, Tesco rejected this too, essentially on the ground that this was not in reality a targeted search aimed at a defined category of documents but a fishing expedition with the hope of catching a sprat whereby to lead to bigger fish.

24. Of course, the fact that such a large repository remains unsearched might be thought to be a source of general concern. Against that, however, the extensive disclosure exercise already undertaken and the searches of other files identified to be, and inherently likely to provide, a better source, substantially attenuate any such concern. Further, I do not think I should assume that Tesco's considered evidence as to the use made of the resource and the unlikelihood of it being a repository of documents not found elsewhere in the email record and on personal laptops is inaccurate or to be discounted. Nor do I think it is impermissible to take into account that the existence of the Shared File Store and Tesco's reasoning why it should not be searched were made clear in its original disclosure proposal and not challenged for 18 months. I accept also that the search proposed has characteristics of a fishing expedition with all the danger that an apparently confined request will lead to an attritional and ultimately expensive but misplaced series of distractive enquiries in the now relatively short period before trial.

25. Accordingly, I do not propose to order searches of the Shared File Drive. In my view, the parties' efforts would not be likely to be productively focused on such an activity: the effort would in the end not be likely to be proportionate or worthwhile.

Application for documents evidencing briefing to Tesco's new CEO and CFO

26. A further area of disclosure sought by the SL Claimants concerned documents constituting or evidencing the accounts and/or briefings provided to Mr David Lewis ("Mr Lewis", Tesco's new CEO) and Mr Alan Stewart ("Mr Stewart", Tesco's new CFO) in respect of Tesco's wrongdoing prior to their assumption of office.

27. At CMC1, Tesco resisted both the inclusion of Mr Lewis and Mr Stewart as custodians, and the extension of the disclosure date range to 22 April 2015. I ruled against Tesco on both issues. Amongst other things, I accepted the MLB Claimants' arguments that "it is reasonably to be inferred that the new management will have investigated what the old management did, including the question of who knew about the overstatements" and "Messrs Lewis and Stewart were given ex post facto accounts of the profit overstatements and how they came about, and that this material is relevant to the issue of PDMR knowledge": Redfern Schedule Ruling items 12(i) and (g), and also item 41(g).

28. The SL Claimants' particular focus now is on documents which may reveal the understanding of these two directors, and the basis for it, when making public statements about Tesco's manipulation of its reporting in respect of commercial income at the end of annual accounting periods. They contend that such documents may reveal knowledge on the part of alleged PDMRs or persons reporting to them, and thus be highly relevant. Although Tesco had indicated such documents would be disclosed as part of its original disclosure proposals, none apparently has been.

29. Mr Lewis is not to be a witness at trial, and though Mr Stewart is, I am told that his witness statement does not address the market statements pleaded by the SL Claimants referred to above, or how he acquired the understanding which he expressed to the market. The SL Claimants contend that it is unsatisfactory for him to be cross-examined about his market statements without the Court having proper documentary evidence of what he was told.

30. Tesco, on the other hand, contends that none of the public statements made by Mr Lewis and Mr Stewart "suggests that Mr Lewis or Mr Alan Stewart were privy to some documents that descended to the knowledge of any particular individual or group of individuals"; and that in point of fact Tesco has already undertaken a search of documents in their possession and their custodian data, albeit only within narrow date ranges suggested by Mr Upson on behalf of the SL Claimants and anything relevant to the issue of knowledge has already been disclosed.

31. I do not see any or any sufficient basis for requiring any further search.

Application for production of the Majid Note despite Tesco's claim to privilege

32. I must next consider the SL Claimants' application for an order that Tesco produce a note of an interview between Kay Majid (a senior Tesco lawyer who reported directly to Mr Adrian Morris, Tesco's Group General Counsel) and Freshfields dated 23

September 2014 (which was referred to as "the Majid Note"), notwithstanding Tesco's assertion of privilege in that document.

33. The Majid Note records a "first account" given to Freshfields by Ms Majid of what she knew of the commercial income overstatements prior to 19 September 2014. It seems that Mr Morris also gave such an account which was also noted. The SL Claimants rely on the knowledge of them both in relation to their case on PDMR knowledge, on the basis that (a) Ms Majid explains her detailed involvement in commercial income issues, and she reported to Mr Morris whilst (b) Mr Morris spoke regularly with Mr Clarke and regularly attended Executive Committee Meetings, and that (c) Tesco's disclosure shows that for a significant period prior to the August Trading Update Mr Morris and Ms Majid knew, as a matter of fact, of the existence of the practices that caused the commercial income overstatements. The SL Claimants plead that Mr Morris either discussed those practices with Mr Clarke (who would have known they were wrongful as a matter of accounting), or refrained from doing so because he understood Mr Clarke already knew of them. The MLB Claimants advance a similar case.

34. The SL Claimants do not any longer dispute (at least for present purposes) that the Majid Note was originally privileged. However, they contend that confidentiality in the document has been lost because of its deployment in open court during the second criminal proceedings, and that as the document is no longer confidential, privilege in it cannot be maintained and the Majid Note must be disclosed.

35. The circumstances in which the Majid Note but no record of the note of Mr Morris's first account came to be referred to in open court can be summarised as follows:
    (1) Tesco provided the Majid note to the SFO pursuant to a limited waiver of privilege, but declined to waive privilege in the note of Mr Morris' first account ("the Morris note"). On 18 July 2018, the SFO issued an application for a witness summons against Mr Ian Taylor of Freshfields to compel production of the Morris note. That application was heard (and refused) by Sir John Royce (as the judge at the second criminal trial) on 30 July 2018.
    (2) In the course of argument, Mr Doble, counsel for Mr Bush and Mr Scouler as defendants to the witness summons for the Morris note, referred Sir John Royce to the Majid note, quoted paragraph 1 of it and invited Sir John to read the first three pages of the document to himself, which the judge did.
    (3) Mr Doble then described or summarised, without quoting, what the note records Ms Majid as having said about certain matters, drawing the judge's attention to what he described as "the first three pages of the document and (for example) to paragraph 20 (again without indicating its content in court).
    (4) Counsel attending for Tesco also referred to and read small extracts from the first three pages of the Majid Note describing Ms Majid's first reactions to the revelation by a whistleblower of the wrongful practices subsequently investigated by Tesco and set out in what has come to be referred to as "the Legacy Paper".

36. The SL Claimants contend that the Majid Note has lost confidentiality and is no longer privileged because in the circumstances described above it was 'summarised, partly read out and discussed extensively in legal argument' at the procedural hearing before Sir John Royce. Tesco submits that this contention is erroneous and that the

Majid Note remains confidential and privileged notwithstanding the reference to it in open court and the judge's expressed consideration of part of it. It is necessary to consider the dispute in more detail since it raises an issue of some importance.

37. The SL Claimants submit that reference to a document can destroy its confidentiality in two ways, relying on the analysis made by Leggatt J (as he then was) in *Serdar Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB). First, sufficient publicity may be given as to its contents and the information in it that it can no longer be regarded as confidential: for example, if a document is read out on the television news or in open court: see *Gotha City v Sotheby's and Another* [1998] 1 WLR 114 at 118F-H. That is a matter of fact and degree: again, see *Mohammed* at [19]. Secondly, confidentiality may be lost because references made in public, though not of themselves sufficient to destroy confidentiality, engage the principle of open justice which gives right of access to the evidence placed before the court and referred to during the hearing so that the way and basis on which the matter has been decided can properly be understood: and see *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 512e-f; also *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 WLR 2253. The SL Claimants submitted that both tests were satisfied in this case. They accepted that the Court had power (pursuant to CPR r.31.22) to make an order restricting or prohibiting the use of a document thus disclosed, even where it had been read to or by the court, or referred to at a hearing in public: but that required an application and none had been made.

38. Tesco, on the other hand, drew a distinction between information contained in a document and the document itself: public reference to such information might cause the loss of confidentiality in the information but not, or not necessarily, in the document in which it was contained. Here, the reference to, and the judge's reading to himself of, three pages of what Mr Mumford (on instructions) informed me was a total of nine pages of the Majid Note should not cause a loss of confidentiality in the document itself: only in the information conveyed, or at most, the three pages, and not the remaining parts of the document (the Majid Note).

39. Mr Mumford especially relied in this context on *Rawlinson and Hunter Trustees SA and others v Akers and another* [2014] 4 All ER 627, particularly at [71] to [73] in the judgment at first instance (Eder J, which was upheld on appeal), where (albeit in a part of the judgment which is strictly obiter) the distinction is drawn and a suggestion that it is too fine and lacking in merit is rejected, and where the point is made that the loss of confidentiality in information is not the same as deployment of a document such as to amount to waiver of privilege in that document. Mr Mumford relied also on a ruling made on 31 March 2010 by the Right Hon. Sir William Gage in relation to *HM's Attorney-General's advice of 2003* on the application of the ECHR to the British Army's operations in Iraq, drawing the same distinction.

40. Noting that of course CPR 31.22 does not apply to criminal proceedings, Mr Mumford drew my attention to the provisions applicable in that context, and in particular to The Criminal Procedure Rules [October 2015], and the Criminal Practice Directions ancillary to those rules. 5B.14 of the latter provides that "open justice requires only access to the part of the document that has been read aloud" though in the event that a member of the public requests a copy the court may order production of "a suitably redacted version".

41. Mr Mumford accepted that such rules are not determinative: the matter is ultimately within the discretion of the court, as emphasised recently by the UK Supreme Court in *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd* [2019] 3 WLR 429 at 442C. The court may have to balance the principle of open justice and the entitlement of the public "to know what is going on" at a public trial against the protection of private interests including confidentiality: see *Dring* at [45] to [47]; and "also relevant must be the practicalities and the proportionality of granting the request" (*Dring* at [47]). In short, the rule should not be applied mechanistically; but the notion of unqualified right of access to a document which has been referred to subject only to a saving power under CPR 31.22 (in civil proceedings) is misplaced, especially where the references have been sparing and unspecific, and/or where no specific or material reference has actually been made, though the court has considered the contents. In the latter context, it is important to distinguish the two bases on which confidentiality may be lost and not to confuse what has actually happened with the right to see documents to understand what has been going on even if they have not in fact been read; and see per Lord Bingham CJ in the *Smith Kline* case at 512.

42. In my judgment, in this case:
    (1) It is not contended that the Majid Note was deployed in such a way as to constitute waiver: only loss of confidentiality is in issue.
    (2) There is a distinction between the information in a document and the document itself. Whether references (whether by the court or counsel) are such as in fact to constitute such an exposure of the document to the public that confidentiality in it is lost is a matter of degree. In this case, the references did not, either in terms of their detail or their extent, amount to a loss of confidentiality in the document itself.
    (3) Noting that in fact no such application was made, I do not think it likely that an application under the Criminal Rules would have led to disclosure of the Majid Note as being necessary in order to understand what was going on. I do not think that the civil rules require any different approach.
    (4) The references to and the judge's reading of the document do not require its disclosure to enable the public to understand the approach of the court to the procedural decision before it (whether to issue a witness summons in respect of another document, the Morris Note).
    (5) Confidentiality in the document was not lost.

43. I shall not, therefore, require disclosure of the Majid Note. Of course, if in the course of the trial the Majid Note is deployed or referred to the matter will have to be re-assessed at that time. As the Trial Judge, I will be assisted by the background knowledge obtained in consequence of the application now.

Application for documents relating to Tesco's Republic of Ireland business

44. The next issue concerns documentation relating to Tesco's Republic of Ireland business.

45. The SL Claimants rely on the extent of knowledge within Tesco's Republic of Ireland business ("Tesco ROI") in support of their case on PDMR knowledge. They contend,

in summary, that the documentary evidence shows that Ms Easterbrook (Managing Director of Tesco's Developing Businesses division, which included Tesco ROI) and Ms Hodges (Developing Businesses Finance Director) were aware of commercial income overstatements in Tesco ROI, and they communicated with the alleged PDMR (including Mr Clarke and Mr McIlwee) on this topic. The MLB Claimants advance a materially identical case.

46. Much of this part of the SL Claimants' application has been agreed. Thus:

    (1) the SL Claimants sought three categories of documents that are referred to in a document known as "the Emerald Report" (dated 14 April 2015, which was prepared by Deloitte): Tesco did not consider these to be relevant to PDMR's knowledge and initially declined to disclose them; but in the fifth witness statement of Mr Nicholas Williams (dated 30 October 2019) Tesco agreed "in the interests of concluding matters" to searches and disclosure as set out in paragraph 1(6)(a) and (b) of the revised draft Order in relation to Tesco's Republic of Ireland business;
    (2) the SL Claimants accepted Tesco's assurance that it had done all reasonable searches for documents relating to an "amnesty" as referred to in the Project Emerald Report.

47. There remained, before the hearing, a dispute in relation to a report produced by Mr Davies as Head of Tesco Internal Audit called *"Irish Commercial Income review"* and in particular to any documents relating to a passage in it entitled "Next Steps to be considered" detailing in six bullet points various matters to be followed up. The SL Claimants contend that the documents are relevant because they are likely to evidence Tesco's contemporaneous acceptance of the serious conclusions reached by Mr Davies as to the likely knowledge of Tesco ROI and Group individuals, in circumstances where Tesco now refuses to accept (or even plead to) the accuracy of those conclusions: see Responses 14-17 to the SL Claimants' Third RFI. However, on detailed analysis, only one of the bullet points raises a real dispute.

48. The first bullet points reads "Finalisation and write-up of timelines; review of meeting notes for completeness". The SL Claimants have accepted Tesco's evidence that no such timelines were written up; and they have on that basis not pursued the request.

49. Tesco maintains that the second and third bullet points (relating respectively to (i) "Discussions with PwC Ireland to finalise the FY14 financial statements" and (ii) "Discussions with PwC Group team and Group finance to consider implications for the Group Financial Statements") can only be relevant to the quantum of the overstatement. However, the SL Claimants maintain that if (as appears) none has yet been made, a search should nevertheless be undertaken, and if any relevant documents are identified they should be disclosed. For the reasons given by Tesco, I consider it unlikely that a search will reveal any relevant documents; even if the documents can be collated relatively easily I do not think a search is proportionate at this stage and I do not propose to require it.

50. As to the fourth bullet point (relating to "Consideration of the regulatory implications in Ireland and the UK''), Tesco has claimed privilege; the SL Claimants require only that the claim be formally certified, and Tesco has agreed to do that.

51. The sixth bullet point referred to "Timing of board briefing". Tesco confirmed (in Mr Williams's fifth witness statement) that searches have been made and no documents found for which there is not a proper claim for privilege. The SL Claimants agreed on that basis not to press that request.

52. That leaves only the fifth bullet point, which reads "Consideration of internal follow up – to include discussions with TK, JE, others tbc". Tesco's position on this was that in the event there were no such discussions, and that what in fact happened was that the matter was passed to Deloitte to undertake the exercise that culminated in the Project Emerald report. The SL Claimants, however, drew my attention to a witness statement of Mr Alan Stewart (Tesco's CFO) dated 24 July 2019 which refers to a "preliminary assessment" undertaken by Mr Jason Davies before the matter was referred to Deloitte and to some consideration being given to it; and they wish to see any documents relating to the assessment and the subsequent consideration of it. There is, as it seems to me, a possibility of documentation relevant to the question of knowledge; and I think that Tesco should make a proportionate search accordingly, and disclose any relevant and unprivileged material found.

Application for production of unredacted versions of documents for expert's review

53. Having (as I understand it) agreed not to pursue a further category sought by the SL Claimants relating to documents generated by a series of internal investigations at Tesco relating to the profit overstatement, the last remaining disclosure sought by the SL Claimants and disputed by Tesco is of unredacted copies of 18 specific accounting documents described in Schedule 2 to the draft Order as originally sought by the SL Claimants.

54. The SL Claimants have sought unredacted copies of these documents (which were disclosed some time ago) at the instance of their expert, Mr Luke Steadman of Alvarez & Marsal Disputes and Investigations LLP. He has indicated in correspondence (and in particular in a letter to Stewarts Law LLP dated 11 October 2019) that (a) "it may be important to review" unredacted versions of Tesco internal accounting policies/manuals, where sections of the TGAP (Tesco Group Accounting Policy) have been redacted; that (b) unredacted versions of Tesco Audit Committee documents "may provide useful, relevant insight in relation to commercial income accounting at Tesco"; and that (c) unredacted versions of PwC documents dealing with the extent to which commercial income was tested and discussed in the audit process "should be reviewed to understand considerations of both materiality and accounting but are not available to me." Mr Steadman has also sought an unredacted version of the February 2015 PwC Audit Plan, even though it post-dates the relevant period, on the basis that the document "is likely to contain items of significant interest in relation to historic commercial income practices at Tesco, as the February 2015 audit was the first external audit after the commencement of the commercial income misstatements and their correction".

55. The SL Claimants submitted that such a request from their expert was reasonable; that the documentation was easily collated and its disclosure would not involve disproportionate effort or expense; that there were no reasons such as confidentiality which might deter disclosure, or at least one that could not be met by use of the

Confidentiality Club if necessary; and that it would be unusual to refuse such a request from a respectable accounting expert like Mr Steadman. However, the SL Claimants very properly conceded that Mr Steadman did not assert nor could they properly contend that the requested documents are critical or necessary in the sense that Mr Steadman would not be able to reach a conclusion on the expert issues without sight of them.

56. Although it has provided unredacted versions of those sections of TAPM and TGAP that concern impairment, Tesco objected to the disclosure requested on behalf of Mr Steadman. Its position was that it had already disclosed parts of these documents which are relevant to trading profit or trading margin, which are the only items in Tesco's published information that the SL Claimants allege were untrue or misleading by reason of the commercial income overstatements, and there was no reason why Tesco should disclose (for example) chapters of TGAP that concern some other category (eg debtors or stock) which is not said by the Claimants to be untrue or misleading. Mr Steadman had not said the further disclosure was critical, nor even explained properly his reason for thinking they "may" or "could" be useful.

57. In the course of argument, I invited Mr Mott to consider whether the standard required by paragraph 18 of the Disclosure Pilot for making an order for disclosure of specific documents (see especially paragraph 18.2) had been met. Paragraph 18.2 specifies that the court must be satisfied that the further disclosure is "necessary for the just disposal of the proceedings" as well as "reasonable and proportionate". After due consideration, Mr Mott very properly did not press the application further. For my part, I do not think the court can be so satisfied. I do not propose to order further disclosure under this heading.

Application to amend/strike out and for documents relating to the "Impairment Issue"

58. The (now) final part of the SL Claimants' application for specific disclosure raises a more convoluted issue which has given rise to three inter-connected applications and some toing and froing between the parties which has not been altogether easy to follow. As I understand it, however, the upshot is that:

    (1) the SL Claimants seek to run a case not previously pleaded except in replies to Tesco's reliance defences alleging errors in Tesco's impairment charges and stock write-downs in relation to their stores, and also alleging that the impairment losses would have been even greater but for overstatements of commercial income for each of FY 2012/13 and FY 2013/14;

    (2) they contend that these issues ("the impairment case") impact on and support their existing case as to the materiality of the overstatement of commercial income (which Tesco has denied);

    (3) they also seek to contend that the materiality of the overstatement of commercial income is further demonstrated by PwC's so-called "Summaries of Unadjusted Misstatements" or "SUMs", recording items which (they say) were not included as accounting items because that have reduced the attractiveness of Tesco's financial reports; and they further contend that the

decision not to include the items in the SUMs must have been taken by management, and thus that the allegation goes also to PDMR knowledge;

(4) they seek disclosure of all documents relating to the impairment case, including not only unredacted copies of the SUMs (which Tesco agreed before the hearing it would provide) but also of any documents showing the individuals who received and/or were aware of the SUMs.

59. Tesco has objected to the introduction of these matters at this stage. It contends that it is simply far too late. Hitherto, Tesco contends, the SL Claimants' case has focused only on trading profit misstatement, and they have never pleaded any case that Tesco's published information was untrue or misleading by reason of inaccurate impairment charges or stock valuation. Tesco originally pressed but now has reserved to trial an argument that the impairment case is not relevant to any pleaded issue, based on the point (which seems to be accepted by the SL Claimants) that additional impairment charges would not have affected the extent of trading profit or trading profit margin overstatement during the relevant period since Tesco recognised impairments in operating profit, not trading profit. Tesco's contention now is that it is far too late to be raising the impairment case, whatever may be its merits, since it would require a disruptive and disproportionate disclosure and evidential exercise that would obstruct the just disposal of the proceedings and indeed give rise to a real risk that the trial date would be lost.

60. Tesco stressed the SL Claimants' delay in making their applications. They provided the following summary of preceding events:

(1) The SL Claimants first made disclosure requests about stock and impairment in correspondence in April 2018, but did not then make any application for disclosure or for leave to amend their pleadings to introduce these allegations, although Freshfields had said in terms that the reason why disclosure would not be provided was that the requests were not relevant to any pleaded issue.

(2) In May 2019, some nine months after the correspondence referred to above and without identifying any reason for such delay,[1] the SL Claimants sought to advance a case about stock-write down and impairment in draft amendments purporting to particularise their case about PDMR knowledge: see paragraphs 8.5.14A-8.5.14C, which made certain allegations about the link between the commercial income misstatements and impairment and about the allegedly 'aggressive application of accounting standards' (of which stock write-down and impairment were cited as instances).

(3) On 13 June 2019, Tesco indicated that it would not consent to these draft amendments. The SL Claimants did not then issue an application for leave

[1] The Claimants reserved their right in correspondence to pursue the specific disclosure requests '*in due course*', and Mr Upson also says that the CMC1 Directions Order envisaged that specific disclosure applications would be made after general disclosure had been given, but Tesco maintains that this did not preclude the Claimants from doing so earlier, and that they ought to have done consistently with PD23A, para 2.7, given that Mr Upson does not suggest that the Claimants were not in a position to make the application until after they had reviewed Tesco's disclosure.

to amend their RAPOC. Instead, they sought to plead the same allegations at paragraphs 6(3)(c) and 6(3)(d) of their Reliance Replies, on the footing that they are relevant to the materiality of the overstatements. Paragraph 6(3)(c) alleged that the impairment charge would have been higher but for the commercial income overstatements. Paragraph 6(3)(d) alleged that (unidentified) 'Tesco personnel' engaged in 'other practices' that involved 'an aggressive application of accounting standards' and gave three instances of such practices, namely the calculation of impairment charges (paragraph 6(3)(d)(i)), stock write-down (paragraph 6(3)(d)(ii)) and 'the summaries of uncorrected misstatements' (paragraph 6(3)(d)(iii)).

(4) Tesco issued an application on 16 September 2019 to strike out paragraphs 6(3)(c) and 6(3)(d) of the Reliance Replies.

(5) Not until 17 October 2019 did the SL Claimants apply for leave to amend the RAPOC.

(6) Subsequently, the SL Claimants have chosen to delete paragraph 6(3)(d) virtually in its entirety, though some of these allegations still remain in the draft RAPOC (including the allegation of the adoption of aggressive accounting practices), because the SL Claimants apparently wish to contend that they are relevant to the issue PDMR knowledge (paragraph 8.5.14C).

61. Tesco initially sought on this basis not only to object to disclosure but to have the averments, whether in the form of amendments to their pleading or in the form of particulars of reliance, refused and struck out.

62. Thus, the disputes about disclosure and the pleadings go hand in hand, and the three applications they have spawned are:
    (1) An application by Tesco to strike out certain passages in the SL Claimants' Reliance Replies;
    (2) An application by the SL Claimants for leave to amend their particulars of claim to introduce (among other things) the allegations concerning impairment;
    (3) An application by the SL Claimants for disclosure concerning impairment.

63. Since the various applications were first issued, matters have moved on and some confinement of each has been achieved. In particular:
    (1) the SL Claimants have sought disclosure of unredacted copies of PwC's so-called "Summaries of Unadjusted Misstatements" or "SUMs" which record all errors above the so-called "clearly trivial" threshold identified by the auditors which the audited company has declined to correct. They contend that they need such disclosure to quantify the extent and materiality of the adjustments set out in the SUMs and especially to test Tesco's case that they were immaterial. Tesco has agreed to such disclosure and it has also agreed not to pursue its attempt to strike out the relevant parts of the draft pleading which relate to those SUMs; and
    (2) Tesco no longer pursued for the purpose of this hearing its argument that an increase in fixed asset impairment is irrelevant to the materiality of the

overstatements of commercial income, accepting that the court could not fairly make such a finding now and such a question is best left to trial.

(3) However, Tesco continued to contend that the introduction of the plea, necessitating investigation of the impairment case, would be disproportionately disruptive and the exercise of disclosure and the need for expert evidence might even result in the loss of the trial date. That is because:

(a) introduction of the impairment case would mean that the Court would have to make findings about what the correct impairment charge would have been absent the commercial income overstatements: for that purpose, expert evidence would be required and the experts would need to consider the relevance of that, if any, to the materiality analysis;

(b) ascertaining the correct impairment charge would require a substantial exercise consisting of two stages: first, whether, but for the commercial income overstatements, there would have been an *'indication of impairment'* or a '*trigger event'*, and if so, secondly, whether the carrying amount of Tesco's fixed assets would have been found to be higher than (i) the value in use of those assets or (if greater) (ii) their fair value less costs of sale;

(c) that exercise would be both judgmental (and involve a detailed exploration as to why Tesco was wrong to conclude that there was no trigger event) and difficult to replicate after such a long passage of time since it would be difficult to identify the relevant documents after a plethora of staff departures; and even if it were possible, an expert would need retrospectively to analyse such documents from the relevant period as are still available, form views about the mindset of management at the time, and assess whether there would have been an impairment trigger but for the commercial income misstatements;

(d) even more problematic would be the second stage (establishing value in use): Tesco has not been able to identify any individuals who are still employed by it who could explain how the value-in-use models (assuming Tesco performed these calculations contemporaneously) work, what the key inputs and assumptions were, and what adjustments management would have made to the model absent the commercial income misstatements;

(e) yet more difficult would be the other aspect of the second stage: establishing fair value less costs of sales ("FVLCS"). There is no indication that a store-by-store fair value assessment was performed either for FY 2012/13 or FY 2013/14. On that assumption (or even on the assumption that some limited exercise was performed), it would, as Mr Williams says, '*be very challenging, and potentially impossible*' to recreate them now for the relevant period without the use of hindsight: Williams 3, para 13. That would, at the very least, require an additional expert in retail property valuation.

64. At the outset of his oral submissions, Mr Mott for the SL Claimants suggested that there was a clear way or short-cut through all this. Noting that Tesco has not so far addressed and contradicted the indicative figures put forward by Mr Upson in his ninth witness statement (dated 8 August 2019) suggesting an impairment of over £400 million, he floated the prospect of the experts agreeing on the level of impairment being such as (even though not exactly quantified) not only to give rise to a trigger event, but also to be material in amount. Mr Mott offered the further attractive prospect of this being a way of in effect making unnecessary hundreds of pages of expert evidence on materiality and other matters: he suggested it to be "a very easy path through the thicket of expert issues on materiality".

65. However, the path depends upon consensus: and the exchanges in correspondence between the experts to which I was taken do not appear to me to suggest any likelihood of consensus of that kind. Furthermore, as Mr Mumford submitted, the SL Claimants' need to establish PDMR knowledge of the falsity of the relevant statements in the published information would make it very likely both that they would have to pursue, as well as other aspects of the materiality case, a more qualitative estimate of impairment, since it seems likely that they would wish to rely on that as supporting an inference of PDMR knowledge of such falsity. Mr Mott did not really demur from this.

66. Mr Mott's alternative argument was that Tesco had greatly exaggerated the difficulties, and that in reality (1) Tesco had a Group Accounting Policy ("TGAP") which stipulated impairment indicators (including, in particular, (a) where IRR was lower than WACC or (b) an individual store's performance deviated from plan) across the stores, making unnecessary an assessment of individual judgment in assessing whether there had been a trigger event; (2) Tesco's financial statements indicated [C3/1477] that during the relevant period Tesco used a standard stores impairment model designed to test the 'Value in Use' of each store; and that if and when Tesco's model could be found, it should be possible (in the view of the SL Claimants' expert, Mr Luke Steadman) to use it to assess a range of impairment impacts across the stores relatively easily.

67. In the latter context, Mr Mott drew my attention especially to letters from Mr Steadman referring to the use by Tesco's auditors (PwC) in the relevant period of what he called "the UK Store Impairment Model" which apparently took as its starting point a five-year cashflow forecast for each UK store and which, during the 2014/15 financial year had been "sensitized" by PwC to assess impairment across the Tesco stores. Mr Mott contended that if the "UK Store Impairment Model" and Tesco's accounting policy manual or other internal documents explaining Tesco's methodology of impairment assessments could be made available it should be relatively straightforward to recreate appropriate impairment analyses which would in effect reflect Tesco's approach at the time.

68. The evidence given on behalf of Tesco in response was somewhat equivocal, or as Mr Mott put it, "carefully hedged". In his third witness statement (made on 23 October 2019) Mr Nicholas Williams of Freshfields did not suggest that such models and documents did not exist, only that none had been seen; though he added that Tesco had "not been able to identify any employees remaining in Tesco who were sufficiently closely involved in considering the property impairments at the time" and "it is likely

that there is nobody who could explain how any models worked and what the inputs and assumptions were, and so that would be dependent on documents being available."

69. To seek to allay any impression to the contrary, Mr Mumford, in his oral submissions, stressed that "since Mr Steadman produced his 11th October letter" searches and enquiries had been undertaken but no "relevant impairment model" had been located. But Mr Mumford put forward, as "the real point on which we rest", that even if "a relevant full impairment model" were to be found, the process of establishing the appropriate impairment would not "be anything like as simple as Mr Steadman suggests to generate the sort of counterfactual answer to whether there would have been a relevant trigger in the relevant years and whether, if there was a relevant trigger, there would have been an impairment charge booked." He stressed that the relevant years are 12/13 and 13/14, and contended that it would be far from straightforward to establish reliable counterfactual impairment store figures for the relevant half years in those periods by an exercise of backward extrapolation from the 14/15 assessment relied on by Mr Steadman. That would especially be so because there was a deterioration in the UK trading profit in the first half of 14/15, before discovery of the commercial income misstatements, so that there would have been materially different assumptions made in the modelling at H1/14/15. Furthermore, he explained,

> "it is not simply an exercise of plugging numbers into models and producing outputs. You've got to work out what judgments were exercised or would, counterfactually, have been exercised by management at the relevant time in making the appropriate forecasts, because, of course, these impairment models are all based upon valuations that are derived from forecasts. They are not retrospective…So what one's actually got to do is identify [what alteration] a change in historical commercial income figures or current commercial income figures would require to your forecast going forward… KPMG are saying that it's not a matter they can decide in isolation on their own, it's going to require input from management…[and]…a disclosure exercise to see if we can identify what the relevant forecasting assumptions were…[and]…who could speak to what was happening and see if they're prepare to give evidence because there may be disputed factual points that need to be resolved before the experts could opine."

70. As a final salvo, Mr Mumford submitted that Mr Steadman was "understating the importance of being able to do an FVLCS valuation" and wrong to suggest that a VIU (Value in Use) analysis was an adequate substitute: both were required. There would have to be a property valuation exercise to establish value as at the relevant time: that would require the appointment of a valuer or valuers to establish a historic value for all of Tesco's store portfolio, and that might well be contested.

71. Turning to my assessment of these competing contentions, I confirm the views that I provisionally expressed in the course of argument, which I can summarise as follows:
    (1) Tesco should continue their searches and enquiries with a view to finding any useful "UK Store Impairment Model" and the further documents revealing the forecast and valuation methodology adopted by Tesco, and/or constituting or evidencing the assessment by members of the Audit

Committee and/or pleaded PDMRs of whether a trigger event had occurred and/or the reporting to or discussions with PwC and the Audit Committee in respect of the process of impairment testing. These searches and the disclosure exercise required are described more fully in paragraph 1(8) of the draft Order drafted for my consideration.

(2) The parties are to agree a time certain for such searches and enquiries: although there is a continuing obligation to review disclosure, the exercise I am directing should be time limited so that the question as to whether the matters are to go forward to trial may be assessed in the relatively near future.

(3) Unless the searches and disclosure reveal a way on which the experts can agree to undertake an impairment exercise for the years 12/13 and 13/14 without a store valuation exercise and without an extended subjective enquiry in creating a counterfactual, the dislocation of the trial involved in permitting the SL Claimants to open this additional front is prohibitive, all sides being in agreement that the trial date must be preserved. Subject to paragraph [72] below, I shall therefore adjourn the Reliance Strike-Out and the Amendment Application until after that exercise is completed.

(4) A suitable date for my review and (in the absence of agreement) final determination of these applications will have to be found; in the meantime, it may well be sensible for the parties to have liberty to apply, though my availability is very limited until mid-January 2020.

72. There is one final issue relating to the SL Claimants' Amendment Application which I have already mentioned but which is of a different nature and which I should address. This is the draft pleading (at paragraph 8.5.15C (1)) [B12/38] of an allegation that:

(1) Tesco's Audit Committee "knew, prior to the publication of the Preliminary Results 2013/14 and the Annual Report 2014, that Tesco's fixed asset impairment in respect of FY 2012/13 and FY2013/14 was being calculated using both a discount rate and a long term growth rate which were outside what PwC considered an acceptable range'' and that

(2) "In the circumstances it is to be inferred that (a) Mr Clarke and/or Mr McIlwee also knew this and/or (b) the Audit Committee's decision to continue to use this discount rate and long term growth rate, notwithstanding the view of Tesco's own auditors, was attributable to a direction by Mr Clarke and/or Mr McIlwee that aggressive accounting practices and assumptions should be adopted wherever possible in order to improve Tesco's financial reporting to the market in respect of FY 2101/13 and FY 2013/14."

73. Tesco applied to strike this plea out on the basis that (i) the allegation of "aggressive accounting practices" is meaningless given that it is not asserted that there was anything unlawful in that regard, and has no bearing on the pleaded case; (ii) the width and lack of definition of the concept makes it nigh on impossible to establish who knew that the practices were "aggressive" in the intended sense; (iii) such an allegation if left to stand would also prompt an examination and presentation of contrastingly prudent accounting judgments to counterbalance the suggestion that there was some general "aggressive" approach that Tesco took; and (iv) the inference pleaded at (b) in paragraph 72(2) above is unsustainable.

74. Sensing my sceptical reaction to that last plea of a general inference, Mr Mott in reply sought to preserve the rest of the draft pleading quoted at (1) and at (2) (a) in paragraph [72] above by agreeing the deletion of (b). Mr Mumford did not accept the suggested deletion was a cure, and suggested that it was simply a deletion of the express whilst not foreclosing the later introduction of the asserted inference.

75. I propose to permit the plea in the amended form as suggested by Mr Mott and delete (b). I should say that I consider the inference as pleaded at (b) to be unsustainable. I also think there is real doubt about the plea of "aggressive accounting practices". But the plea of a departure from PwC's "acceptable range" seems to me to be unobjectionable at this stage, and the more limited inference of Mr Clarke and Mr McIlwee's knowledge to be permissible, leaving both those matters on the record to be adjudicated at trial. The parties have agreed that any question of further disclosure should be addressed after Tesco have pleaded in response; and that the parties should have permission to apply failing consensus at that stage.

Tesco's application for disclosure

76. I turn to Tesco's application for further disclosure, most of which has been resolved to the parties' mutual satisfaction by agreement. Two specific disclosure topics remain: both relate to the issue of reliance. One concerns Tesco's request for disclosure of the underlying formulae contained in the quantitative investment model, called BMR+, used by the investment manager for Claimant 33 ("Frankfurt Trust"). The other concerns Tesco's request for disclosure of "*the individual risk profiles of the clients for whom Rathbones* [Claimant 9] *traded shares during the Relevant Period.*" This relates to approximately 8,000 individual clients.

Frankfurt Trust

77. Part of the hearing of the issue relating to Frankfurt Trust was held in private. This was because the model used was said to be highly confidential. I do not think anything in this judgment will require redaction: but that is a matter that can be addressed when it is circulated in draft.

78. The issue is a narrow one. The SL Claimants do not dispute the entitlement of Tesco to disclosure of the model which guided Frankfurt Trust's investment decision. The issue is whether the proposal they have put forward, to protect its confidentiality, suffices. Tesco contend that it does not, because it needs the full, unredacted and native version of the model in order to test the counterfactual case, and whether when inputted the result would be a recommendation to buy, sell or hold.

79. In essence, the proposal (set out in a letter from Stewarts Law LLP to Freshfields dated 25 October 2019) would require (1) Tesco, instead of running its own tests, to notify Stewarts Law LLP of the experiments it wishes to run on each of the BMR+ models disclosed, specifying which input metrics it wishes to change and the altered values/figures for these metrics that it wishes to be inputted and how; (2) for the SL Claimants then to review Tesco's proposed experiments for relevance with a view then to agreeing them; and then (3) for a video conference to be convened at which Frankfurt Trust would run the experiments, with members of Stewarts Law LLP and representatives of Tesco (excluding Ms Rosie Bichard who may be regarded as running a competing investment business) attending remotely by video link (or in

person if required, and feasible); (4) for that video conference to be recorded; and finally (5) for the results of the experiments thus undertaken and recorded to be the subject of witness evidence or an agreed statement of facts. The SL Claimants stress the justification of such an approach is that (a) it should accommodate Tesco's legitimate desire to test the system through inputting counterfactuals but (b) protect Frankfurt Trusts' proprietary and highly confidential formulae.

80. Tesco's main objection to the proposal is that it deprives it of the flexibility it should be entitled to have to test with its own expert various counterfactual inputs and outputs, and (since it is understood that the model works off consensus estimates) different market consensus views, and without the intrusive supervision of the SL Claimants as the opposing party. Such supervision would amount to peering into Tesco's preparations which would otherwise be privileged. Tesco has no wish to exploit the model for any other purpose, nor any objection to the experiments being within the Confidentiality Club arrangements (from which it entirely accepts Ms Bichard should, for these purposes, be excluded). Tesco stresses that no other Claimant which has used a computer model has objected to its disclosure. Lastly, Mr Mumford made the point that confidentiality is not of itself an answer to disclosure; and whilst the court will seek ways of protecting it, the burden is on the party resisting disclosure to persuade the court that this can be done without eroding the rights of the other party (and see *Science Research Council v Nasse* [1980] AC 1028). Mr Mumford disparaged the apparent insistence on the part of Frankfurt Trust that "it's not prepared to disclose the working formulae": as a claimant it is bound to abide by the rules of the court whose process it has engaged.

81. The balance between the legitimate commercial desire to protect highly confidential information, processes and material and the right (subject to the discretion of the court) of a party to receive proper disclosure in a way that enables it to test the other side's case can be, and in this case in my view is, a difficult one. I am not persuaded that the proposal put forward is sufficient to discharge the burden that (in agreement with Mr Mumford) I accept is on the SL Claimants (and, in particular in this regard, Frankfurt Trust). However, I am impressed by the particular confidentiality and sensitivity of the formulae and other workings of the model, which the evidence I was shown does indeed suggest is of a very high order. Parties should not be required as the price of vindicating their rights to prejudice their proprietary rights (described by Mr Mott as "the life's work, essentially, of the gentleman behind this"); and I approach Frankfurt Trust's reluctance to reveal this in that light. In my view, some better balance must, if at all possible, be achieved.

82. It seems to me that this must be tailored to affording greater flexibility to Tesco and its expert, and reducing the intrusion; and this may only be possible by the instruction of a highly trusted third party nominated by Frankfurt Trust and approved by the court to supervise the process, which might be recorded by a video which would be kept in case of the necessity for the court to determine any dispute, but sealed. For the present, I leave it to the parties, with such benefit that this thought provides, to try to find some better proposal than is presently put forward. Otherwise I shall have to adopt the rather blunt and binary approach left to the court. I would invite formulation of an appropriate revised proposal within 14 days (or such other period as the parties may agree).

Rathbones

83. I turn to the issue concerning Rathbones. The problem arises principally in the context of Rathbones' particular investment decision processes. In this regard, Rathbones operates differently from the other SL Claimants in that decisions were made by in excess of a hundred investment managers over the relevant period who, in turn, acted on behalf of their underlying clients. It would appear from this that the requirements of those individual clients were an important factor that drove the relevant investment decisions. This has two broad consequences: first, since each investor may have different outlooks (not for example, fashioned by a model or investment formula common to all as in the case of Frankfurt Trust and others) reliance will ultimately have to be established in the case of each investor, though 'sample' investors have been chosen in the first instance to seek to establish parameters which may assist in the determination of the case on reliance more generally. Secondly, it is especially important to test the 'sample' cases by reference to information about the clients' individual circumstances, risk appetite, investment objectives and requirements available and current at the date of the relevant investment decision.

84. Although Stewarts Law LLP (by letter to Freshfields dated 5 November 2019) have agreed to provide (subject to certain conditions apparently designed to protect confidentiality to which Tesco has not objected) client agreements and profiles for the clients represented by the investment managers to be tried as 'sample' cases, Tesco has ascertained that the information provided may not be up to date, or reflect more detailed and contemporaneous information obtained in informal discussions rather than in the course of a formal updating process which I am told occurred only every three years. Tesco seeks an order requiring a search and disclosure of such information, making the point that it must have been sought and kept by Rathbones or the relevant manager for regulatory purposes. The SL Claimants have objected on the basis that a search of all five 'sample' investment managers' communications with their clients (I was told some 216 clients) and records of informal updating of their objectives, risk appetite and the like would be very difficult, time-consuming and expensive and that the exercise would thus be both too granular and disproportionate.

85. As I mentioned in the course of the hearing, I must admit to finding it surprising that there should be such difficulty in collating the detailed information sought given what I assume are regulatory requirements in that regard. I asked to be informed more precisely what these requirements (if any) are (or were at the relevant time). Further to this intervention Rathbones agreed to investigate again the viability of providing Tesco with more detailed information, and the upshot has been an exchange of correspondence in the course of which I apprehend that a reasonable resolution has been reached, subject to Tesco's reservation of its right to request further documentation from Rathbones in relation to individual client circumstances should the documents to be provided in accordance with the proposal turn out to be inadequate. I am content with that course.

Tesco's applications for Letters of Request

86. The dispute on the issue of reliance spawned a further agenda item for determination at CMC4. Tesco seeks disclosure of the models used by investment managers and other analyses of Tesco shares in order fairly to be able to test the SL Claimants'

reliance case. In some instances, however, the SL Claimants have taken the position that the models and other documents are in the control of investment managers, not the relevant SL Claimant. Some investment managers are outside the jurisdiction. Tesco has accordingly issued two applications, supported by witness statements of Mr Ian Taylor of Freshfields in each case, for a letter of request to be issued by the English court to the relevant foreign court with a view to obtaining these documents from the investment managers.

87. The SL Claimants have not consented to these applications but do not oppose them, though they have expressed concern about the width of the request, potential issues of confidentiality and the likely time frame for the working through of the procedure and its potential to impact the trial timetable.

88. One preliminary point seems to me to be worth making, although I confess it has occurred to me after considering the basis of the requests. It is this: in one sense, at least, the apparent reluctance of those who in fact made or directed the decision to provide the documentation on which it was based is somewhat surprising. Tesco's requests do not seem to me to involve a broad trawl; and I would expect the documentation to be fairly easily collatable. Just as Tesco seek the documents to test the relevant SL Claimants' reliance case, so it might be thought those Claimants might need the documents to establish it. Although I cannot usefully or appropriately speculate any further as to the thought-processes guiding those concerned, it may be that reflection on the matter, may encourage a more constructive approach. In the meantime, I can only base my approach on the assumption that a letter of request is the only way of obtaining the documents.

Jurisdiction

89. Turning to my jurisdiction, it was pointed out to me at the outset by Mr Mumford that although Mr Taylor states in his 15th witness statement in support of the first application and in his 17th witness statement (in support of the second) that the application is made pursuant to CPR 34.13, that provision of the rules relates to applications for examination of witnesses out of the jurisdiction and not in a Regulation State. However, the court does have inherent jurisdiction to issue a letter of request for the production of particular documents (though not for more general discovery): see *Panayiotou v Sony Music Ltd* [1994] Ch 142 at 149H, 151B-C and (as to the need for the request to be confined to particular documents, though these may be described compendiously) 153F-G. Mr Taylor's 18th witness statement (in further support of the first application) invokes that inherent jurisdiction expressly. I take both applications to be intended to invoke that jurisdiction.

90. The test for the exercise of the jurisdiction, which is discretionary, is that the letter of request must be limited to documents that exist, are capable readily of being identified by the recipient and which would be admissible as evidence in the English action: *ibid.* at 153G.

Application re Dimensional

91. The first request concerns documents held by DFA Australia Ltd ("Dimensional"), the investment manager for the QIC Claimants (SL Claimants 69 and 86). The QIC Claimants have explained (some time ago, in May/June 2019) that relevant documents

requested by Tesco and falling within agreed categories are not within its control, but rather in the control of Dimensional. Dimensional is incorporated in New South Wales, Australia. As to this request to the Supreme Court of New South Wales ("the NSW Supreme Court"):

(1) It is clear from the QIC Claimants' evidence that Dimensional's portfolio managers used proprietary tools in making investment decisions, the output of which was recorded in spreadsheet form, showing how the stock under evaluation compared to other candidates in the investment universe.

(2) As Mr Taylor accepts in his 15th witness statement Dimensional has cooperated to some extent; and some issues have been resolved consensually (for example, Dimensional has queried its trading records databases for all trades in Tesco in the QIC portfolios in the relevant period and searched associated Excel files containing information supporting the generation of the orders on which the trades were based, and it agreed (in July/August 2019) to conduct keyword searches of its Excel files, archived email and instant messages). However, the documentation as to the basis on which the investment decision was made remains materially incomplete.

(3) The QIC Claimants have not disclosed any working native models of these spreadsheets, nor any documents evidencing the underlying data and calculations used in those models. Nor has there been any disclosure of documents that explain the quantitative metrics, calculations and ranking systems used by Dimensional.

92. I am satisfied that these documents exist (as is apparent from the QIC Claimants' own evidence). Although the SL Claimants have queried the width of the disclosure sought, I note that the documents sought in section 12(1) of the proposed Letter of Request are referred to in a witness statement made by Dimensional's Head of Asia-Pacific Portfolio Manager on behalf of Dimensional and the QIC Claimants; and the documents described in section 12(2), though admittedly fairly broad in potential scope, have been described with as much specificity as possible and should be readily identifiable by Dimensional. I am also satisfied that the documents would be admissible as evidence in this action and are important to Tesco's ability to test the QIC Claimants' reliance case and bring forward a counterfactual case.

93. The concerns expressed by Dimensional about confidentiality are material and need to be taken into account. Dimensional has expressed particular concern lest Ms Bichard, who works as an equity analyst, gain access to proprietary and confidential material belonging to a competitor. However, in my view, if the documents and any model are kept confidential in the same way as other models provided within the Confidentiality Club, and provided (for reasons previously summarised) Ms Bichard is not shown or given access to any of them, it seems to me that should suffice at this stage of the process. Of course, it will be a matter for the requested Court (the NSW Supreme Court) to determine any further restrictions it considers necessary in response to any claim to preserve confidentiality in, or proprietary rights governed by, its jurisdiction.

94. The other issue raised by the SL Claimants, as to the potential timing of the process and any possible impact on the Trial or its preparation, has also caused me some concern. However, I am reassured in that regard by the view of Counsel and Attorneys in the firm of Clayton Utz in Sydney, Australia, whom Freshfields have instructed on behalf of Tesco, that it is reasonably to be expected that the NSW Supreme Court

would deal with the matter within weeks rather than months; that if not opposed by Dimensional the documentation may reasonably be expected to be provided by 10 January 2020; and that if Dimensional oppose and the matter went on appeal, it would be likely to be expedited and concluded in February or March 2020. Whilst the latter date is perilously close to the trial commencement date in June 2020, I do regard the prospect of an appeal as presently unlikely: as I elaborate also in the context of the second application, the documents in question may be as useful to the relevant Claimants as to Tesco, and excessive reluctance to provide them may tell against the Claimants.

95. I am satisfied in these circumstances that a letter of request for production of the specified documents and models by Dimensional should be issued. I am content with the form now proposed. By analogy with CPR 34.13(6)(b) and PD34A, para. 5.3 (5), I require and would accept the undertaking usually offered to be responsible for the Secretary of State's expenses incurred in relation to the Letter of Request.

Application re TGAL

96. The second request concerns documents held by Templeton Global Advisors Ltd ("TGAL") which acted as the investment sub-advisor or sub-sub-advisor for the John Hancock Templeton Claimants (that is to say, SL Claimants 8, 15 and 92). It appears from Reliance Particulars served by the SL Claimants that it was TGAL which made, directed or at least advised the decisions to purchase, hold and sell Tesco shares on behalf of the John Hancock Templeton Claimants in alleged reliance on Tesco's Published Information. TGAL is incorporated in the Commonwealth of the Bahamas ("the Bahamas"). The SL Claimants have taken broadly the same position on this application as on the first.

97. As to the background and basis of this request:
    (1) Stewarts Law LLP have explained (by letter to Freshfields dated 12 July 2019) that the majority of documents that would fall within the agreed disclosure categories are, so far as they relate to the John Hancock Templeton Claimants, held not by them but by investment managers, and in particular TGAL.

    (2) In witness statements provided on behalf of those Claimants, Mr Edgerton Tucker Scott (an Executive Vice-President of TGAL who was the lead portfolio manager for Claimants 8 and 15) and Mr Norman Boersma (Chairman and CEO of TGAL who was the lead portfolio manager for Claimant 92), have stated that TGAL evaluates stocks by a *"rigorous fundamental analysis of a company's business to determine what we consider its economic worth"*.

    (3) These witness statements refer to internal analysts' reports on which it is said reliance was placed; and these have been disclosed. However, the disclosure provided to date includes no working native versions of the underlying models used by TGAL, nor any documents evidencing the data or calculations used in those models nor any documents evidencing analysis or consideration of the Tesco stock by the individuals said to have been the

decision-makers at TGAL. Mr Taylor notes that the internal analyst reports or "Food Retail Reports" already disclosed refer to six metrics to forecast Tesco's performance: trough margin, peak margin, 7yr, 8yr and 9yr average margin, FY6 margin, 7 or 9 year CAGR and 2014-2019 CAGR, and there must be documents containing or evidencing these and the other underlying data, assumptions, calculations and third party data used by the analysts to populate the models: but none has been produced. Nor has there been produced any documentation evidencing the consideration of the investment decision by the key decision makers. The disclosure so far is, to my mind, notably thin.

(4) Tesco has sought disclosure of these documents from the John Hancock Templeton Claimants; but they have responded saying that the documents were not in their control but rather in the control of TGAL, and that TGAL's searches *"were circumscribed by their concerns regarding confidentiality and/or the disproportionate amount of management time which would be taken by disclosure"* and that identifying further relevant documents would be *"unduly burdensome and disproportionate"*, especially in light of the departure of the relevant analyst from the organisation. According to Stewarts Law LLP's letter to Freshfields dated 12 July 2019 conveying these points, TGAL has also put forward confidentiality concerns as a reason for declining to undertake a further voluntary search and disclosure: it is said that "*this confidential information forms the basis of…[its]…point of differentiation and competitive advantage in its market and it is not willing to risk this information becoming available to competitors*", and that it does not believe that the Confidentiality Club provides sufficient comfort because Ms Bichard (an equity analyst for a competitor) is a member of it.

(5) In the light of this response, Tesco has further reduced to what it regards as a minimum the number of documents sought by its proposed letter of request; but the documents now sought are said to be plainly necessary in order to enable the proper testing of the reliance claim and the exercise of identifying and producing them would be proportionate. Without these documents and the ability to analyse the financial models and the investment decision making process that TGAL followed to determine or direct whether to purchase, hold or sell Tesco shares, Tesco contends that it would not be able properly to test the John Hancock Templeton Claimants' reliance case, or in particular, the allegation that the investment decision made would have been different had Tesco published the correct trading profit figures.

98. I am satisfied that these documents are likely to exist. Although the SL Claimants have queried the width of the disclosure sought, I am also satisfied that the documents sought are capable of being identified, collated and produced, would be admissible as evidence in this action and are important to Tesco's ability to test the John Hancock Templeton Claimants' reliance case. I consider that I am entitled to assume that TGAL maintains a proper filing system for each of its clients and properly collated and files records of the advice it has given about investments such as that in Tesco. Very little substance has been provided to substantiate the conclusory statement that the search and production requested would be disproportionately burdensome: the relevant analyst's departure may make the task marginally more difficult but (in a well-ordered

office) not markedly so; and the proposition that confidentiality concerns would circumscribe or impede the process is not further explained and is not easy to accept.

99. Once again, the SL Claimants' concerns about confidentiality need to be taken into account. However, in my view, and as in the case of the first application, if the documents and any model are kept confidential in the same way as other models provided within the Confidentiality Club, and provided (for reasons previously summarised) Ms Bichard is not shown or given access to any of them, it seems to me that should suffice at this stage of the process. It is Ms Bichard's inclusion in the Confidentiality Club which has been singled out as the concern: and that can, as it seems to me, thereby be addressed. Of course, it will be a matter for the requested Court (the Bahamas Supreme Court) to determine any further restrictions it considers necessary in response to any claim to preserve confidentiality in, or proprietary rights governed by, its jurisdiction; but for my part, I do not think the safeguards are inadequate.

100. In the course of the hearing, I pointed out that (in contrast to the position in the first application) there was no estimate provided by Bahamian Counsel as to the likely timescale, and I asked whether such information might be made available. After the hearing I was provided (by email from Freshfields to my clerk dated 8 November 2019) with the following information based on the advice of Bahamian Counsel, namely Lennox Paton:

> "Once it has been approved by the English Court, the position is that the Letter of Request is sent to the Registrar of the Supreme Court of the Bahamas; the Registrar then passes the Letter of Request to the Attorney-General who makes an application to the Supreme Court for an order giving effect to the Letter of Request. Without waiver of privilege Tesco confirms, in the light of discussions with Lennox Paton, the local counsel firm it has retained in the Bahamas, that the likely timescale from receipt of the Letter of Request by the Registrar of the Supreme Court of the Bahamas to the making of an order that documents be produced would be three months."

101. This timescale, which does not cater for the possibility of an appeal (albeit I would hope an unlikely one, since the documents seem to be as necessary for the purposes of establishing as they are for rebutting the reliance case), is a little unsettling. Anything that might be done to accelerate it would be beneficial; and if on reflection, and given the issue of a letter of request, TGAL consider that voluntary production would, after all, be in the interests of their clients, that would be a very helpful solution. However, even on the basis that the documents may not be produced until February or so, I have concluded that the delay is not of itself a sufficient basis for denying the request.

102. Otherwise, I am satisfied in these circumstances that a Letter of Request for production of the specified documents and models by TGAL should be issued. I am content with the form now proposed. By analogy with CPR 34.13(6)(b) and PD34A, para. 5.3 (5), I require and would accept the undertaking usually offered to be responsible for the Secretary of State's expenses incurred in relation to the Letter of Request.

Adequacy of the current trial estimate

103. Welcome co-operation between the parties has resulted in a fresh estimate for trial and agreement in principle between them as to what Mr Mumford described as "the broad contours of the trial timetable".

104. The original trial estimate was some 40 to 50 days. The trial is currently listed for 44 hearing days, commencing on Tuesday, 2 June 2020. It is now considered that this is inadequate and that a realistic time estimate would be 56 days. I am content with that.

105. Tesco's main concern is that its lead Leading Counsel, Mr Rabinowitz, is presently not available after Friday, 11 September 2020. Tesco would have preferred to conclude the case by then and has advocated that the court should depart from the usual practice in the Commercial Court and in the Financial List of sitting on four days a week, and direct that the court will sit on 5 days a week, at least for part of the time. Tesco also invited me to direct much shorter oral openings than the Claimants had signalled they wanted.

106. In the course of the hearing, I indicated that I did not think that it would ultimately be beneficial for there to be a departure from the usual rule of four hearing days per week. My experience has been that the break on the fifth day is salutary. I indicated that I would not, save exceptionally, wish to depart from it.

107. I also indicated that in a document-heavy case, while longer oral openings than usual might be helpful to the court in preparing it to understand the evidence and the process of cross-examination, the Claimants' proposal of 13 days for oral openings was excessive.

108. In the light of my indications, and my expression of a willingness to sit for part of September to assist the parties, the upshot has been a revised proposal reducing the time for oral openings to seven days and providing for there usually to be four hearing days a week. The price is that the evidence will spread over until September, but factual witnesses should almost all be completed by the end of July with the first two weeks in September allocated to expert evidence. There will then be time during the latter part of September for the preparation of written Closing Submissions before the trial recommences for oral closings on 5 October 2020, with a view to the completion of the process on Friday 16 October. Although no doubt disappointed that they may not have Mr Rabinowitz for the oral closings, Tesco has confirmed that it is content with this course.

109. I too am broadly content with these proposals, though they may require refinement as matters develop.

Conclusion

110. I would ask Counsel to agree a draft order to reflect these rulings. Any points of remaining disagreement can be submitted to me in writing in the first instance.