Claim No: CL-2019-000127 and Others

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

Royal Courts of Justice,
Rolls Building,
London

Date: 02/07/2023

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

The Republic of Mozambique	**Claimant/ Respondent**
- and -	
Credit Suisse International and Others	**Defendants/ Applicants**

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- -

Sharif A Shivji KC, Andrew Scott KC, Tom Gentleman, Emma Horner and Andrew McLeod, and with Laurence Rabinowitz KC and Kenneth Maclean KC (instructed by **Slaughter & May**) for Credit Suisse International and Others
Peter Knox KC, Ian Smith, Rupert Butler and Daniel Goldblatt (instructed by **Leverets**) for the CS Deal Team
Frederick Wilmot-Smith (instructed by **Signature Litigation**) for the Privinvest Defendants and Mr Safa
Duncan Bagshaw (instructed by **Howard Kennedy**) for Ms Lucas
Timothy Howe KC, Rupert Allen, Daniel Edmonds and Orestis Sherman (instructed by **Weil**) for VTBC
Richard Hill KC and Gregory Denton-Cox (instructed by **Macfarlanes**) for VTBE
James Macdonald KC and Timothy Lau (instructed by **Pallas Partners**) for Beauregarde Holdings LLP, Orobica Holdings LLC and VR Global Partners LP
Stephen Midwinter KC and Tom Wood (instructed by **Enyo**) for Banco Comercial Portugues SA, United Bank for Africa plc
Jonathan Adkin KC, Jeremy Brier KC, Richard Blakeley and Ryan Ferro (instructed by **Peters & Peters Solicitors**) for the Republic of Mozambique

Hearing dates: 13-15 June 2023

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JUDGMENT (No. 9)

(approved subject to any editorial corrections)

This judgment is handed down in public on Monday 2 July 2023 at 1030 (London time) by email to all parties and transmission to the National Archives.

Robin Knowles J CBE:

Introduction

1. This litigation comprises 11 sets of proceedings. There are related arbitrations. In the main set of proceedings the Republic of Mozambique is Claimant ("the Republic Proceedings"). In a number of other sets of proceedings that include questions of state immunity and have become known as "the Immunity Proceedings" the Republic is Defendant.

2. Two years ago on 21 July 2021 I ordered that there be a combined trial, of the Republic Proceedings, of Preliminary Issues that had been ordered in the Immunity Proceedings, and of all issues that remained under a number of applications brought for stays under section 9 of the Arbitration Act 1996 (save one, which is before the Supreme Court). I ordered that the trial length was to be limited to 13 Commercial Court weeks and that the trial be listed from October 2023 to December 2023,

3. My reasons were given in my ruling of 21 July 2021 ([2021] EWHC 2749 (Comm)). Broadly, I sought to bring together as many of the disputes between the many parties as possible, so that as much could be decided as was necessary and possible, and within as definite a time frame as possible. There was otherwise a real danger of the litigation, and the disputes it was intended to decide, simply losing coherence and at the same time taking many years. The issues are of potentially great significance, financially and reputationally, to the state, the financial and other institutions, the businesses and the individuals involved. The allegations are of great seriousness and the sums at issue are enormous.

4. As well as the arbitral proceedings already mentioned there have been criminal proceedings and arbitral proceedings in other parts of the world, but this litigation is of central importance to all parties. In setting the limit to the hearing length and in fixing the dates for trial I had regard to the parties and to the proportionate requirements of this litigation between them, but also to the interests of other users of the Court.

5. The trial is scheduled to commence on 2 October this year, in 3 months time. Over the last two years time and resources have been dedicated to case management and preparation towards trial, working through many difficulties. The time and resources been considerable but not disproportionate to this litigation and to the end of resolving it fairly. Witness statements for trial have been exchanged. Expert evidence across a number of fields has been exchanged and, with very limited exceptions, is to be complete by the end of July. A pre-trial review and certain further interim matters are scheduled to be heard at the end of this month and beginning of August 2023.

6. In litigation with many challenging areas, an especially challenging area has been disclosure. The overall endeavour here has been vast, but again not disproportionate to the issues in the litigation and to the end of resolving them at a fair trial. A number of parties are still in the final stages of providing further disclosure, although what each still has to do has been defined, and as all parties understand their disclosure obligations are continuing obligations.

7. I have given a number of judgments and rulings in relation to disclosure. Most have concerned the Republic's disclosure. I have had to emphasise at several points to the Republic specifically the importance of disclosure and its particular importance in this litigation. As appears below, on 3 March 2023 I had to declare that the Republic was not complying with its disclosure duties, specifically in relation to documents held at three parts of the administration of the Republic.

8. Between 13 and 15 June 2023 I heard applications by a number of parties to strike out the Republic's claims in the Republic Proceedings and to debar the Republic from defending the Preliminary Issues in the Immunity Proceedings ("the Applications to Strike Out"). These applications were based on failures, or alleged failures, by the Republic in giving disclosure, and in addressing related orders of the Court.

Disclosure from the Office of the President and SISE

9. Although there are additional criticisms of disclosure and these are referred to below, at the centre of the Applications to Strike Out is disclosure by the Republic from two parts of the administration of the Republic (referred to for convenience as "State entities" in the litigation). The first is the Office of the President ("OOP"). The second is the Serviço de Informação e Segurança do Estado ("SISE"), the state security service. Disclosure has been given by the Republic from many other State entities.

10. The Republic itself properly acknowledged in its Disclosure Review Document that the OOP and SISE were likely to hold documents relevant to the Issues for Disclosure. The Republic has been ordered to give extended disclosure on Model D across a range of issues set out in the List of Issues for Disclosure. In Judgment 7 [2023] EWHC 514 (Comm) I addressed the relevance of disclosure from these State entities, describing them at [28] of "real relevance across the piece".

11. I said in Judgment 7 at [19]:

> "The exercise to date has clearly been one of scale and challenge. I take close account of the difference there will be between the systems available to the Republic for the purposes of public administration, including information retention and record keeping and retrieval, and those available in other States enjoying the good fortune of greater resources or more developed arrangements."

12. I have also made clear throughout (including at [30] and following in Judgment 7) that I fully understand that the Republic is concerned about security, particularly where these State entities are involved. The security of a foreign friendly state is a matter of great importance. I have made decisions, provided explanations and offered guidance relevant to this aspect at various stages in the litigation.

The Declaration

13. In the result, on 3 March 2023, on applications by various parties, I concluded that the point had been reached at which it was appropriate to make a declaration ("the

Declaration") that the Republic was not complying with its disclosure duties, specifically in relation to documents held at the OOP and SISE. (I reached the same conclusion in relation to another State entity, the Council of State, but that is not at the centre of the Applications to Strike Out.)

14. My reasons were given in Judgment 7. Broadly I focused on the lack of evidence of challenge to the quality of the disclosure exercise where almost no documents had been found by the Republic. This was also in circumstances where Peters & Peters, and even the PGR (the state legal service), were not being allowed to participate in searches at the OOP and SISE.

The Plan

15. I accompanied the Declaration with Orders in these terms:

> "2. The Republic, by Peters & Peters Solicitors LLP ("Peters & Peters") (in its capacity as the Republic's solicitors and as officers of the Court), shall by 31 March 2023 prepare and file with the Court a plan addressed to the Court (the "Plan"), and copied to the Participating Parties, for giving disclosure of relevant documents from the OOP, SISE, the Council of State and the Republic's Navy. The Plan shall be prepared on the basis that the approach to disclosure contained therein will be a fresh exercise, as though the Republic were starting its disclosure exercise at the entities listed in Paragraph 1 and 2 from the beginning.
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> 3. The Plan may include any request to the Court to preserve the confidentiality of any disclosable document, or for the Court to consider exempting a document from disclosure including where it is not of central relevance to the Proceedings but is categorised as State Secret.
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> 4. Where a request in accordance with paragraph 0 above is made, the Court shall discuss with the Participating Parties how to determine such a request.
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> 5. The Plan, and any disclosure provided by the Republic in accordance with it, shall be considered at the April 2023 CMC."

16. On 31 March 2023 Peters & Peters filed a Plan.

17. In relation to the OOP specifically, this was stated in the Plan:

> "22. The Republic and Peters & Peters are not able to put forward a disclosure plan for the OOP.
>
> 23. The PGR, represented by Deputy Attorney General Vasco Matusse, has met with both … the Minister for the Presidency, as well as … the Director of the OOP. The judgment and order … were explained to them. The importance of a further disclosure exercise involving Peters & Peters as much as possible was communicated to the OOP. The OOP indicated that it would consider this request.

24. Thereafter, it was communicated to the PGR that following the meeting referred to in paragraph 23 above, the OOP had, again, searched for relevant hard copy and electronic documents, strictly following the guidance by the PGR. The search benefited from IT technical staff and specialised officials responsible for the Office's archives and classified material. As a result of this new search no additional documents were found. As a result, it is the position of the OOP that there is no need for further searches to be carried out."

18. In relation to SISE specifically, the Plan stated (footnotes omitted):

"15. The Deputy Attorney General Vasco Matusse has met representatives of SISE. The judgment and order … were explained to them. The importance of a further disclosure exercise involving Peters & Peters as much as possible was communicated to SISE. SISE indicated that it would consider this request.

16. In responding, SISE indicated that it had to take into account the fact that:

a. SISE is an institution definitionally subject to State Secrecy. This means that all documents produced by SISE are subject to State Secrecy.

b. SISE, given its role as the Republic's intelligence service, has particular policy and operational reasons for restricting access to its files.

17. In light of this, and following further meetings between the PGR and SISE, SISE agreed to certain searches being undertaken. SISE will not permit a search for hard copy documents in its archives. SISE has explained to Deputy Attorney General Vasco Matusse that (a) it has already undertaken searches of its hard copy documents and not found relevant documents; and (b) SISE believes that it does not hold hard copy documents relevant to the Proceedings because the relevant SISE individuals engaged in the criminal conspiracy either did not use SISE to store documents or had removed them by the time the conspiracy was uncovered. Moreover, the hard copy documents it does hold are subject to State Secrecy and are operationally sensitive.

18. The further searches at SISE will, therefore, be limited to electronic searches of:

a. All institutional e-mail accounts held on SISE's server, being 39 e-mail accounts. The server has been in operation since 2018. No accounts for Mr Leão, Mr do Rosario and Mr Mutota are on the server.

b. Four desktop computers – These computers have been identified by SISE as the appropriate computers given the topics which SISE have been told are relevant. Specifically: i. Two of these computers originate from the Office of the Director General. They were used by secretaries to the Director General, as Directors General do not generally use computers themselves. One dates from the period that Mr Leão was Director General. The other dates from 2018. ii. The other two of these computers originate from the General Secretariat of SISE which is responsible for receiving, transmitting and managing correspondence. The two computers date from 2018.

> 19. Supervision and Training of the PGR disclosure team: Peters & Peters has provided training to the PGR disclosure team over a period of years. That training has continued in advance of the SISE disclosure process and has included tailored training and supervision from Peters & Peters in relation to this entity. In light of the focus on electronic documents, consideration has also been given to the appropriate keywords to be used.
>
> 20. The search of the identified electronic repositories at SISE is being conducted by the IT professionals from the PGR disclosure team, attended by SISE. The method being used is applying the attached keywords, with responsive documents being isolated and saved for consideration by the PGR. The PGR will seek the declassification of any potentially relevant documents from SISE. Once documents have been declassified, Peters & Peters will review material on its disclosure platform and consider it for relevance. Relevant material will thereafter be disclosed.
>
> 21. The search has started. To date, no decisions on declassification have been made. The Republic intends to complete the aspect of the Disclosure Plan relating to SISE by 28 April 2023."

19. The language used in some places in the Plan is or could be read as clearly inappropriate when the Court had made Orders for disclosure and for the Plan and had made the Declaration. The Orders of 3 March 2023 were not a "request" to be "considered" (paragraphs 21 and 15 of the Plan). It was not for the OOP to take the "position" "that there is no need for further searches to be carried out." (paragraph 24 of the Plan). It was not for SISE to decline to "permit a search for hard copy documents in its archives" and to decide that "further searches … will, therefore, be limited to electronic searches" (paragraphs 17 and 18 of the Plan). However, save to notice the language and record my regret at its use, especially by a State, I do not propose to dwell on language and will instead concentrate on substance and action.

The List

20. In Ruling 29 dated 7 April 2023, as a further exercise to help establish the position with the Republic's disclosure, I invited all parties other than the Republic to compile a single composite numbered list ("the List") of any point that identified an important relevant document known or likely to exist (and why) and likely to be or to have been held at SISE or the OOP (and why).

21. I went on to state that I would then like the Republic to address in writing, point by point, the points in the List. This would assist in consideration of the Republic's disclosure at the then forthcoming Case Management Conference on 27-28 April 2023 (the April CMC). I indicated that I would also like the partner from Peters & Peters who had particular responsibility and operational oversight for the work on the Plan in relation to SISE and the OOP to be present in Court at the April CMC.

22. The List was duly produced on 14 April 2023, addressed by the Republic in writing on 21 April 2023, and considered at the April CMC. In the course of argument at the April CMC I said to Mr Jonathan Adkin KC, leading for the Republic:

> "The plan itself, which I read the moment I received it, was, again, I will be completely open, fully disappointing in relation to the Office of the President, and I wasn't impressed with the treatment in relation to SISE."

In Ruling 30 made at the April CMC I stated:

> "1. … On the face of things and as I see it at the moment - which means I am open to further understanding and also matters may develop - although I required a plan there is no plan for the OOP. Further, on the face of things, although I required a plan, there is no plan in relation to SISE that would achieve compliance with the objectives that the plan was designed to serve.
>
> 2. I am asked to make a declaration of breach or continuing breach in relation to disclosure duties and in relation to the order for a plan. I am not going to take that formal step. I have said what I have said just now and that is sufficient for the moment. Credit Suisse and others couple a request for declarations with a request to move on to a full hearing about strike-out. That hearing I will make arrangements to enable.
>
> 3. I need to say something to each of the two sides about such a hearing.
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> 4. To the Republic, the importance of every day from here to the hearing should be evident. Every day is an opportunity to try and achieve a position in which the Republic can say that matters have moved on and the application is no longer needed, or is less powerfully needed.
>
> 5. On the other hand, I need to say to the Credit Suisse team and others that, as I know that they too will have in mind, amongst the points the court will consider at such a hearing is the question whether, even if some aspect of sanction is or may be necessary, that is the right point in time or whether a point in time that is closer to or at trial is more appropriate. Those points may come into the equation if one reaches a question of consequence or sanction or possible consequence or sanction. And strike-out is not the only matter that would fall for consideration, all other things being equal.
>
> 6. That said, I am persuaded that further court time should be allowed for the hearing and in reasonably short order. I adhere to that view, notwithstanding the further work it is going to put onto all sides when there is a lot else to be done as well."

What the Republic has gone on to do

23. Mr Keith Oliver, Head of International at Peters & Peters and the lead partner at the firm for this litigation, has made witness statements dated 17 February 2023 (his 19th) and dated 26 May 2023 (his 21st). I had regard to the former before making the

Declaration and requiring the Plan. But the latter was in response to the Applications to Strike Out, and it brings things further up to date.

24. Mr Oliver's witness statement dated 17 February 2023 had included evidence (a) that Peters & Peters had provided detailed guidance to the OOP regarding the disclosure process, the Republic's disclosure duties and categories of potentially relevant documents that it might hold, although apart from at a first meeting in 2019 "because of the nature of the institution and concerns about state secrecy, all further communications regarding the disclosure process have been transmitted to the OOP via the PGR". (b) that Peters & Peters made inquiries about organisational structures, IT and communications frameworks and policies, regarding preservation and retention of documents, and (c) that searches were carried out within the OOP by the staff of that Office.

25. In his witness statement dated 17 February 2023 Mr Oliver had included evidence (a) that after a meeting in 2019 at which the process of disclosure was explained, various in-person meetings had taken place between Peters & Peters and SISE to discuss guidance provided to SISE and answer any questions they had about the litigation and the disclosure process, in addition to meetings also attended by SISE to provide information about the disclosure process, (b) that Peters & Peters had provided detailed guidance to SISE regarding the disclosure process, the Republic's disclosure duties and categorise of potentially relevant documents that it might hold, (c) that Peters & Peters made inquiries about organisational structures, IT and communications frameworks and policies, regarding preservation and retention of documents, and (d) that searches were conducted at SISE by SISE employees.

26. Points highlighted (with the benefit of argument) in Judgment 7 (3 March 2023), and in the argument for the hearing leading to that judgment, together with points revealed by the List (14 March 2023), and points discussed at the April CMC (27-28 April 2023), all showed the need and scope for challenge of the results of the searches.

27. Mr Oliver's witness statement dated 26 May 2023 includes evidence of a meeting between Mr Oliver (and Mrs Gabriel, a partner in his firm) and the President of Mozambique, HE President Nyusi (in his official capacity; he is also a party to the litigation in his personal capacity, subject to a claim of immunity) and Deputy Attorney General Matusse on 5 May 2023, with a pre-briefing prepared with the assistance of Peters & Peters.

28. At this meeting Mr Oliver and Mrs Gabriel explained to the President the importance of disclosure, "the difficulties which had been experienced by the Republic, in particular concerning the OOP and SISE", and brought to his attention "the previous comments of the Court concerning the Republic's disclosure", the importance of properly involving Peters & Peters and the PGR in the process, and the Declaration, the requirements to file the Plan and respond to the List, and the purpose of the List. Mr Oliver and Mrs Gabriel "explained to the HE President Nyusi, and challenged HE President Nyusi upon, the results of the previous disclosure exercises carried out at the OOP and SISE".

29. Mr Oliver's evidence as regards OOP is of these further steps following:

a. The OOP has now gone on to conduct further searches targeted on particular offices within the OOP, namely The President's Office (ii) Offices of the Advisors to the President (iii) the General Secretariat and (iv) the Office of the Chief of Staff.

b. A search of computers from the General Secretariat, the Office of the Chief of Staff and from what is called the "Sessions Room" has been conducted by staff from the OOP. The OOP does not have a server or centralised facility for storing documents, and these computers were chosen "because it is thought they are likely to be the electronic repositories where potentially relevant material (other than emails) would be found".

c. Institutional email accounts of the OOP are held by the agency INAGE and "OOP has confirmed that it will authorise INAGE to carry out certain searches of emails" but "the details of the email accounts to be searched and the keywords to be used have yet to be confirmed" although Mr Oliver hoped (as at 26 May) "to address this at a further meeting with the OOP as soon as possible".

d. The OOP has reviewed the List and "responded separately to each of the 70 items of the List" and has searched for them. Documents were found under 5 items.

e. OOP has found 20 documents (a letter of 12 June 2023 from Peters & Peters to all parties explained these comprised 59 individual when separated for review, of which 8 were determined by a solicitor at Peters & Peters to be relevant), including 2 of a total of 3 previously identified by OOP as being potentially relevant (the third "cannot now be located").

A footnote to the Republic's skeleton argument reports a further meeting with the OOP attended by Mr Oliver on the day of the skeleton argument (8 June 2023) "at which the OOP was challenged by Mr Oliver in relation to its disclosure").

30. As regards SISE, Mr Oliver's evidence in his witness statement dated 26 May 2023 is of these further steps:

a. On 10 May 2023, SISE provided its response to each entry in the List. "SISE's responses were independently arrived at and did not take account of the Republic's response to the List prepared by its legal team" but were also, for one reason or another, incomplete as regards some 24 entries. There were 20 entries in respect of which SISE said there were, or they had, no documents, 16 entries in respect of which SISE said any documents would be in the form of personal correspondence and would therefore not be held by SISE, and 10 entries in respect of which SISE said that any documents would be held elsewhere in the Republic.

b. Through a series of meetings with SISE in Maputo, on 16, 24, 25 and 26 May in Maputo, Mr Oliver and others from Peters & Peters challenged representatives of the PGR, and from SISE. SISE attended by a senior individual responsible for legal affairs, a senior individual responsible for archiving and a member of SISE's IT team. The challenge was to SISE's responses to the entries in the List in detail and explanations were sought for those responses. Examples are given in Mr Oliver's

statement but included pushing SISE to confirm, in relation to each of the items in the List where they said there were no documents or the documents were elsewhere, how they had arrived at their conclusions that the institution held no documents and whether searches had taken place in response to their receipt of the List, including further detail as to who had carried out searches, where such searches had been carried out, what SISE had looked for and how searches had been undertaken. Mr Oliver and colleagues asked specifically about letters which had been produced by way of disclosure, on SISE letterhead, which appeared to have been authored by the former Director General of SISE, General Lidimu, in 2017. Mr Oliver and colleagues showed SISE a translation of the Second Witness Statement of Luke Barden de Lacroix and asked specifically about those categories of document that Ms Lucas (a former Director of Treasury of the Republic) had identified should be held by SISE.

c. SISE confirmed that searches for documents, whether they bore a reference or not, had been carried out in its electronic and hard copy archives. Such searches included searches for meeting notes, minutes, agendas and other similar documentation.

d. The SISE representative with responsibility for legal affairs stated that he, along with 5 other individuals in his team, had carried out searches of SISE's hard copy and electronic archives on 4 occasions including specifically in response to receipt of the List. They had looked for documents, including each of the items set out in the List, in the places where they would have expected them to be, but they had not found anything and, in respect of certain categories of documents, they confirmed they would not have expected them to be anywhere other than in their archives if they still existed. For reasons of national security, SISE were neither willing to confirm the categories of documents that should be in its archives nor the structure of its archives. However, Mr Oliver states it was apparent that, in respect of referenced letters, these were organised chronologically and the representatives of SISE were not able to find a document bearing the relevant reference in the chronological run of documents.

e. SISE confirmed that it was and still is rare for individuals working within the institution to use institutional email accounts. They had checked whether any of Mr Leão, Mr Mutota or Mr do Rosario had SISE institutional email accounts, which they confirmed have the domain "@sise.org.mz" and established they had not. The SISE representative with responsibility for legal affairs relayed that few people in SISE had credentials to log in to the institutional IT system and even fewer people had an institutional email account. He made clear it was not surprising to him that none of Mr Leão, Mr Mutota or Mr do Rosario had email accounts, including because those working within SISE are strongly discouraged from using electronic means of communication. Members of the Peters & Peters team have carried out searches of the disclosure to see what evidence could be located of the use of institutional email. The results were that the only domain name that could be located in documents including "SISE" is "@sise.org.mz". The Republic has collected under 100 documents sent to email addresses including the domain "@sise.org.mz". Peters & Peters has reviewed these documents and they are not relevant to the Proceedings. In addition both Mr Leão and Mr Mutota, who are incarcerated in

separate institutions, separately informed an associate at Peters & Peters that they did not use SISE institutional email accounts.

f. No letters purportedly written by General Lidimu in 2017 could be located. The SISE representative with responsibility for legal affairs could provide no explanation for the absence of these letters in SISE's archives. He accepted that it may be that the institution produced these letters, but they had been searched for and were not in SISE's records.

g. SISE's IT professional confirmed that he and 2 representatives from the PGR had carried out searches of the 4 computers within SISE identified in the Plan. He had applied the 454 keywords appended to the Plan and reviewed responsive documents for relevance to the Proceedings. SISE has identified no relevant documents, but searches of the 4 computers within SISE had (despite the terms of the Plan) not extended to 39 institutional email accounts. Deputy Attorney General Matusse is taking urgent steps enable PGR to review documents that responded to keyword searches.

h. Entry 74 in the List concerns studies carried out by SISE in 2010/2011 to identify threats and concerns regarding Mozambique's coastline. SISE has accepted that studies were carried out. SISE representatives were able to say that the documents concerned would contain an analysis of the threat faced by the Republic and how the Republic could address that threat (and that even studies prepared in 2011 would likely contain information relevant to current actual or potential threats to the Republic). The SISE representative with responsibility for legal affairs was aware that reference had been made during a criminal trial in Mozambique to a study concerning the Republic's EEZ and reportedly created by SISE. He stated to Peters & Peters that he and his colleagues had carried out searches for it and they had not been able to locate it. It is clear that had it been located, SISE would resist production. The underlying reason would be national security but the Republic makes clear that it would also maintain a challenge to relevance. It adds that related documents would likely to have been held by the Ministry of National Defence and the Ministry of Interior, from which disclosure has been given (the adequacy of disclosure from these Ministries is not at the heart of the Applications to Strike Out).

31. The representatives of SISE expressed the view that the individuals with positions at SISE and who were involved or alleged to have been involved in the relevant transactions (Mr Leão, Mr Mutota and Mr do Rosario), were at all times acting in their personal capacities. The view was expressed that these individuals would simply not have allowed any material connected with dishonest activities to come into, or remain at, SISE, and could have written letters on SISE letterhead outside the institution, asking their secretaries or others to provide reference numbers, without any copy or trace of such letters being retained in the archives. The fact a letter bore a reference number (or even a stamp) did not, in their view, mean that it had been received by the institution, or correctly filed as sent by the institution. Further, due to the hierarchical nature of the institution, and the seniority of Mr Leão, Mr Mutota and Mr do Rosario, requests for reference numbers or letterhead would not have been questioned.

32. A letter from Peters & Peters received by the Court and the parties, on 22 June 2023, after the hearing of the Applications to Strike Out conveyed that Peters & Peters are instructed that the Director General of SISE has directed that the search of the 39 institutional email accounts should take place, but as Slaughter & May respond for Credit Suisse this is late and there is no timetable.

33. I note that the question whether (as originally proposed by Mr Stephen Midwinter KC at an earlier hearing) the Republic should be required to provide a schedule in advance of trial containing further information about its disclosure exercise remains scheduled for consideration at the CMC (and Pre Trial Review) listed for 28 July 2023.

Striking out in the context of disclosure and non-compliance

34. The Applications to Strike Out involve several related aspects. These are, in summary, compliance with a party's duties to the Court (disclosure duties are duties to the Court: PD 57AD §3.1), compliance with the Court's orders, and ensuring a fair trial. The Overriding Objective of enabling the court to deal with cases justly and at proportionate cost is relevant throughout, including as elaborated at CPR 1.1(2).

35. As Credit Suisse note, this Court has already emphasised that its paramount duty is to ensure a fair trial (see [9] and [66] of Judgment 7). It has emphasised the important role that compliant disclosure from the Republic plays in this regard (see Judgment 6 [2023] EWHC 91 (Comm) at [1], [19]-[20]; Judgment 7 at [10]). In each respect the Court's observations reflect the Overriding Objective.

36. Credit Suisse highlight these passages in Judgment 7:

> "9. The Court's concern, front and centre, is that any trial is a fair trial. That is what the parties and the public are entitled to; and it is what the rule of law requires.
>
> 10. The Court is pleased to be trusted with the resolution of important international disputes such as the present. These disputes can involve States, companies and individuals. Trust in the Court is earned and, in every case, the Court must continue to earn it. It is a trust based on the delivery of a fair, independent hearing and decision. And one of the things that the Court insists on to achieve a fair decision is disclosure of relevant documents.
>
> …
>
> 38. Non-compliance with the court's orders or with the disclosure process is an important matter in its own right. Here of course the importance is, again, in the context of fairness of trial. …".

37. Authority cited by Credit Suisse on the issue of compliance with the Court's orders includes Lord Neuberger PSC's words in Global Torch Ltd v Apex Global Management Ltd (No 2) [2014] 1 WLR 4496 at [23]:

> "… The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if

> persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons…"

38. In JSC BTA Bank v Ablyazov (No 8) [2013] 1 WLR 1331 at [188], Rix LJ put the matter in these terms:

> "… The authorities demonstrate that it is vital for the court, in the interests of justice, to have effective powers, and effective sanctions. Without these, it would be possible for a defendant (or, in a different situation, a claimant) to flout the orders of the court, which are the court's considered means by which to keep the scales of justice for the parties even. If once it became known that the court was unable or unwilling to maintain the effectiveness of its orders, then it would lose all control over litigation of this kind, with terrible consequences for the administration of justice. …"

39. Credit Suisse also cites JSC BTA Bank v Granton Trade Ltd & Ors [2012] EWCA Civ 564 per Tomlinson LJ (with whose judgment Moore Bick and Mummery LJJ agreed) at [21], who said when referring to the possibility of making an order striking out a claim for "failure to give proper disclosure" that:

> "… leaving aside instances of flagrant abuse of process, the touchstone for relief will usually be whether the conduct of the defaulting party has jeopardised a fair trial or prevented the court from doing justice …".

40. This is an area where each case will turn on its own facts and circumstances. In Summers v Fairclough Homes Ltd [2012] 1 WLR 2004 (SC) at [61] Lord Clarke JSC said that in considering whether to exercise its power to strike out:

> "… the test in every case must be what is just and proportionate".

As Credit Suisse highlight, he went on to note at [62] that:

> "one of the objects to be achieved by striking out a claim is to stop proceedings and prevent further waste of precious resources on proceedings which the claimant has forfeited the right to have determined".

41. Arrow Nominees and Another v Blackledge & Ors [2000] EWCA Civ 200; [2000] 2 BCLC 167 was a case of fabrication and destruction of documents. However it was understandable that it should still be cited for principle. At [54]-[56] Chadwick LJ said:

> "54. … I adopt, as a general principle, the observations of Mr Justice Millett in *Logicrose Ltd v Southend United Football Club Limited (The Times, 5 March 1988)* that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court

> - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> 55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself. That, as it seems to me, is what happened in the present case. The trial was "hijacked" by the need to investigate what documents were false and what documents had been destroyed. The need to do that arose from the facts (i) that the petitioners had sought to rely on documents which Nigel Tobias had forged with the object of frustrating a fair trial and (ii) that, as the judge found, Nigel Tobias was unwilling to make a frank disclosure of the extent of his fraudulent conduct, but persisted in his attempts to deceive. The result was that the petitioners' case occupied far more of the court's time than was necessary for the purpose of deciding the real points in issue on the petition. That was unfair to the Blackledge respondents; and it was unfair to other litigants who needed to have their disputes tried by the court.
>
> 56. In my view, having heard and disbelieved the evidence of Nigel Tobias as to the extent of his fraudulent conduct, and having reached the conclusion (as he did) that Nigel Tobias was persisting in his object of frustrating a fair trial, the judge ought to have considered whether it was fair to the respondents - and in the interests of the administration of justice generally - to allow the trial to continue. If he had considered that question, then - as it seems to me - he should have come to the conclusion that it must be answered in the negative. A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

42. In Byers v Samba Financial Group [2020] EWHC 853 (Ch) Fancourt J, who was ultimately to strike out parts of but not the whole of a defence in the particular facts and circumstances of the case, valuably explained his approach as follows:

"120. An order striking out a defence and debarring a defendant from defending (or striking out a claim) is the ultimate sanction that the court can impose for a breach of its order that does not amount to a contempt of court. It therefore must be a sanction of last resort and is likely only to be imposed for a serious and deliberate breach. The sanction must be necessary and proportionate in the circumstances. Lord Clarke said in Summers v Fairclough Homes Ltd [2012] UKSC 26; [2012] 1 WLR 2004 at [61], giving the judgment of the Supreme Court that: "the test in every case must be what is just and proportionate", and he emphasised the draconian nature of the strike out sanction and the flexibility of remedies available to the court to fashion a proportionate remedy. Rix LJ similarly emphasised in Aktas v Adepta [2010] EWCA Civ 1170; [2011] QB 894 at [92] the flexible remedies that the court had at its disposal to make the sanction fit the breach. If a breach, though serious, is excusable, an order striking out a party's case and debarring it from proceeding further may well be disproportionate, at least if another sanction is sufficient to achieve the ends of justice notwithstanding the breach.

121. I have refused to vary or revoke the order for standard disclosure. I did so on the basis that the Bank's disclosure was and remains necessary for a fair trial of the action, and because the importance of disclosure substantially outweighs the existence of a risk to the Bank in complying with the order. The Bank is now in serious breach of the order and will remain in breach: I have formed the view that the Bank will not give disclosure while SAMA's ruling remains in place and that it is unwilling to approach SAMA to change it. In those circumstances, there is little real alternative available to the court but to strike out the Defence and debar it from defending at the very least those issues that are fact sensitive and to which the Defendant's disclosure documents could be relevant. The question that I have to decide is whether the breach is so serious and inexcusable that the Bank must be taken to have forfeited its right to a trial even of issues of law or foreign law, where documents of the Bank will be irrelevant to the outcome of those issues.

122. There was an interesting argument at the Bar as to whether a full debarring order is a "normal" or "usual" response of the court to serious non-compliance with its orders. The Claimants relied on Caven-Atack v Church of Scientology Religious Education College Inc (unrep, 31.10.94, C.A.), cited in Matthews and Malek on Disclosure (5th ed., 2016), the dicta of Christopher Clarke J in JSC BTA Bank v Ablyazov (No.3) [2010] EWHC 2219 (QB); [2011] 1 All ER (Comm) 1093 at [38] and the dicta of Soole J in Michael v Phillips [2017] EWHC 1084 (QB) in support of that proposition. I do not consider that those decisions establish that under the Civil Procedure Rules an order striking out the whole of a claim or defence, as the case may be, is the standard or expected order in the case of a serious breach of a court's order. In many cases of serious breach such an order may be the only effective and proportionate sanction, but – at least where the breach is not contumacious – it would be surprising if there were a standard approach under the flexible approach mandated by the Civil Procedure Rules.

123. I prefer the approach described by Lord Clarke and Rix LJ to which I have referred. The court must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding

> objective. The seriousness of the breach, the extent if at all to which it is excusable and the consequences of the breach will be very important factors, but the overriding criterion is the requirement for the sanction to be proportionate and just.
>
> 124. The choice for the Court now is to strike out the Defence and debar the Bank entirely from defending the claim, or to strike out and debar save as regards those issues that can fairly be tried without disclosure by the Bank. It clearly would not be just to allow the Bank to defend any factual issue where it might have relevant documents that it should have disclosed. The risk of whether the Bank's documents might be relevant to such issues would clearly have to fall on the side of the Bank. In my judgment, the Court can properly except certain issues from a debarring order if it is satisfied, first, that such issues can fairly be tried without the Bank's disclosure; second, that such an exception would be in the interests of justice and fair to both parties; third that the conduct of the Bank is not so inexcusable that a full debarring order is deserved and is proportionate, and fourth that making exceptions from the debarring order in that way does not undermine the authority of the Court. There must clearly also be some sensible purpose served by having a trial of certain issues only."

43. Giving Byers v Samba as an example, in PIFSS v Al Wazzan 2023 EWHC 1065 (Comm) at [100] Henshaw J referred to the importance of what he usefully termed careful calibration:

> "As PIFSS points out, whilst the court is empowered to strike out a defence, the case law indicates that responses to non-compliance can be carefully calibrated to do justice in the case (an example being Fancourt J's decision in Byers v Samba [2020] EWHC 853 (Ch) §§ 120-123 and 129-130, where he disbarred the defaulting party from defending only on the particular issues where disclosure was required for a fair trial). …"

44. On behalf of the Republic, in relation to the Immunity Proceedings Mr Adkin KC referred to section 13(1) of the State Immunity Ac 1978. This provides:

> "No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party."

The Republic's argument that this had application here was rightly robustly answered by Mr Howe KC. The section, in my judgment, does not assist the Republic; striking out is not a "penalty by way of committal or fine".

The argument of the applicants for striking out, and now, and in full

45. Mr Andrew Scott KC appearing for Credit Suisse led the argument for applicants in the Republic Proceedings. He developed six core propositions on behalf of Credit Suisse. In this he was supported (without repetition) by other applicants, including by Mr Timothy Howe KC who led argument for applicants in the Immunity Proceedings.

46. The first of the core propositions was that the Republic remains in declared breach of its disclosure duties as regards the OOP and SISE. The declaration remains in place. The Republic has not applied to revoke or vary it on the basis that it has now come into compliance with its disclosure duties or on any other basis. Nothing material has changed, submits Mr Scott KC, since Judgment 7 was given and the declaration was made.

47. The second core proposition developed by Mr Scott KC was that the Republic is also in clear breach of the order made at the March hearing requiring a remedial disclosure plan for the OOP and SISE. What the Court ordered was a plan to remedy the declared breaches at those State entities, to be a fresh exercise, as if one were starting from the beginning. The Court's assessment as at the April CMC was that there was no plan for the OOP and no plan in relation to SSE that would achieve compliance with the objective that the plan was designed to serve. Mr Scott KC acknowledged that that assessment was expressly subject to further understanding and development, but submitted that nothing has since occurred that is material and which would change that assessment. There is no revised plan for the OOP or SISE and nor has the Republic said it intends to provide one. Indeed, argued Mr Scott KC, matters have worsened because of the admitted failure to search at all the 39 SISE institutional email accounts and the fact that the relevance review of the four computers was done by a SISE IT professional without evidence that he/she has any legal training or experience or familiarity with the issues in the litigation. Mr Scott KC said that it remained to be seen whether the Republic will allow Deputy Attorney General Matusse to rectify these errors that, but even if it does, that would not alter the fundamental point that (as he contended) all it would achieve is the implementation of a plan which the Court had assessed would not achieve compliance

48. The third core proposition developed by Mr Scott KC was that the Republic's breaches of its disclosure duties and of the Court's orders in relation to the OOP and SISE are serious. That follows, he argued, from the nature and importance of the obligations in issue, both the disclosure duties and the orders made to enforce them, each of which is fundamental to core aspects of the overriding objective and of the court's paramount duty to ensure fairness. Mr Scott KC said that the seriousness is also clear from the conclusions that I had already reached in Judgment 7 and by which the Republic is bound: I had already decided in Judgment 7 that the results of the searches of those repositories did not withstand the simplest challenge.

49. That the Republic's breaches are wilful was Mr Scott KC's fourth core proposition. That necessarily follows, be argued, because this is not a case in which the Republic's failure to provide compliant disclosure from the OOP or SISE or a plan to remedy it is the result of any external impediment. It is a case, he urged, in which the Republic has chosen not to comply with its obligations, and this despite them having been made clear to the Republic in no uncertain terms by this court and by its own lawyers too, they acting as officers of the court and under their own duties to the court in that capacity. Mr Scott KC submits that the Republic's choices will necessarily have been made or approved at the highest levels of its government and ultimately by President Nyusi who is the person with ultimate authority for access to the most important state documents at the most important state entities and the Republic is responsible for his choices to grant or refuse that access. In MR Scott KC's submission, "recalcitrant litigant" is an

entirely fair and accurate characterisation, at least so far as the position of the OOP and SISE.

50. The fifth of the core propositions developed by Mr Scott KC was that the Republic's breaches jeopardise the fairness of the proceedings and the possibility of a fair trial. Credit Suisse's primary position is that that is necessarily so where the Republic agreed in its Disclosure Review Document to give disclosure from the OOP and SISE on a model D basis. The court made an order for extended disclosure encompassing that disclosure, which it could only have done under the practice direction having been, as paragraph 6.3 provides, persuaded that it was appropriate in order fairly to resolve one or more of the issues for disclosure. The Republic has not applied to vary or extend the disclosure order. There is no need, says Mr Scott KC, in these circumstances, and it would be contrary to principle and authority, for the Court to ask in the abstract whether fairness is jeopardised without compliant disclosure in the repositories; he submits that it necessarily follows from the orders already made and the Republic's non-compliance with them that it does. The overriding objective refers at rule 1.1(2)(a) to the importance of ensuring that the parties are on an equal footing and can participate fully in the proceedings; that, says Mr Scott KC, would be subverted if a party could choose, as the Republic has, to withhold the disclosure required of it. Critical too, in and of itself, is the importance under rule 1.1(2)(f) of enforcing compliance with rules, practice directions and orders. The administration of justice and the rule of law depends on it. Mr Scott KC again says that the Republic has not remedied its breaches and it has not said that it intends to, and it has not given the Court any reason to think that there is any real prospect that it would be able to do so, let alone in the time that is left available to the trial.

51. As the sixth, and final, core proposition Mr Scott KC contended the only principled, proportionate and just sanction in response to the Republic's serious and wilful breaches is to strike out its claim and its statements of case, and to do this now. Alternatives, unless orders, partial orders, adverse inferences and so on, would be inadequate to discharge the court's duty in the circumstances that now exist, he argued. If the court is satisfied now, as Mr Scott KC says it should be, that the Republic is in serious and wilful breach and that this jeopardises fairness, it would be wrong in principle to proceed any further.

52. The question is not one of case management, in Mr Scott KC's submission, it is about my paramount duty of fairness and ensuring compliance. Case management would, he argued, only come in if I were in some doubt as to whether the Republic is in breach, whether its breaches are serious and wilful, and whether they jeopardise fairness. The Republic is pursuing alleged private law rights in connection with commercial transactions and it must play by the same rules of the game as any other litigant that does so. Even if the Republic were to be regarded as acting in the public interest, as it suggests, that does not justify proceeding with a trial in which fairness is jeopardised. The paramount public policy here is fairness, the proper administration of justice, and that is what the court must now, he contended, sanction.

53. Beyond OOP and SISE, the Applications to Strike Out also rely on or reference additional areas of the Republic's disclosure. I will mention the main examples among those raised. Mr Richard Hill KC criticised the position in relation to disclosure of electronic documents relating to Mr Chang, the former Finance Minister. Several parties criticised the Republic's approach to disclosure of work-related emails held in

personal email accounts and on personal devices of the Republic's officials and office holders. Mr Peter Knox KC for the members of the CS Deal Team highlighted the position with documents on files in criminal proceedings in the Republic that were not being made available. In the course of the litigation each of these areas has been the subject of correspondence, case management discussion, rulings and judgments.

54. In Judgment 7 at [43] I said that:

> "… [i]n some cases the trial itself, rather than a point before trial, will be the point at which there is greatest clarity and where precision is possible…".

Mr Adkin KC relied on this for the Republic, saying that this was just such a case. Credit Suisse disagreed and its submissions may be summarised as follows:

(1) The Court's duty is engaged whenever the fairness of the trial is jeopardised. If the Court is satisfied that the Republic's breaches create a substantial risk of an unfair trial, the Court's duty is to protect against that risk. It would be wrong in principle to allow the litigation to proceed any further.

(2) The need to conserve the resources of the Court and the Parties also cautions against deterring determination of the issue. That is one of the facets of the Overriding Objective under CPR r.1.1(2)(e). Very substantial resources have already been expended in addressing compliance by the Republic with its disclosure duties.

(3) The disclosure failures are not discrete and have not been remedied and the Court cannot be satisfied that there is any real prospect that they will be remedied by the time of trial. The Republic's conduct has put the fairness of the trial in jeopardy.

(4) A fair trial is one at which the issues in the litigation are determined based on the disclosure that the Court has required. It is unfair for a trial to be hijacked by the need to deal with disclosure failings; the more so where they are serious and wilful ones which are identified ahead of the trial, and which jeopardise the fairness of the trial itself and where the failings arise notwithstanding a lengthy and intensive process of case management in which the Republic has had ample opportunity to comply but has chosen not to do so.

55. Credit Suisse does go so far as to contend that in the present litigation there are no material issues (i.e. those upon which the outcome of the litigation would turn) which can fairly be tried without compliant disclosure from the OOP and SISE. Without prejudice to their primary position on fairness and the need to enforce compliance, the Credit Suisse parties identified four examples of core factual issues in the litigation which might be material to its outcome and in respect of which it was argued there is a substantial risk that a trial without compliant disclosure from the OOP and SISE would be unfair.

56. These were, first, the existence and extent of the alleged bribery of the Republic's officials. Second, the attribution to the Republic of the knowledge and conduct of its personnel. Third, the Republic's allegation, in the claim of conspiracy, that the supply contracts were instruments of fraud or shams. Fourth, the Republic's case that the wrongdoing it alleges caused macroeconomic losses. Those examples showed, urged Mr Scott KC, that the risk of unfairness created by the Republic withholding disclosure

is not a theoretical or abstract one, it is one of acute practical importance to the outcome of this claim. Mr Howe KC, Mr Hill KC, Mr James MacDonald KC for Beauregarde Holdings LLP, Orobica Holdings LLC and VR Global Partners LP, Mr Frederick Wilmot-Smith and Mr Knox KC each drew attention to the fewer or narrower issues with which their clients were involved.

The Court's assessment and decision

57. As at the date of the Declaration, 3 March 2023, the Republic was in breach of its disclosure duties. However the Republic has not left things there. It has searched further and work continues.

58. Thus, as Mr Oliver's evidence shows, the Republic has now gone on to conduct further searches targeted on particular offices within the OOP and a search of computers. The Republic has used the List, produced on 14 April 2023, in its searches at OOP and SISE. It is to carry out searches of institutional email accounts at OOP using keywords. At SISE, searches have been carried out of its electronic and (despite the statement in the Plan that hard copy archives would not be searched) its hard copy archives including specifically in response to receipt of the List.

59. As regards the OOP, the Republic remains in breach of the Court's order made on 3 March 2023 to provide a plan. The position is deeply regrettable because continuance of the breach by the Republic is completely unnecessary - it is now apparent that the Republic has in practice pursued a plan in relation to OOP since 31 March 2023. The latter fact mitigates the harm caused by the breach, but it is nonetheless a breach of the Court's order. A proper decision by the Republic would be to apologise and address it now. The sanction of striking out for this breach alone would be disproportionate. The Court will consider any proportionate sanction at a later stage after the Republic has considered this judgment.

60. The Court appreciates acutely that the outcome of the Republic's searches in relation to OOP and SISE remains very limited in terms of numbers of documents produced. That is a basis for challenge (including within the Republic, with the involvement of its legal advisers) to the quality of the searches. The need for challenge has been something the Court has emphasised on several occasions, and it has since received some assurance, including from Mr Oliver's evidence and through Counsel, that there has been more challenge.

61. Evidence said to support allegations that OOP and SISE were involved in relevant transactions at every stage is provided by Mr Jonathan Clark, a partner in Slaughter & May for Credit Suisse. The witness statements that have now been served by the Republic and the other parties for the trial are limited and this is said to underscore the importance of contemporaneous documents.

62. However it does not necessarily follow from a very limited outcome in terms of numbers of documents that disclosure duties have not been performed. Many points in this area have two sides: where few documents are disclosed one side says it is because the other is not looking and the other side says it is because they are not there. The

Republic has now pointed to some reasons that might explain why the outcome of its searches remains as very limited in relation to the OOP and SISE as it does.

63. The Court notes these examples without attempting to be comprehensive:

(a) SISE has provided an answer (albeit the answer is open to dispute) to the question why material connected with dishonest activities would not come into, or remain at, SISE, even were reference numbers or SISE letterheads to be involved.

(b) The Republic has explained that SISE does not hold personal correspondence.

(c) More has become known (as has been the subject of correspondence and case management discussion) about damage to or deletion of some electronic documents that cannot or cannot yet be accessed.

(d) SISE has also provided a confirmation that Mr Leão, Mr Mutota or Mr do Rosario did not have institutional email accounts at SISE and an explanation why that would be the case.

(e) In the Republic, office holders and officials used personal email accounts and personal devices for their work-related correspondence.

(f) The Republic has made the point that documents might, if they existed, be held elsewhere in the Republic: for example at the Ministry of Finance and Economy where as I said in Judgment 7 at [20] important searches had been undertaken by the Republic, and where at material times President Nyusi was Minister of Finance.

64. Of course some of these reasons are not accepted by the other parties. They may be further explored at a trial. The Court also emphasises it is in no sufficient position at this point before trial to know what contribution disclosure from the Ministry of Finance and Economy may make, one way or another, towards reaching a just decision. Just as the Court is in no sufficient position to assess the witness statements for trial to which reference has been made.

65. The Court is very aware that the Republic has chosen not to use solicitors from Peters & Peters to undertake the searches required at the OOP and SISE. The Court has previously determined that it would be lawful under Mozambican Law for the Republic to allow solicitors at Peters & Peters to do so (see in particular Judgment 6, and [21]-[22] in Judgment 7), and has in a number of rulings and judgments, explained the important part played by solicitors. But the Court has also previously declined to accept the proposition that a party must always use solicitors (see [35]-[37] in Judgment 7).

66. Failing to use solicitors does not mean the searches are not disciplined at all by disclosure duties owed to the Court, for the Republic itself owes disclosure duties. The Republic does remain prepared to use Peters & Peters to review documents where found, after declassification. As Mr Oliver's evidence shows, Peters & Peters has also been involved in using the List, and Ms Lucas' account, to challenge the Republic's efforts. Peters & Peters has also undertaken training of at least some of those involved in searching.

67. At the same time it is already clear that errors have been made by the Republic. The Republic cannot now locate one of the very few documents that it had previously identified. There are the 39 institutional email accounts, although the Republic proposes to correct the position there. There are other examples.

68. As with all parties the Republic's disclosure duties are continuing. The particular relevance of this in this litigation was emphasised at [8] in Judgment 7. The Court is not to be taken to be attempting to be comprehensive when it says that it is quite clear to the Court that the Republic's continuing disclosure duties require it to consider very carefully indeed (and it will need Peters & Peters' advice in this):

(a) with the benefit of close study of the transcript at the hearing of the Applications to Strike Out, the review by Mr Hill KC and the discussions that followed at that hearing of the position with electronic documents, archives and databases, and transfers;

(b) the points made by Mr Clark in his 14th and 15th witness statements, to establish where searches or further searches might be undertaken at OOP for the period before 2018 (the date from which most of the electronic searches are directed);

(c) the points made in oral argument on the hearing of the Applications to Strike Out by Mr Duncan Bagshaw for Ms Lucas in relation to the Central Bank.

69. Progress seems to be being made towards searching for documents on personal email accounts and devices of named officials and office holders (the subject of Judgment 4 [2022] EWHC 3054 (Comm), Judgment 8 [2023] EWHC 1148 (Comm) and the exchange at [18] to [21] in Ruling 30 on 28 April 2023) this work must of course continue. There is still room for further development between now and trial over access to documents on files in criminal proceedings in the Republic.

70. However, at present and emphasising that the Court keeps its mind completely open as evidence and argument may develop, the Court sees the present position in this litigation as more about success or lack of success in searching than about withholding the results of searches or documents known to exist. The Court adds, although this was not the way that matters were put against the Republic, that it does not consider that the present litigation involves what Chadwick LJ described as:

> "A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial …" or
>
> "… where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."

71. The Court does acknowledge that it seems apparent that the Republic would likely refuse to provide a document at entry 74 in the List if found, but the present position is that such a document has not been found. If it is found the Court will deal with its production, and the consequences of non-production, on the merits.

72. The Court is not persuaded that the litigation should be struck out now as a matter of principle, as a sanction for non-compliance with Court's orders. In the present litigation, the Court does not consider that it can be said correctly at this point that there is a

substantial risk of an unfair trial, or that it can be concluded at this point that a fair trial is in jeopardy.

73. The Court has read, listened to and considered the arguments on all sides carefully. In this litigation the trial is close by and I will be the trial judge. The allegations and counter allegations for the trial are many, and the parties have devoted thousands of pages between them to statements of case of skill and intricacy.

74. As to the question whether the litigation should be struck out because an analysis of the potential consequences for each allegation in the litigation would support that end, it is unsuitable and unhelpful that the Court should start expressing views close to trial about each allegation and how it stands evidentially. The Court would in fact risk unfairness to one or more parties if it sought to start expressing these types of views now, and yet it is fairness that the Court is seeking to achieve and that the parties are entitled to expect. The Court is in no way yet in a position to know what results from the combination of disclosure that has been given (and some that is still in process, including from parties other than the Republic), taken with admissions, evidence of fact, expert evidence and legal analysis.

75. For the Republic, Mr Adkin KC presented argument to the effect that the Republic's case on attribution, advanced primarily under Mozambican Law, was central and was unaffected by the position on disclosure. This was robustly challenged by others, including Mr Wilmot-Smith for the Privinvest Defendants and Mr Safa. More fundamentally Mr Adkin KC argued that this litigation is of a complexity that the point to assess whether an allegation should be struck out (or instead, say, an adverse inference drawn) because of the possibility of an undisclosed document was at trial.

76. The use of four examples by Credit Suisse does not provide a complete review. That is no criticism of Credit Suisse. The argument presented by Mr Knox KC for the CS Deal Team included focus on what documents from the OOP and SISE might show and not on what other material shows or may show. That is no criticism of the CS Deal Team. But to start separating out and working through issues for decision now, when the nearby trial is already heavily in preparation, risks error and unfairness. In any area where I did not strike out and gave reasons, how would that leave things between the parties where the reasoning had already entered into the issues ahead of the trial?

77. The exercise would also tend against the important advantages secured by the order two years ago for a single trial of as much as sensibly possible. Other litigation may be more clear cut, but not this litigation and it is not desirable that this litigation fragment.

78. The Court does accept that in light of what has happened it will have to guard with particular vigilance against unfairness at trial, but the Court will do that. In fact, since it appeared that documents on criminal files in Mozambique would not be available it has been clear that the Court was going to have to handle the consequences of unavailable documents at the trial. The Court accepts that at trial it may yet have to conclude that deficiencies in the Republic's disclosure or the Republic's compliance with its disclosure duties have substantive adverse consequences for the Republic's case.

79. At trial, all alternatives, including to strike out and in whole or in part, remain available. The criticisms of the Republic's disclosure, both individual criticisms and the question

of the overall effect on confidence in its disclosure, may be highly material at trial. A calibrated response will be possible in a way that is not possible now.

80. The Court does not accept that, at trial, deficiencies in the Republic's disclosure or the Republic's compliance with its disclosure duties will occupy "far more of the court's time than was necessary for the purpose of deciding the real points in issue", as was the experience in Arrows. And although very substantial resources have already been expended in addressing compliance by the Republic with its disclosure duties, that does not make it just or proportionate to strike out the Republic's statements of case at this particular point in this particular litigation.

81. Drawing on the above and returning to Mr Scott KC's six core propositions, in summary:

(1) The position has developed since Judgment 7 was given and the Declaration was made. It has further work to do to achieve compliance with its disclosure duties, which are continuing.

(2) The Republic is in breach of the order made at the March hearing requiring a remedial disclosure plan for the OOP and SISE but a number of things have since occurred that are material and which serve the ends to which that order was directed. The fact that the Plan in relation to SISE was not good enough does not mean that steps taken pursuant to it do not count; it means that more was required.

(3) The Republic's breaches of its disclosure duties and of the Court's orders in relation to the OOP and SISE were serious, but the position is improved. Nonetheless the nature and importance of the obligations in issue, both the disclosure duties and the orders made to enforce them, do remain fundamental to core aspects of the overriding objective and of the court's paramount duty to ensure fairness.

(4) The Republic's breaches declared by the Declaration were in some particulars wilful in that the Republic was choosing not to comply with its obligations, and this despite them having been made clear to the Republic by this court and by Peters & Peters. However the Republic has reconsidered its choices in material, but not all, respects, with the result that further work has been done. The continued failure to produce a plan for the OOP despite being ordered to do so is an example where the Republic has not reconsidered its choices. The Court expects the Republic to reflect further on what to do about this continued failure.

(5) As things now stand the Court does not accept that the fairness of the proceedings and the possibility of a fair trial are jeopardised. The Republic's choices are not now "to withhold the disclosure required of it", but there is still work to be done to achieve the disclosure required of it. The Court does accept that it will be necessary to keep under review whether there is any unfairness on any issue. The Court also accepts that enforcing compliance with rules, practice directions and orders is important in and of itself, as a matter of the administration of justice and the rule of law. What can be said in the present litigation is that compliance by the Republic with its disclosure duties is improving, and orders of the Court have helped achieve that. This is not a satisfactory position, but it is not as acute as some positions. The consequences may yet be very serious for the Republic, and in a number of ways,

but striking out its statements of case now is not required in the administration of justice or by the rule of law.

(6) Striking out, now, the Republic's statements of case and its claims, and debarring it from defending, is not the only principled, proportionate and just sanction in response to what the Republic has done, and where things currently stand. The Court accepts that what is involved is what Mr Scott KC terms the Court's "paramount duty of fairness and ensuring compliance", but the Court is quite clear that it can honour that duty as things proceed to trial and at trial, and it is of course committed and determined to do so. The Court does not rule out striking out, including of all but perhaps especially of particular allegations (of claim or defence), at trial, or the deployment of inferences adverse to the Republic. Nor does the Court rule out other alternatives.

82. It may in fact be that, contrary to Mr Scott KC's submission, this decision at this point is a case management decision in character, but that does not affect the Court's decision.

Conclusions

83. It is not just, proportionate or necessary to strike out the Republic's statements of case or claims, or debar it from defending, at this stage. However all points remain available to all parties and to the Court at the trial in 3 months time. The disclosure duties of all parties are continuing.