UT Neutral citation number: **[2025] UKUT 00404 (TCC)**

UT (Tax & Chancery) Case Number: UT/2024/000032

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

Hearing venue: Rolls Building
Fetter Lane, London EC4A 1NL

*FINANCIAL SERVICES – procedure – the Authority applies for a declaration that it may use and disclose documents provided to it by Ancean in ongoing reference proceedings - whether there is an implied undertaking or rule restricting the collateral use or disclosure of the documents – the statutory scheme, s.348-349 FSMA and FSMA (Disclosure of Confidential Information) Regulations 2001, provides a complete code as to whether, how and when the Authority may use and disclose documents provided to it in reference proceedings – the scheme displaces the position at common law which is in any event unclear - the Authority does not require the permission of the Tribunal to use and disclose Ancean's documents, but if permission were required, it is given – the directions made and reasons given suffice, even if the Tribunal had the power to make a declaration*

**Heard on: 17 October 2025**
**Judgment date: 5 December 2025**

**Before**

**JUDGE RUPERT JONES**

**Between**

**ANCEAN LIMITED**

**Referring Party**

**- and -**

**THE FINANCIAL CONDUCT AUTHORITY**

**The Authority**

**Representation:**

For the Referring Party: Mr Christopher Botsman, Keystone Law

For the Authority: Mr Nicholas Peacock KC and Mr Adam Temple, counsel instructed by the Financial Conduct Authority

DECISION

**Introduction**

1. Ancean Limited ("Ancean" or the "Referring Party"[1]) is the applicant to an ongoing reference to the Upper Tribunal ("the Tribunal") challenging a decision made by the Financial Conduct Authority ("the Authority") to refuse it permission to carry on regulated activities under the Financial Services and Markets Act 2000 ("FSMA").

2. The Authority has received various documents from Ancean, provided during the course of the reference proceedings. In very broad terms, this decision concerns what use or disclosure the Authority may make of the documents and other written material that Ancean has provided or may provide to it in these proceedings. This decision also concerns the mechanism by which the Authority is lawfully empowered to use or disclose the documents - whether the Authority requires permission from the Tribunal in order to do so.

3. The issues are raised by virtue of an application made by the Authority on 11 February 2025, pursuant to rule 6(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Tribunal Rules"). The original application was for the Tribunal to:

   a) make a declaration as to whether the Authority is bound by any rule of the Tribunal preventing or otherwise restricting the collateral use of documents and witness statements disclosed to, or served on, it by Ancean during the course of proceedings in the Tribunal ("Collateral Use Rule");

   b) in the event that the Tribunal considers a Collateral Use Rule to apply to the Authority, to make a declaration as to the scope of the Collateral Use Rule; and

   c) in the event that the Tribunal considers a Collateral Use Rule to apply to the Authority, to make a direction permitting the Authority to use any such documents disclosed to, or served on, it by Ancean in this case for the purpose of exercising any of its regulatory functions.

4. The Authority's primary case was that the Tribunal should make a declaration in the following terms:

   > "Documents, information and witness statements provided to the Authority in a reference against the Authority are not subject to any restriction preventing the collateral use thereof by the Authority. Insofar as the said documents, information and witness statements constitute confidential information for the purposes of section 348 of the Financial Services and Markets Act 2000, the Authority holds the same subject to that section."

[1] While Ancean is the applicant in the reference proceedings I will not refer to it as such because it is the respondent to the current application made by the Financial Conduct Authority with which this decision is concerned.

5. Ancean objects to the Authority's application for any of the declarations or directions sought.

6. The Tribunal held a hearing on Friday 17 October 2025. Mr Peacock KC and Mr Temple of counsel appeared for the Authority. Mr Botsman, solicitor advocate and partner at Keystone Law appeared for Ancean. The Tribunal is grateful to them for their submissions and assistance.

**The material considered**

7. The Authority relied upon: a) its application notice dated 11 February 2025; b) witness statement of William Walsh dated 11 February 2025 together with exhibit WJTW1; and c) skeleton argument dated 10 October 2025.

8. Ancean relied upon: a) its Response document dated 9 July 2025; and b) skeleton argument dated 10 October 2025. Mr Botsman also handed up written submissions dated 17 October 2025 during the hearing.

9. Post hearing written submissions were received on behalf of the Authority dated 31 October 2025.

**Summary of the Authority's application for a declaration**

10. The Authority argues that no Collateral Use Rule applies to it in respect of documents disclosed to it by a party during the course of proceedings before the Tribunal. In particular, this is because there is no express restrictions on the collateral use of documents or witness statements in the Tribunal Rules, such as those contained in Civil Procedure Rules ("CPR") 31.22 and 32.12, and there is no place for the importation of the Collateral Use Rule under the common law given the statutory restrictions imposed upon the Authority as to its disclosure of confidential information contained in sections 348-349 of FSMA and the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001.

11. The Authority considers the existence or otherwise of a Collateral Use Rule (and, if it exists, its scope) to be a matter of general importance in its ongoing regulatory work. As a result, it considers it important, for the purposes of achieving certainty, that the Tribunal determines explicitly whether or not a Collateral Use Rule applies to the Authority in Tribunal reference proceedings under FSMA and, if so, its scope.

12. The Authority submits that a declaration by the Tribunal is the best way to achieve this certainty and argues that the Tribunal is empowered to give such a declaration pursuant to its powers deriving from section 25(1) of the Tribunals, Courts and Enforcement Act 2007 and rule 5(1) of the Tribunal Rules.

13. The Authority contends that its application for the above stated declaration or directions be granted for the reasons outlined in the accompanying witness statement by William Walsh, dated 11 February 2025 ("the Witness Statement").

**The Background**

14. The following matters are set out in the Witness Statement and were not the subject of any dispute.

15. By a decision notice dated 29 February 2024 addressed to Ancean (the "Decision Notice"), the Authority informed it of the Authority's decision to refuse its application dated 23 December 2022 for permission to carry on regulated activities, pursuant to sections 55X(4) and 388 of FSMA.

16. The Authority's Decision Notice provided a summary of reasons for refusing Ancean Part 4A permission to carry on the regulated activities of advising and arranging regulated mortgage contracts, home reversion plans and non-investment insurance contracts. Additionally, the firm had applied for permission to carry out credit broking, debt counselling and debt adjusting.

17. By a reference notice dated 26 March 2024 (the "Reference"), Ancean referred the matter to the Tribunal. The Reference challenges the refusal by the Authority of Ancean's application, under Part 4A of FSMA, for authorisation to conduct regulated activities.

18. The Authority's original Statement of Case was sent, pursuant to paragraph 4(1) of Schedule 3 to the Tribunal Rules, on 1 May 2024. As set out in the Authority's Statement of Case dated 1 May 2024, the Authority decided to refuse Ancean's application because it considers that it cannot ensure that Ancean will satisfy, and continue to satisfy, the applicable threshold conditions, in particular the suitability threshold condition. This conclusion is based on the alleged conduct of Ancean's sole director and controller, David Ewing. Of particular relevance, the Authority is concerned about Mr Ewing's conduct in relation to investment schemes he operated and/or participated in during, and after, the time he was a director (and, for part of the time, chief executive) of SVS Securities Plc ("SVS").

19. SVS was an authorised financial services brokerage and wealth management firm. It provided investment management services, for the purposes of which it created 'Model Portfolios': these were portfolios of financial assets, designed and managed by SVS, into which consumers were induced to invest. Following the imposition of requirements on SVS by the Authority in July and August 2019 as a result of concerns about its business, SVS entered special administration on 5 August 2019 and has since been dissolved.

20. Mr Ewing was a director of SVS from 1 August 2014 until 30 April 2018. In that role, he was approved by the Authority to perform the CF1 (director) controlled function from October 2014 to April 2018 and the CF3 (chief executive) controlled function from January 2017 to April 2018.

21. While a director of SVS, Mr Ewing participated in a scheme ("Ingard 1") whereby investment monies (generally those held in self-invested personal pensions), entrusted by consumers to be managed by SVS, were invested, indirectly through an Irish bond-issuer, into a property bridge-lending company, Ingard Alternative Funding Limited ("IAF"). Both the Irish bond-issuer and IAF were owned and directed by Mr Ewing.

22. The Authority alleges that Ingard 1 was devised jointly between (amongst others) SVS and IAF for their mutual benefit, rather than in the interests of the consumers whose investments SVS was managing, and that this involved the creation and mis-

management of multiple conflicts of interest ("the Ingard Conflicts"). After he resigned as a director of SVS in April 2018, Mr Ewing participated in a very similar scheme ("Ingard 2"), whereby monies entrusted to SVS were invested, through a separate Irish bond-issuer (again owned and directed by Mr Ewing), in IAF. In total, £5.7 million of investment monies were invested through the scheme.

Ancean's Reply

23. Ancean's initial Reply to the Authority's Statement of Case was served on 12 June 2024. On 23 September 2024, it filed an amended Reply dated 22 September 2024 ("the Updated Reply"). It filed 18 documents annexed to the Updated Reply and as listed in its List of Documents on which it relies in supports of its case. The Reply and list of documents were filed pursuant to paragraphs 5(1) and (3) of Schedule 3 to the Tribunal Rules which govern references to the Tribunal.

24. On 8 November 2024, Ancean filed a further amended Reply dated 6 November 2024 ("the Final Reply"). It filed a further 36 documents annexed to the Final Reply.

25. In summary, Ancean and Mr Ewing vigorously deny the Authority's allegations, including any allegations of misconduct, and those are matters that are yet to be determined in the Reference proceedings. The Authority has also made an application to amend its Statement of Case which is the subject of a separate case management decision made by the Tribunal on the papers.

26. Importantly for these purposes, the Authority has currently received and is in the possession of a total of 54 documents filed and served by Ancean in support of its case. The Authority's application concerns what use or disclosure may be made of these documents.

The Enforcement Cases

27. Mr Ewing was not subject to a statutory investigation, nor enforcement action, by the Authority in relation to his actions at SVS. However, investigations were conducted into three other former directors or officers of SVS, not including Mr Ewing, ("the Enforcement Subjects"). These investigations led to regulatory enforcement action being taken against each of the three Enforcement Subjects.

28. On 17 February 2023, on the decision of the Regulatory Decisions Committee of the Authority ("the RDC"), the Authority issued Warning Notices to the Enforcement Subjects, proposing to impose financial penalties and prohibition orders on each. Following both written and oral representations made by each of the Enforcement Subjects to the RDC (including the disclosure of various documents), Decision Notices were issued to each. By virtue of the Decision Notices, the Authority decided to impose on each of the Enforcement Subjects, a financial penalty and a prohibition order. Mr Ewing was given third party rights, pursuant to section 393 of FSMA, in each of the notices but made no representations and has not referred the notices to the Tribunal.

29. One of the Enforcement Subjects, who was alleged by the Authority to be involved in Ingard 1 and the Ingard Conflicts, did not refer his case to the Tribunal and a Final Notice was issued. However, the other two Enforcement Subjects each referred their cases to the Tribunal. Their cases have been joined, ("the Enforcement References").

30. Proceedings in the Enforcement References are ongoing before the Tribunal. In the Statement of Case filed by the Authority in the Enforcement References the Authority alleges that, through their conduct as approved persons in respect of SVS, each of the subjects acted in breach of Statement of Principle 1 and Statement of Principle 6. The two Enforcement Subjects deny the allegations and challenge the Authority's decisions.

Relationship between the Ancean Reference and the Enforcement References

31. Mr Walsh states that there is an obvious overlap in the factual circumstances underpinning both the Ancean Reference and the Enforcement References, in that both concern conduct by officers of SVS in respect of SVS's business. Indeed, much of the evidence relied upon by the Authority in the Ancean Reference was obtained during the course of the investigation which led directly to the Enforcement References.

32. He states that the direct overlap is limited since the matters now alleged in the Enforcement References generally concern matters other than Ingard 1 and the Ingard Conflicts. Ingard 2 has some relevance, in that it involved the provision of commissions to SVS (which are alleged to give rise to breaches of Statement of Principle 6), and one of the two Enforcement Subjects is alleged to have treated due diligence of Ingard 2 as a formality (also in alleged breach of Statement of Principle 6). Ingard 1 did feature in Warning Notices issued to the subjects of the Enforcement References, but these did not feature in the Decision Notices.

33. Mr Walsh states that a result of the limited overlap, the Authority has not applied to join the Ancean Reference and the Enforcement References together and no other party has made such an application.

The different teams within the Authority

34. The investigation and ensuing regulatory processes before the RDC which led to the Enforcement References (and to the other Enforcement Subject's Final Notice) were conducted by an investigation team from the Authority's Enforcement and Market Oversight Division ("EMO") and lawyers from Mr Walsh's department. He is not part of this team and is not (nor has been) directly involved in the Enforcement References[2].

35. Mr Walsh states that consideration of Ancean's application for authorisation, and the regulatory process arising from its refusal, was conducted by the Authorisations Division ("Authorisations team"), which is separate to EMO, with his assistance and that of another lawyer from Enforcement Legal who is not part of the team conducting the Enforcement References. As a result, the teams conducting the Ancean Reference and the Enforcement References are separate and distinct.

36. To date, the team working on the Enforcement References have not considered documents disclosed by Ancean in this reference, due to (a) Ancean's refusal to consent

[2] Mr Walsh's statement states this at paragraph 54. However, this is subject to an exception notified to the Tribunal on circulation of the draft decison. Mr Walsh has clarified the fact that since submitting the statement he assisted the EMO team in responding to one piece of correspondence from one of the Enforcement Subjects, during the absence of the lawyer who has generally assisted the EMO team. That correspondence was limited to a question regarding a potentially privileged document and was not connected with Ancean/Mr Ewing or the documents that they have disclosed. Therefore Mr Walsh is not (nor has been) directly involved in the Enforcement References in any meaningful way.

to any collateral use of the documents; and (b) the lack of clarity as to the rules against collateral use in Upper Tribunal references. Such concerns have given rise to the Authority's application.

37. However, he states that given the factual overlap between the cases, there has been close and regular liaison between the teams, as would be expected, in order, amongst other things: (a) for the Authorisations team to draw upon the EMO team's knowledge of events at SVS when assessing the actions of Mr Ewing in the context of Ancean's application; (b) to identify, and obtain access to, relevant evidential material that was obtained during the Enforcement investigation; and (c) to ensure that each team is able to comply with the Authority's respective disclosure obligations in each of the Ancean Reference and the Enforcement References.

38. Mr Walsh states that purposes (a) and (b) from paragraph 36 above have not given rise to any concerns about the Collateral Use Rule, because they involved using information that the Authority was entitled to use under sections 348 and 349 of FSMA. In another case, however, it might give rise to such issues if a second case was considered after the first case has finished.

39. However, he states that in relation to purpose (c), the application of a Collateral Use Rule could be particularly problematic in the Ancean Reference and the Enforcement References. That is because the Authority has obligations pursuant to paragraph 6 of schedule 3 to the Tribunal Rules in each proceedings to disclose material which might reasonably be expected to assist the respective subjects' cases. As Mr Walsh understands the operation of the Collateral Use Rule under the CPR, if applied to Ancean's documents served on the Authority, it would not even be able to review documents or witness statements disclosed in one set of proceedings for the purposes of considering whether they should be disclosed in the other set of proceedings.

40. Mr Walsh states that this gives rise to a risk that, if the Authority is prevented by a Collateral Use Rule from reviewing documents disclosed in one set of proceedings for the purposes of disclosure in the other proceedings, it will fail to comply with its disclosure obligations. This is plainly an unsatisfactory state of affairs and would not be, in the Authority's view, in the interests of justice.

Rationale for the Authority making the application

41. Mr Walsh accepts that the Authority does not seek to make the application because of an urgent concern for the need to disclose documents disclosed by Ancean in the course of these proceedings to the subjects in the Enforcement References: the 18 documents disclosed by Ancean in September 2024 generally relate to the business of IAF, rather than to that of SVS, and his knowledge of the cases against the subjects of the Enforcement References suggests that they are unlikely to be relevant in those proceedings.

42. However, he states that this situation is unsatisfactory since his knowledge of the Enforcement References is inadequate for him to make judgements about the potential relevance of material which should be made by the Authority's disclosure officer in the Enforcement References.

43. Mr Walsh also states that a particular difficulty which the Authority foresees is that, when witness statements are exchanged in the Ancean Reference, any statements provided by Ancean, in particular any statement from Mr Ewing, may well be relevant (and potentially disclosable) in the Enforcement References since they are likely to contain evidence of how investment decisions at SVS were made and who was involved, an issue that is potentially of significance in both sets of proceedings.

44. Equally, witness statements served in the Enforcement References may be relevant to the Ancean Reference. To the extent that a Collateral Use Rule would prevent the ability of the Authority to review statements disclosed in one set of proceedings for the purposes of disclosure in the other, there is a clear risk that the Authority will fail to comply with its disclosure obligations.

45. He states that, in addition, documents disclosed by Ancean may be relevant to other regulatory work. This includes ongoing considerations of the fitness and propriety of Mr Ewing as an approved person in respect of another authorised firm, Ingard Financial Limited ("IFL"), future applications for approval or authorisation, or any other action which might be taken in the future. The Authority would wish to be able to use such documents in those regulatory processes, insofar as relevant. By way of specific example, documents disclosed by Ancean include financial and business records of IAF. These may be relevant to any action taken in respect of the Ingard bond schemes.

46. Mr Walsh, on behalf of the Authority, considers that the use, or potential use, of the documents has the potential to advance its regulatory objectives, and thereby the public interest.

Consent Requests

47. In an attempt to resolve the particular issue in this case, on 22 November 2024, Mr Walsh wrote to Ancean's solicitors, Keystone Law, seeking Ancean's consent to use any disclosed documents for the purposes of exercising the Authority's regulatory functions, including complying with its disclosure obligations in the Enforcement References.

48. On 3 December 2024, Mr Botsman of Keystone Law responded to this request, declining to provide the requested consent. Mr Botsman subsequently confirmed Ancean's opposition to the Authority's collateral use of documents disclosed in the Ancean Case by an email dated 16 January 2025. Thereafter, on 11 February 2025, the Authority made its formal application.

**Ancean's objection**

49. In its Response dated 9 July 2025 Mr Botsman, on behalf of Ancean, outlined four objections to the Authority's application.

50. First, as a principle based in fairness and efficient litigation, Mr Botsman submitted that the Collateral Use Rule is as applicable to the Authority as it is to ordinary parties involved in civil proceedings, criminal proceedings and regulatory proceedings. Although framed as an issue complicating the Authority's disclosure obligations (a complication that the Authority and its predecessor have managed for decades) the unstated purpose of the application is to use material from the Enforcement References in its case against Ancean.

51. He argued that in criminal proceedings, the collateral use of unused material disclosed in the proceedings is prohibited by sections 17 and 18 of the Criminal Procedure and Investigations Act 1996. On pain of contempt, such material may only be deployed in the proceedings in which it was disclosed unless (a) it is required for purposes incidental to the main case (eg. an appeal), (b) the material has been referred to in open court or (c) the prior permission of the trial judge has been obtained.

52. Mr Botsman relied on the principle in *Hollington v Hewthorn* [1943] KB 587 which prohibits the use of prior findings/determinations as proof of facts in subsequent proceedings has also been applied in the regulatory context. In *Consumers' Association v Qualcomm Inc* [2023] CAT 9 before the Competition Appeal Tribunal ("CAT"), the CAT (Mrs Justice Bacon DBE, Justin Turner KC and Professor Mason) granted Qualcomm's application to strike out a passage of a Reply that relied on findings from foreign regulators or courts. The basis for the application was that it offended against the long-standing rule derived from *Hollington v Hewthorn* that factual findings made by another decision-maker are inadmissible in a subsequent trial. That was so even though the CAT held that, given the wide discretion conferred by its procedural rules, it was not bound by the rule. Nonetheless, the CAT considered that it was appropriate to adopt the same underlying principle, namely that the findings of fact at trial are to be made solely by the appointed judge or tribunal. The CAT reasoned that its task is not to second-guess the quality of the assessment of other decision-makers but to evaluate the body of evidence before it.

53. Second, he argued that this is not an appropriate test case. There is a well-established principle in both public and private law that courts and tribunals do not give hypothetical advice. Their function is to resolve actual disputes (based on concrete facts) involving real legal rights and obligations, not to offer abstract or speculative guidance regarding the impact of the Collateral Use Rule on the Authority's disclosure obligations.

54. Mr Botsman contended that, to the extent that the Authority made reference to actual documents (the 18 documents disclosed by Ancean generally relating to the business of IAF), Mr Walsh acknowledges that the documents are "unlikely to be relevant" in the separate (Enforcement References) proceedings. As for the hypothetical scenario involving the use of witness statements from the Ancean and Enforcement References, the potential disclosure difficulties forecast by the Authority (difficulties that have presumably been managed in the past) is answered by Mr Walsh's earlier acknowledgment in the supporting witness statement that the Ancean and Enforcement references were not joined because of the limited overlap between the two proceedings.

55. He submitted that even overlooking the surrounding objections, unless and until the Authority can point to concrete examples of evidence from the Enforcement References that it wishes to rely on in this proceeding, the application is, at the very least, premature.

56. Third, Mr Botsman argued that the cost of debating hypothetical questions should not be visited on Ancean. In the *Qualcomm* case at [30]–[33], the CAT agreed with Qualcomm that it would be inappropriate to put the parties to the expense of adducing potentially voluminous evidence at trial as to the circumstances of the prior foreign

proceedings. The same concerns apply in this case. Ancean has already been put to considerable expense, including as a result of the Authority's continuing and ongoing disclosure. It should not be put to the cost of debating abstract questions impinging on policy questions such as the approach that the Authority takes to its disclosure obligations.

57. Fourth, he submitted that having regard to the power imbalance that exists in criminal proceedings and regulatory investigations, with prosecutors and regulators enjoying vast advantages in information gathering over defendants and respondents, it would be unfair for regulatory agencies to exploit the already decisive advantage they enjoy by making collateral use of information obtained from separate proceedings.

58. In summary, Mr Botsman contended that the proposed future use that the Authority seeks to make of presently unspecified material from the Enforcement references in its case against Ancean/Mr Ewing is:
a. prejudicial, insofar as it seeks to rely on facts alleged by others without affording Ancean an opportunity to contest them;
b. procedurally unfair, particularly where Ancean is not a party to the Enforcement References and is therefore not in a position to deal adequately, or at all, with statements by others that may appear to be inculpatory (or to take advantage of exculpatory statements); and
c. misleading, if presented as probative of Ancean's conduct without acknowledging its prior context or limitations.

**The Law**

Implied Undertaking and Collateral Use Rule

59. I am very grateful to Mr Peacock and Mr Temple for the thoroughly researched and detailed exposition on the law concerning implied undertakings and the collateral use of documents which they prepared. Mr Botsman did not put forward any disagreement with it. I accept and adopt it below.

*The common law implied undertaking*

60. The common law has long accepted that the recipient of documents, disclosed under compulsion of law, is subject to an implied undertaking not to make improper use of those documents. The concept and history were explained by Hobhouse J in *Prudential Assurance v Fountain Page* [1991] 1WLR 756 ("*Prudential Assurance*"), at 764H:

> 'This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from…'

61. This principle is based on the 'compulsion principle': see *Prudential Assurance* at 765C:

> 'The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or

information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them'

62. The common law implied undertaking did not extend to disclosure which was 'voluntary'. In this context, 'voluntary' disclosure covers the production of any documents and information other than pursuant to a court order obliging the party to disclose the same under the penalty of contempt of court or criminal sanction. This was explained by Hobhouse J in *Prudential Assurance*, at 769:

'…there is no blanket restriction on the use of documents and information acquired in the course of litigation. Prima facie there is no restriction. The compulsion exception is confined to documents and information which a party is compelled, without any choice, to disclose. Where a party has a right to choose the extent to which he will adduce evidence or deploy other material, then there is no compulsion even though a consequence of such choice is that he will have to disclose material to other parties. …'

63. In order to be compelled there must be a sanction of contempt of court or criminal offence in failing to produce the documents or statements. The mere fact that, as a matter of practical effect, a party will lose a case or have their case struck out for failure to produce the relevant document or information does not make disclosure 'compulsory', see *Prudential Assurance* at 765G:

"In litigation a party may be subjected to orders or rules of procedure which require him to do various things or take various steps in the action. It was argued that whenever a party was in this position he was acting under a compulsion which brought the implied undertaking into force. This argument can be attractively developed. It is said that many things in actions are done because a party is ordered or otherwise required to do them. They are required to deliver pleadings, swear and lodge affidavits, call witnesses, or, in the present context, serve advance copies of the evidence upon which he proposes to rely at the trial. In all these situations the practical sanction is similar to that which arises from a failure to give discovery or respond to other orders. The primary sanction that the court imposes is to strike out the claim or the defence. If a party fails to deliver a pleading or to lodge or adduce evidence he will fail to protect his rights and the other party's claims or defences will prevail. The outcome for the litigant is in practical terms the same. However in legal terms this is not correct. There is distinction between orders, the breach of which is a contempt of court and those orders or rules which merely give rise to a default. The principle of compulsion applies to the former category only. This has been made clear in a number of cases."

64. There are few authorities subsequent to *Prudential Assurance* that consider the ambit of compulsion. The CPR, introduced a few years later, made such issues largely irrelevant in normal civil litigation. However, in respect of relevant 'compulsion' *Prudential Assurance* has been quoted and applied in at least two cases. In *Cassidy v Hawcroft* [2000] All ER (D) 1082 (CA) at [18] the Court of Appeal (Moritt LJ; May LJ and Forbes J) cited and approved *Prudential Assurance* (albeit quoting a different passage from that set out above). The Court of Appeal held that there was no implied undertaking applicable to documents referred to in affidavits. The disclosure in the affidavit was voluntary, even if the Court then compelled production of those documents. The High Court in *Official Receiver v Skeene* [2020] EWHC 1252 (Ch) at [32] quoted the passage set out above. The Official Receiver had applied to the Court for permission to provide an affidavit and its accompanying exhibit of documents to the Serious Fraud Office. The CPR had not, at that stage, been extended to cover affidavits. At [34], the Court found that the implied undertaking did not apply, as the affidavit was

produced voluntarily. Thus, there is no reason to doubt that Hobhouse J's comments in *Prudential Assurance* as to compulsion continue to represent the law.

65. The Rules of the Supreme Court ("RSC") were later amended to include a prohibition on the use of witness statements other than for the purpose of the proceedings in which they were served, until put in evidence These amendments also removed the preservation of privilege relied upon by Hobhouse J. Accordingly, unless a party retains privilege over witness statements served on other parties, no common law implied undertaking applied.

*Exceptions to the common law implied undertaking*

66. The common law implied undertaking was not, originally, subject to an exception where documents have been referred to in open court: *Harman v Home Office* [1983] 1 AC 280. However, following that decision and a settled appeal to the European Court of Human Rights, the government undertook to amend the rule. The amendment took effect by RSC Ord. 24 r. 14A. From that point onwards, the implied undertaking ceased to apply to documents once they were referred to in open court (though the court could impose an order even after such references).

67. Even without statutory amendment, it appears that the common law would now recognise that the implied undertaking ceases to apply once documents have been referred to in open court. Case law on open justice (in particular *Dring v Cape* [2019] UKSC 38; [2020] AC 629) emphasises that the public has a general right to see documents that have been referred to in open court, subject to some countervailing reason why they should not.

68. The courts have also recognised that the implied undertaking could and should be released in appropriate circumstances. The implied undertaking relies on a public policy which could be overridden by other public policy factors. *Birdseye Wallis v Harrison* [1985] ICR 278 at 289 (Waite J presiding, in the Employment Appeal Tribunal):

> 'Like all principles of public policy, however, it is not … immutable; and if its application in any particular circumstances threatens conflict with some countervailing public principle—such as the public interest in the due and fair administration of justice—then the court is required to undertake a weighing up of the public interests involved…'

69. Accordingly, the undertaking may be released where a party applies to use documents for a specific collateral purpose.

*The CPR and restrictions on the collateral use of documents disclosed in civil proceedings*

70. The CPR were introduced in 1998 and came into effect on 26 April 1999. These rules only have application in England & Wales. Following the introduction of the CPR, in the civil courts the common law implied undertaking has been replaced by restrictions on the collateral use of documents in CPR 31.22 and 32.12. CPR 31.22(1) and 32.12 provide:

> **31.22**
>
> (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

…

**32.12**

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that–

(a) the witness gives consent in writing to some other use of it;

(b) the court gives permission for some other use; or

(c) the witness statement has been put in evidence at a hearing held in public.

(3) This rule applies to affidavits in the same way as it applies to witness statements.

…

71. The most significant development from the common law position is that the CPR extends the collateral use rule to voluntary disclosure of documents, which do not appear to have been covered by the common law implied undertaking.

72. The change in approach was explained in *Smithkline Beecham Plc v Generics (UK) Ltd* [2003] EWCA Civ 1109; [2004] 1 WLR 1479 ("*Smithkline*"). *Smithkline* was concerned with documents exhibited to an expert report. The applicant argued that such documents had been voluntarily disclosed, and that introduction of the CPR did not change the position: see [23]-[28]. At [29], Aldous LJ rejected the argument that the CPR '*perpetuated in all respects the distinction between documents disclosed in a list of documents and those that might be disclosed in another way*'. As the expert report had 'disclosed' the documents referred to, they were covered by the implied undertaking, even though the disclosure was not made under compulsion.

73. It follows that CPR 31.22 applies wherever disclosure is voluntary: *IG Index v Cloete* [2014] EWCA Civ 1128 at [45] (Christopher Clarke LJ).

74. Scottish courts do not have procedural rules restricting the collateral use of documents. In Scotland, there is no procedural rule equivalent to the CPR. Instead, the common law of Scotland has followed the English approach: a 1998 appellate case applied the common law implied undertaking as set out in *Harman v Home Office* [1983] 1 AC 280 (*Iomega Corporation v Myrica* (1998) SC 636). That also appears to be the position in Northern Ireland: see *JR42's Application* [2010] NIQB 95.

*Extent of the implied undertaking and the CPR collateral use rule*

75. Whether under the common law implied undertaking or under the CPR, the collateral use rule prevents 'use' of documents for purposes other than the immediate proceedings.

76. The authorities show that the concept of 'use' is extremely wide: *IG Index v Cloete* at [40] (Christopher Clarke LJ):

> 'What the rule precludes is the use of the document(s) disclosed. "Use" is a wide word. It extends to (a) use of the document itself e.g. by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the characteristics of the document, which include its provenance.'

77. In *Tchenguiz v Grant Thornton LLP* [2017] 1 WLR 2809 at [28] and [31] Knowles J stated:

> '28. … the rules themselves do envisage the use of the document (i) for the purpose of assessing whether "the document has been read to or by the court, or referred to, at a hearing which has been held in public", (ii) seeking permission of the court under the rule or (iii) seeking agreement under the rule. I am prepared to hold that the rules impliedly permit this very limited activity, because it is part of the working of those rules.
>
> 31… if the purpose of a review of documents that were disclosed in litigation is in order to advise on whether other proceedings would be possible or would be further informed, then the review would be a use for a collateral purpose. …'

78. In *Lakatamia v Su* [2020] EWHC 3201 (Comm); [2021] 1 WLR 1097 at [59] and [93] (Cockerill J (as she then was) stated:

> '59… doing anything other than realising, in the course of review for the purposes of the proceedings in which documents are disclosed, that a document or documents would be relevant to other proceedings actual or contemplated, may constitute a collateral use…
>
> 93… while a realisation of relevance within a permitted review is itself permitted, even using that information to ask for permission for further review, or for use is on the edge of what is permissible.'

79. Breach of the common law implied undertaking is in principle a contempt of court.

<u>Jurisdiction of the Tribunal and nature of proceedings on a reference from a decision of the Authority under FSMA</u>

80. Section 133 FSMA provides that an applicant may challenge and refer certain decisions of the Authority to the Tribunal. It makes clear that the Tribunal's function is a review of a 'relevant decision' by 'the decision-maker' (being the Authority or one of the other authorities listed in s.133(1)). The Tribunal has different jurisdictions and powers (see s.133(5) and (6)) depending on whether the reference is a disciplinary reference or not as defined in s.133(7A).

81. The First-tier Tribunal ("FTT") and the Tribunal were created by the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). Section 3(5) of the TCEA provides that the Tribunal shall be a superior court of record. Section 25(1) and (2) provide that the Tribunal shall have, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court in relation to 'all other matters incidental to the Upper Tribunal's functions' (s.25(2)(c)).

82. The Tribunal itself is a creature of statute, meaning its jurisdiction is defined by statute and does not extend to inherent powers found in the ordinary courts: *Hoey v HMRC* [2022] EWCA Civ 656 at [117]. Accordingly, virtually all cases before the Tribunal have their own statutory scheme. There is, therefore, a distinction between Tribunal

proceedings and ordinary civil litigation in terms of (1) the parties generally before the Tribunal; and (2) the inevitable statutory background to every dispute.

83. In the financial services context, particularly in relation to references under FSMA, the Tribunal has a role as part of the statutory machinery in regulating the financial services industry: *FCA v Hobbs* [2013] EWCA Civ 918; and *FCA v Seiler* [2024] EWCA Civ 852. In the latter case, at [63], Fraser LJ expressly rejected the argument that a reference in the Tribunal can be seen as 'ordinary civil litigation'. Moreover, and importantly, the Tribunal's role in hearing a reference is a continuation of the regulatory process that commences as from the very first interaction between the Authority and the subject of the reference. Thus, in *FCA v Bluecrest Capital Management* [2024] EWCA Civ 1125 Popplewell LJ emphasised at [178] that:

> 'a reference is not an appeal from a regulatory process which concludes with the FCA decision, but rather a continuation of that process by an independent specialist judicial tribunal. This is reflected in the language of the matter being referred and a reference rather than an appeal…The reference before the Tribunal transcends the private interests of the parties in ordinary civil litigation because it is concerned with the regulatory objectives which affect consumers and the market.'

The Tribunal Rules

84. Rule 5(3) of the Tribunal Rules contains a number of case management powers. Rule 5(3)(d) empowers the Tribunal to "permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party". Rule 6 empowers the Tribunal to give directions of its own initiative or on the application of the parties.

85. The Tribunal Rules contain no rule equivalent to CPR 31.22 nor 32.12 as to the restriction on the collateral use of documents provided in proceedings.

86. Rule 14 empowers the Tribunal to make orders and directions restricting the disclosure or publication of documents filed or served in Tribunal proceedings in the following terms:

> **14.**—(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
> (a)specified documents or information relating to the proceedings; or
> (b)any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.
> (2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
> (a)the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
> (b)the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
> (3) If a party ("the first party") considers that the Upper Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—
> (a)exclude the relevant document or information from any documents that will be provided to the second party; and

(b)provide to the Upper Tribunal the excluded document or information, and the reason for its exclusion, so that the Upper Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).
(4) . . . . . .
(5) If the Upper Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Upper Tribunal may give a direction that the documents or information be disclosed to that representative if the Upper Tribunal is satisfied that—
(a)disclosure to the representative would be in the interests of the party; and
(b)the representative will act in accordance with paragraph (6).
(6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Upper Tribunal's consent.
…

87. Rule 15(2) governs the admission of documents in evidence in proceedings before the Tribunal. It is widely drafted and empowers the Tribunal to (a) admit evidence whether or not—(i) the evidence would be admissible in a civil trial in the United Kingdom; or (ii) the evidence was available to a previous decision maker; or (b) exclude evidence in certain circumstances that would otherwise be admissible.

88. Schedule 3 to the Tribunal Rules specifically governs financial services and wholesale energy cases. It lays down a procedural code for an applicant who seeks to challenge decisions of the Authority made under FSMA amongst other things.

89. Paragraph 2 of Schedule 3 provides for the filing of the reference notice by an applicant. Paragraph 4 provides for a respondent (in this case, the Authority) to send or deliver its Statement of Case within 28 days thereafter and, by virtue of paragraph 4(3), to provide (a) a list of documents on which it relies in support of its case and, importantly (b) any further material which might undermine its decision. This material is to be served on the applicant as well as sent to the Tribunal.

90. In contrast, paragraph 5 of Schedule 3, provides that the applicant must send or deliver to the Tribunal its reply to the statement of case 28 days thereafter together with a list of documents: but only those documents on which the applicant relies in support of his case (there is no corresponding exculpatory duty for it to disclose to the Authority the documents which may undermine its case).

91. The Authority is under an ongoing disclosure duty and, by virtue of paragraph 6 of Schedule 3, it must, 14 days after the applicant's reply has been sent or delivered, send or deliver to the Tribunal a list of such further material which might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply and which is not included in its original disclosure under paragraph 4(3).

<u>FSMA provisions as to the use and disclosure of confidential information</u>

92. Section 348 of FSMA provides generally for a restriction on the Authority and other regulators disclosing confidential information they have received. Confidential information is defined broadly under s.348(2) so that it would include any documentary material supplied to the Authority by Ancean as part of any investigation, enforcement

or Tribunal proceedings. Albeit, once the material has been referred to in public, such as in open court or tribunal proceedings, it is not confidential by virtue of s.348(4).

93. The section provides that the primary recipient, such as the Authority, must not disclose confidential information unless it has consent of the supplier but subject to some exceptions. The restriction provides relevantly as follows:

> **348 Restrictions on disclosure of confidential information by FCA, PRA etc.**
> (1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—
> (a) the person from whom the primary recipient obtained the information; and
> (b) if different, the person to whom it relates.
>
> (2) In this Part "confidential information" means information which—
> (a) relates to the business or other affairs of any person;
> (b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the FCA, the PRA ... or the Secretary of State under any provision made by or under this Act; and
> (c) is not prevented from being confidential information by subsection (4).
> **…**
> (3) It is immaterial for the purposes of subsection (2) whether or not the information was received—
> (a) by virtue of a requirement to provide it imposed by or under this Act;
> (b) for other purposes as well as purposes mentioned in that subsection.
>
> (4) Information is not confidential information if—
> (a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or
> (b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.
>
> (5) Each of the following is a primary recipient for the purposes of this Part—
> (a) the FCA;
> …"

94. Section 349 FSMA provides relevant further exceptions to the restriction on disclosure of confidential information by prescribed recipients, such as the Authority, to other persons for purposes including as follows:

> **"349 Exceptions from section 348.**
> (1) Section 348 does not prevent a disclosure of confidential information which is—
> (a) made for the purpose of facilitating the carrying out of a public function; and
> (b) permitted by regulations made by the Treasury under this section.
> (2) The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind—
> (a) by prescribed recipients, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions;
> …"

95. The FSMA (Disclosure of Confidential Information) Regulations 2001 ("the 2001 Regulations") are authorised by section 349(1)(b) and other sections of FSMA.

96. Regulation 2 defines "the regulators" as including the Authority, the PRA and the Bank of England and "regulator worker' includes employees of the regulators.

97. Regulation 3 provides relevantly that disclosure to any person by the Authority, as a regulator or a primary recipient, is permitted for the purposes of enabling the person making the disclosure (the Authority) or other regulators to discharge any public functions. It provides relevantly:

> **"Disclosure by and to the regulators, the Secretary of State and the Treasury etc.**
> **3.**—(1) A disclosure of confidential information is permitted when it is made to any person—
> (a) by one of the regulators or a regulator worker for the purposes of enabling or assisting the person making the disclosure to discharge any public functions of that regulator or (if different) the regulator worker;
> …
> …
> (d) by one of the regulators or a regulator worker to one of the other regulators or a regulator worker employed or instructed by one of the other regulators for the purpose of enabling or assisting the recipient to discharge any public functions of the regulator or (if different) the regulator worker.
> (2) A disclosure of confidential information is permitted when it is made by any primary recipient, or person obtaining the information directly or indirectly from a primary recipient, to one of the regulators, the Secretary of State or the Treasury for the purpose of enabling or assisting that regulator, the Secretary of State or the Treasury (as the case may be) to discharge any of its, his or their public functions.
> …"

98. Regulation 4 provides relevantly that the Authority, as primary recipient, may disclose confidential information it has received (in any context and which would include from Tribunal proceedings) for the purposes of a criminal investigation or proceedings:

> "Disclosure for the purposes of criminal proceedings and investigations
>
> **4.** A primary recipient of confidential information, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to any person—
>
> (a) for the purposes of any criminal investigation whatever which is being or may be carried out, whether in the United Kingdom or elsewhere;
>
> (b) for the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere; or
>
> …"

99. Regulation 5 provides relevantly that the Authority, as both a primary recipient and one of the regulators, may disclose confidential information it has received into certain court and tribunal proceedings. Regulation 5(6)(b) specifically provides that the Authority is permitted to disclose confidential information (which may include material disclosed to it during the course of Tribunal proceedings before the material has become public) to any person for the purpose of other proceedings before the Tribunal:

> "Disclosure for the purposes of certain other proceedings
>
> **5.**—(1) Subject to paragraphs (4) and (5), a primary recipient of confidential information, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to—

(a) a person mentioned in paragraph (3) for the purpose of initiating proceedings to which this regulation applies, or of facilitating a determination of whether they should be initiated; or
(b) any person for the purposes of proceedings to which this regulation applies and which have been initiated, or for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end.
(2) A person mentioned in paragraph (3) (or a person who is employed by one of the regulators or the Secretary of State) is permitted to disclose confidential information to any person for a purpose mentioned in paragraph (1)(a).
(3) The persons referred to in paragraphs (1)(a) and (2) are—
(a) the regulators;
(b) the Secretary of State; and
…
(6) The proceedings to which this regulation applies are—
(a) civil proceedings arising under or by virtue of the Act, an enactment referred to in section 338 of the Act, the Banking Act 1979, the Friendly Societies Act 1974, the Insurance Companies Act 1982, the Financial Services Act 1986, the Building Societies Act 1986, the Banking Act 1987, the Friendly Societies Act 1992 or the Investment Services Regulations 1995;
(b) proceedings before the Tribunal;
(c) any other civil proceedings to which one of the regulators is, or is proposed to be, a party;
…"

100. Section 352 FSMA provides for a criminal offence for persons disclosing information in contravention of section 348 FSMA.

101. Section 391 FSMA provides for restrictions and prohibitions on the publication of warning notices and decision notices issued by the Authority in a number of circumstances.

**Ancean's submissions**

102. Mr Botsman expanded on the four heads of Ancean's objection in his oral submissions and skeleton argument and submissions dated 10 and 17 October 2025.

103. First, he opposed the application because he submitted that the implied undertaking and Collateral Use Rule applied in these proceedings, Ancean's reference to the Tribunal. He argued that the common-law rule (*Riddick v Thames Board Mills Ltd* [1977] QB 881 (CA); *Harman v Home Office* [1983] 1 AC 280 (HL)), now reflected in CPR 31.22, provides that documents or information disclosed in the course of proceedings under the authority of the court or tribunal may be used only for the purposes of those proceedings unless the court gives permission. The rule protects the confidentiality of the disclosure process itself and prevents collateral use of material obtained through the compulsory mechanisms of litigation.

*104.* He submitted that the rule applies in Tribunal proceedings which are governed by the Tribunal Rules as much as it does in civil court proceedings which are governed by the CPR. He relied upon the Upper Tribunal decision in *MST and Others (Disclosure – restrictions – implied undertaking) (Eritrea)* [2016] UKUT 337 (IAC) ("*MST*") in which it was stated at [17]:

> "*It is accepted, correctly in our view, that the implied undertaking applies as fully to Tribunal proceedings as to other forms of civil proceedings… We can think of no good reason in principle or otherwise for holding that the implied*

*undertaking does not apply to the disclosure of documents in Tribunal proceedings*."

105. Mr Botsman contended that this approach finds support in *Consumers' Association v Qualcomm Inc* [2023] CAT 9 at [30]–[33]; *Boris Frederiksen v HMRC* [2025] UKFTT 854 (TC) at [49]–[59]; and *PF (International) Ltd v FCA* (UT Direction, 24 September 2024) ("*PF(International)")*. Each concerned specific documents and limited purposes; none created a general licence of the kind now being sought by the Authority.

106. He contended that *PF (International)* demonstrates the correct approach. The Tribunal there proceeded on the express assumption that the implied undertaking applied and granted permission only for a defined set of documents — witness statement, exhibits, written submissions and correspondence — and only for a specific criminal-investigation purpose. He submitted that *PF(International)* therefore supports Ancean, not the Authority. It confirms that: (a) the Tribunal recognises the implied undertaking; (b) permission to depart from it is exceptional and must be confined to identified material and defined purposes; and (c) no precedent of general authorisation exists.

107. He submitted that there was further support in the FTT decision in *Boris Frederiksen v HMRC* [2025] UKFTT 854 (TC) ("*Fredriksen")*. The FTT held that the implied undertaking against collateral use applies in tribunals as a matter of common law, even though the FTT procedural rules (drafted in similar terms to the Tribunal Rules) contain no analogue of CPR 31.22. The FTT traced the *Riddick* and *Harman* line of authority and confirmed that the undertaking attaches to material disclosed in tribunal proceedings "by the formulation of principles which have not been abrogated by statute or otherwise." The FTT found that HMRC could re-use information across its functions only because Parliament had enacted a specific statutory permission in s.17 of the Commissioners for Revenue and Customs Act 2005 ("CRCA"). Section 17 provides that information acquired by HMRC in connection with one function may be used for another of its functions.

108. Mr Botsman argued that there is no equivalent to secttion 17 CRCA contained within FSMA that would authorise the Authority to the cross-use or disclosure of material supplied by Ancean. Indeed section 348 FSMA imposes a confidentiality constraint and points in the opposite direction.

109. Second, he argued that the Authority's application is abstract, over-broad, and premature such that the Tribunal should not grant permission for the disclosure or use of any documents disclosed by Ancean to the Authority in the reference proceedings. Permission to depart from the Collateral Use Rule must always be case-specific and document-specific - never a blanket rule. The Tribunal cannot assess fairness or necessity without concrete material being identified. The Authority was inviting the Tribunal to pronounce a general procedural doctrine for future cases. That is not a judicial function. The Upper Tribunal's jurisdiction is statutory and confined to deciding individual references or appeals created by Parliament. Its procedural powers are governed by rule 5 of the Tribunal Rules, which permits the Tribunal to "regulate its own procedure" and to give directions "in relation to the conduct or disposal of proceedings." He argued that those powers are purely procedural and case-specific:

they exist to secure the just and efficient management of individual cases. They do not authorise the Tribunal to create, vary or legislate new procedural doctrines of general application.

110. Mr Botsman submitted that the Tribunal cannot, under rule 5, generate an exception to the common-law implied-undertaking rule or to the statutory confidentiality regime in section 348 FSMA. The Tribunal's jurisdiction is confined to deciding individual FSMA references and exercising case-management powers under rule 5 of the Tribunal Rules; it cannot legislate exceptions to established common-law principles.

111. He accepted that, in principle, the Authority could bring a future, narrowly framed, document-specific application, of the kind exemplified by *PF (International)*. In the reasons given for that Direction, the Tribunal granted permission for the Authority to use a defined set of documents - including a witness statement, its exhibits, associated written submissions and correspondence - for a specific criminal-investigation purpose. The application was not contested, and at paragraph 2 of its reasons the Tribunal stated that it was "prepared to assume that the implied undertaking applies."

112. Mr Botsman argued that any such future application would need to comply with the statutory confidentiality regime in section 348 FSMA and the 2001 Regulations. The Authority would have to show either: (a) a specific gateway under sections 349–352 or Regulations 3, 4 or 12; or (b) that it had the necessary consents under section 348(1)(a) and (b), including consent from Ancean/Mr Ewing as "the person to whom the information relates." The application should therefore be refused in its entirety. If the Authority later seeks leave for identified documents, it may do so within the limits of both the common-law undertaking and section 348 FSMA. The present "test-case" invitation lies outside the Tribunal's jurisdiction.

113. The Tribunal must decide: (1) whether this abstract request for general authorisation should be granted (it should not); and (2) whether a later, document-specific application could be considered on its merits. As to (1), this application is impermissibly abstract and should be refused outright; only a document-specific application could properly be entertained. The Authority seeks an open-ended ruling permitting cross-use of unspecified evidence and disclosure from other SVS proceedings. It identifies no documents, witnesses or defined purpose. Relevance and fairness can only be assessed once documents are identified. The application is thus too broad and premature and should be dismissed.

114. Third, he submitted that it would also be unfair for the Tribunal to grant the Authority permission to depart from the Collateral Use Rule in this case and permit disclosure of Ancean's material in the other Enforcement References. Mr Botsman's objection was not in fact focussed on Ancean's material being disclosed into the Enforcement Reference proceedings before the Tribunal (to which Mr Ewing but not Ancean, had third party rights). His objection was focussed on the point of principle being established because it would likewise permit the mirror disclosure of material from the Enforcement Reference proceedings into the Ancean Reference proceedings.

115. He argued that the Authority had chosen to pursue separate decisions resulting in separate references against different SVS directors rather than seeking joinder or to pursue a joint case. His objection was to the Authority seeking to reuse materials from the separate Enforcement References against Mr Ewing in the Ancean Reference proceedings. Mr Ewing has been given access to materials from the earlier SVS proceedings, but he was not a party to those cases and had no role in shaping or testing the evidence presented. He therefore cannot know what has or has not been disclosed, or how the materials were used in their original procedural context.

116. Engaging with that evidential record would place a significant burden on him. The volume and complexity of the material, and the absence of full procedural context, make it costly and difficult to interpret fairly. Much of the information also remains "confidential information" within the meaning of section 348 FSMA, limiting Mr Ewing's ability to deploy or test it. Allowing the Authority to rely on such material would further exacerbate the information asymmetry and generate further cost and disputes about context and admissibility - contrary to the Tribunal's overriding objective of fairness and efficiency.

117. Fourth, Mr Botsman submitted that there was no statutory exception to the Collateral Use Rule and section 348 FSMA did not assist the Authority. He contended that section 348 FSMA imposes an absolute prohibition on the disclosure of "confidential information" received by the Authority in the discharge of its functions unless a statutory gateway applies or both consents are obtained. Breach is a criminal offence (see seciton 352 FSMA).

118. There was a purpose based objection. By virtue of section 348(3) FSMA, he argued it is immaterial whether information was provided voluntarily or under compulsion; the trigger is the purpose for which the Authority received it. All SVS materials are therefore confidential under section 348(1). Section 348(1) requires consent from both the source and the person to whom the information relates. The materials plainly relate to Mr Ewing. No consent has been given and no gateway applies; he therefore submitted that the Tribunal cannot authorise use contrary to s 348(1)(b). The Authority had identified no gateway under section 349 nor the 2001 Regulations that permits cross-use between separate Tribunal references. Reg 3(1)(a) ("self-help") requires necessity for a public function and does not authorise adversarial use in litigation. Regulations 4 (criminal) and 12 (co-operation) are likewise inapplicable.

**Discussion and Analysis**

119. I agree with the Authority's position that sections 348-349 FSMA and the 2001 Regulations provide the only relevant limitation or restriction on the use or disclosure by the Authority of documents, information and witness statements (confidential information) supplied either by parties to the Authority in Tribunal references or by any regulated person at any earlier stage when the Authority is carrying out its statutory functions (such as investigations, supervision and enforcement).

120. Sections 348-349 FSMA and the 2001 Regulations displace any common law implied undertakings or Collateral Use Rule which might otherwise have applied generally to proceedings in the Tribunal or specifically to reference proceedings under FSMA challenging decisions of the Authority.

121. This conclusion is based purely on statutory interpretation but is consistent with the practical need for the Authority to carry out its regulatory functions, and the purpose of the statutory scheme under which both the Tribunal and the Authority operate.

122. There is no proper basis for applying, by analogy, the CPR provisions on the collateral use of documents to the disclosure obligations upon the Authority in FSMA references to the Tribunal, given the CPR provisions are not of direct application and the statutory scheme provides for clear and significantly different restrictions. Whether or not material disclosed to the Authority would otherwise be subject to implied undertakings or the Collateral Use Rule, the common law (and the CPR, if it had applied) is displaced by a coherent and complete statutory scheme.

123. This scheme authorises the Authority, in respect of such information, statements or documents (confidential information) supplied to it by parties to Tribunal proceedings or the subject of its regulatory functions, to use the material for all of the Authority's public functions as provided by statute. This statutory scheme authorises the various different teams of the Authority to cross-use for the purposes of all of their statutory and public functions, any material provided to the Authority by parties to reference proceedings. It also empowers the Authority to disclose any material it has received into other Tribunal proceedings, including to the parties involved in other reference proceedings, or to disclose for other purposes and to other persons authorised by the 2001 Regulations. There are limited exceptions to these principles but the only exceptions are those specified in FSMA and the 2001 Regulations.

124. My reasons are as follows and largely mirror the submissions made on behalf of the Authority.

1) <u>The CPR (specifically CPR 31.12 and 31.22) do not apply to proceedings on a reference to the Tribunal under FSMA</u>

125. Contrary to some suggestions in some of the authorities above, there is no basis for concluding that the CPR collateral use rules apply in the Tribunal. This is for the five reasons that the Authority relies upon.

126. First, the Tribunal Rules were created in 2008, a decade after the CPR provisions. If the framers had intended that a wide CPR-type collateral use ought to apply, they could have said so. To imply or apply the CPR provisions into the Upper Tribunal Rules wholesale would be unjustified – it would be an application too far.

127. Secondly, Lewis J. (as he then was) in *Menon v Herefordshire* [2015] EWHC 2165 (QB) ("*Menon")* was right to say that the CPR is a procedural code applicable only in the County Court, the High Court and the Civil Division of the Court of Appeal: CPR 2.1. That is not to say that the tribunals may not use the CPR as a guide and import relevant principles when considering their own rules, as they sometimes do, but they are not bound to do so and the starting point must be the tribunals' own rules.

128. Thirdly, the CPR have no application in Scotland or Northern Ireland, both being jurisdictions in which FSMA applies, the Authority acts as regulator, and in

respect of which the Tribunal will hear references. It would be wrong either to impose upon those other jurisdictions the procedural provisions that apply in the Courts of England & Wales, or to adopt different procedural provisions than those other jurisdictions. As Lord Briggs put it in *BPP Holdings v HMRC* [2017] UKSC 55 when addressing the Tribunal's jurisdiction and procedures in relation to tax appeals at [23]:

> '…it is highly desirable, particularly in a field where the law is the same throughout the United Kingdom (as in tax), that tribunals, or at any rate tribunals in the same field, apply the same, or (at least in some cases) even similar, rules in the same way throughout the UK. In these circumstances, all tribunals and appellate courts above the level of the UT should be wary of applying or relying on the procedural jurisprudence of the English and Welsh courts without also taking into account that of the Scottish and Northern Irish courts...'

129. Fourthly, the CPR rules are procedural rules primarily designed for adversarial private law litigation in the specified courts (albeit the rules do apply to court proceedings which include public law disputes such as judicial review in the Administrative Court). They are not primarily directed to disputes involving a public authority and a statutory scheme.

130. Fifthly, there is no principled basis for applying the expanded version of the collateral use rules in the CPR. Even if any Collateral Use Rule would otherwise apply in the Tribunal, and this is unclear, it would be the common law rule, supported by the compulsion principle and not the CPR. This leads naturally into the next broad heading.

2) <u>Given the state of the existing authorities, it is not clear whether the Collateral Use rule applies to ordinary tribunal proceedings before the FTT and UT to which FSMA does not apply</u>

131. Notwithstanding that CPR 31.22 and 32.12 should not be imported into Tribunal proceedings generally, it is unclear whether the implied undertaking and Collateral Use Rule would apply by virtue of the common law in ordinary, non-FSMA, proceedings before the Tribunal such as appeals from the FTT. It is even less clear the common law on implied undertaking and collateral use of documents would apply to reference proceedings before the Tribunal from decisions of the Authority.

132. The application of a Collateral Use Rule in the FTT and the Tribunal has been considered in at least six FTT or Tribunal decisions and one High Court case. The Tribunal is not bound by its own decisions or those of the High Court, but will as a matter of judicial comity usually follow such decisions unless they are persuaded that they are wrong.

133. The cases to date paint a mixed picture as to whether any Collateral Use Rule applies and, if so, whether it is the narrower common law implied undertaking (limited to documents disclosed under compulsion) or the CPR rules (including voluntarily disclosed documents and witness statements but not, apparently, expert reports).

134. Importantly, however, none of these cases have concerned references to the Tribunal relating to FSMA and involving the Authority. None have addressed the particular position of the Authority nor the particular nature of the Tribunal's role in

relation to a reference. To an extent, therefore, they are decisions that might be said to be of limited relevance. Nonetheless, the Authority rightly identified them and they are considered below as part of a wider consideration of the Collateral Use rule in the tribunals.

135. The first case is *Euro Trade and Finance Limited v HMRC* [2016] UKFTT 286 (TC). This First Tier Tribunal case dealt briefly with CPR 31.22, in concluding that HMRC was not prevented from using a witness statement in one proceeding in another proceeding. At [284]-[285]:

> '284. '…We were referred to CPR 31.22. Our decision was that this CPR was not binding in this Tribunal but we should have regard to the underlying purpose of the rule. We considered that the purpose of the rule was to protect witnesses against unanticipated use of their evidence and documents in proceedings other than those in which they were served.
>
> 285. However, whilst the current proceedings were different proceedings than those in which the two statements were served, in practice the parties were the same…'

136. The decision might have meant to refer to CPR 32.12 rather than CPR 31.22. In any event, whether or not a witness anticipates that their evidence might be of relevance to functions of the Authority beyond the immediate reference, there is a public interest in the Authority being able to make use of it. Witnesses are adequately protected by section 348 FSMA.

137. The second case, *Evans v Information Commissioner* [2015] UKUT 0233 (AAC) (Walker J presiding), implicitly rejected the notion of an implied undertaking applying in Tribunal proceedings. In that case (which is only available as a very brief summary decision), it was said that (at [H]):

> '… Mr Evans acknowledges that in court proceedings there is such an implied undertaking. He observes, however, that the present proceedings are tribunal proceedings, not court proceedings. The Tribunal Rules do not contemplate any implied undertaking of the kind that applies to court proceedings. Moreover there is no suggestion that disclosure/publication would harm their own interests or the interests of any third party. We agree with both these observations.'

138. In the third case (decided just after *Evans*), *Menon*, the High Court considered an application for permission to rely on documents the applicant had received pursuant to a compelled disclosure order in First Tier Tribunal proceedings. Lewis J (as he then was) was not referred to *Euro Trade* or *Evans*. He stated at [51] that:

> 'there would, on the authorities and as a matter of principle, have been an implied obligation on a party receiving them, or an implied undertaking would be treated as being given, that the documents produced pursuant to that order would not use them for any collateral purpose, including other litigation, without the leave of the court or the express consent of the party disclosing or producing the document.'

139. After citing case law on the common law implied undertaking, he added at [53]:

> 'In my judgment, as a matter of principle, either a similar implied undertaking is to be treated as given in proceedings in other tribunals where documents can be required to be disclosed or produced, or the statutory provisions governing the making of orders for disclosure or production of documents will be read as imposing such an obligation…'

140. At [55], Lewis J commented on a further argument:

> 'In submissions made after the hearing, [counsel for the applicants] submitted that the position in the present case was governed now by CPR 31.22 and that that rule had superseded the common law so that there was no implied undertaking. I doubt that that is correct in relation to the proceedings before the First-tier Tribunal at issue in the present case. First, the CPR apply to proceedings in the County Court, the High Court and the Civil Division of the Court of Appeal (see CPR 2.1). They do not apply to proceedings before tribunals. The provisions of the CPR could not impose an obligation in relation to documents produced in proceedings before tribunals. …'

141. In the fourth case, *MST*, the Immigration and Asylum Chamber was concerned with a 'Fact Finding Mission' report disclosed by the Home Office within the proceedings. At [15], the Upper Tribunal referred to 'the well known implied undertaking'. The decision then cited a number of pre-CPR cases before stating, at [17]:

> 'It is accepted, correctly in our view, that the implied undertaking applies as fully to Tribunal proceedings as to other forms of civil proceedings. While the procedural regime of Tribunals does not contain any provision comparable to CPR 31.22 (in the High Court), we consider this lacuna to be of no moment since the implied undertaking has emerged and evolved by the formulation of principles which have not been abrogated by statute or otherwise. … We can think of no good reason in principle or otherwise for holding that the implied undertaking does not apply to the disclosure of documents in Tribunal proceedings and neither side suggested the contrary. …'

142. The Tribunal concluded at [19] that disclosure by the Home Office of the relevant report was not 'voluntary', in that it had been required to produce evidence (which led to disclosure of the report), and the applicants were not at liberty to use the report for collateral purposes. Accordingly, the Tribunal in *MST* applied the common law implied undertaking where both parties agreed that it applied. It was not concerned with the wider CPR 31.22 as interpreted in *Smithkline*.

143. The fifth case, *DVLA v Information Commissioner* [2020] UKUT 310 (AAC) ("*DVLA*") was concerned with the intention of one Mr Williams to publish hearing bundles and skeleton arguments on the internet prior to the relevant hearing taking place. Upper Tribunal Judge Wikeley, at [22], noted case law that the CPR could provide 'guidance' on issues where the Upper Tribunal Rules are silent or unclear, but also the comments of the then Senior President in *R (on the application of LR) v FTT* [2013] UKUT 294 (AAC) at [30] that 'If those who make Tribunal Procedure Rules wish to mirror the CPR, there is nothing to prevent them from doing so expressly'.

144. At [23] of *DVLA*, the Judge suggested that CPR 31.22 and 32.12 could be applied because 'The implied undertaking at common law is codified in relation to civil litigation in the CPR'. As submitted by Mr Peacock and explained above, the CPR did not merely codify the previous common law rule but extended the rule to documents voluntarily provided. However, Judge Wikeley was not commenting, and was not asked to comment, on any distinction between the two regimes. There is no discussion in the case about compulsory versus voluntary disclosure.

145. The sixth case is *Williams v Information Commissioner* [2021] UKUT 110 (AAC). This was a rerun of *DVLA*. The same Mr Williams again sought to publish

bundles online, in separate proceedings. I rejected that application, applied *DVLA*, and made an order prohibiting publication on the internet for the reasons given.

146. The seventh case, and most recent, is *Frederiksen*, a First Tier Tribunal case involving an applicant seeking a disclosure order against itself, coupled with a direction limiting HMRC's collateral use of the documents thus disclosed. Tribunal Judge Blackwell concluded, at [77]-[78] that:

> '77 … despite the FTT Rules not mentioning the prohibition on collateral use, the common law operates so that an order for disclosure is granted on the basis that an implied undertaking is given by the receiving party that it will not use or allow the documents or their contents to be used for any purpose, other than the proceedings in which disclosure was given. However, in the case of documents disclosed to (as opposed to by) HMRC, that undertaking is qualified by section 17 [Commissioners for Revenue and Customs Act] 2005…
>
> 78. In reaching this view I have taken into account that the policy reasons for the prohibition on collateral use in civil proceedings weigh less in proceedings before this Tribunal, since standard disclosure in tax cases only requires parties to disclose documents on which they rely. There is therefore no reason to adopt a strained construction in order to protect fundamental rights. I also note that the position is different in civil proceedings, where parties are required to disclose documents adverse to them and the policy reasons for the prohibition on collateral use is engaged, as the CPR is an enactment which qualifies section 17 CRCA 2005.'

147. Thus, Judge Blackwell accepted that the common law implied undertaking could in principle apply but was excluded by statutory provisions inconsistent with the undertaking.

148. Again, Mr Peacock argues that there are some elements in the analysis which need to be treated with caution. At [83], the judge approached CPR 31.22 as substantially the same as the common law rule. Mr Peacock submits that it is not, as explained above. At [95], the judge stated that the rule against collateral use also applies to voluntarily disclosed documents. It is true that CPR 31.22 applies to voluntarily produced documents, but Mr Peacock argues that the common law implied undertaking does not do so, as explained above.

149. Despite this, Judge Blackwell proceeded to consider whether disclosure was compelled, concluding at [88]-[90]:

> '88… the policy reasons for the prohibition on collateral use have much less force in relation to proceedings before this Tribunal than in civil litigation governed by the CPR.
>
> 89. Standard disclosure in tax cases only requires parties to disclose documents on which they rely: r.27(2)(b) of the FTT Rules. In contrast, under the CPR a party is also required to disclose documents that adversely affect his case or support his opponent's case: CPR 31.6. Standard disclosure is the default in tax cases and it is open to a party to apply for specific disclosure against the other party. However that is rare. It is not the case in this appeal. I also note in *IG Index* at [44] Christopher Clarke LJ comments that the "reach of the rule must be assessed so as to cater for the usual case".'

150. The FTT Rules (Rule 27, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) with which Judge Blackwell were concerned applied to both HMRC and the applicant, and state:

'… each party must send or deliver to the Tribunal and to each other party a list of documents… of which the party providing the list has possession, the right to possession, or the right to take copies; and … which the party providing the list intends to rely upon or produce in the proceedings.'

151. Despite the use of the word 'must' in this rule, the Judge concluded at [92] that disclosure was not compulsory in the sense required for the implied undertaking to apply. Disclosure by compulsion of law 'contemplates compulsion of a higher degree': [92]. At [94], he concluded that the implied undertaking could only apply where disclosure was truly compelled:

> 'compulsion is from having to disclose documents that the party would rather not disclose, because they are adverse to their case, rather than simply having to disclose because they are relying on them and engaged in litigation.'

152. All this compelled Judge Blackwell to find, at [96], that protection by means of an implied undertaking was not a 'fundamental right', such that it was proper to give full effect to section 17 CRCA, which allows HMRC to use information acquired by it in connection with any function. The net effect was that HMRC was not subject to the implied undertaking.

153. In the case of *PF(International)*, the collateral use point was not argued and the Tribunal did not decide the issue but proceeded on an assumption as invited by the parties.

154. In summary, the FTT and Tribunal decisions above are unclear as to whether and how the rule against collateral use or implied undertaking would apply generally in tribunal proceedings. However, I do not need to decide the point. I do not even need to determine whether an implied undertaking and rule against collateral use would apply by virtue of the common law in relation to documents or information provided to the Authority by an applicant as part of the material it provides in a reference it makes to the Tribunal under FSMA.

155. This is because, whatever the position under the common law, the specific statutory regime which governs the use of material filed, served or disclosed by applicants in reference proceedings under FSMA displaces the position at common law. There is already some support for this analysis from the FTT's recent decision in *Frederiksen*. The decision is persuasive in demonstrating the proper relationship between any common law implied undertaking or rules on the collateral use of documents disclosed in tribunal proceedings and any governing statute which would displace their application. By virtue of section 18 CRCA, HMRC is subject to confidentiality rules akin to section 348 FSMA on the use of information it receives. However, section 17 CRCA explicitly permits HMRC to use any documents disclosed to it for any of its functions. There are equivalent, although not identical, provisions in FSMA and the 2001 Regulations which govern the use and disclosure of confidential information provided to the Authority. This leads naturally into the third broad heading.

3) <u>The statutory scheme under ss.348-349 FSMA and the 2001 Regulations authorise the Authority to use or disclose material received by it from applicants in Tribunal references. The scheme displaces any implied undertaking or rule against collateral</u>

use, even if they might otherwise have applied to Tribunal reference proceedings under FSMA.

*Use and disclosure of material received by the Authority under FSMA and 2001 Regulations*

156. Whilst the decisions referred to, above, do not all speak with one voice, they suggest the prima facie application of the common law implied undertaking, applicable only to documents disclosed under compulsion of law, and subject to displacement by contrary specification in the relevant statutory scheme (as in *Frederiksen*).

157. Where documents are disclosed under compulsion of law, the Authority accepts that the common law implied undertaking would prima facie apply. For decades, the common law saw the implied undertaking as providing the necessary protection where there is compelled disclosure. Absent any other protections for a party forced to disclose documents, the logic of that position applies in the Tribunal.

158. However, despite that prima facie rule, there are two reasons why the Authority is not subject to a common law implied undertaking in respect of the documents disclosed by Ancean.

159. First, section 348 FSMA provides all the necessary protection required where documents are disclosed under compulsion of law. Parliament has decided that section 348 should provide sufficient protection when the Authority compels the provision of information under FSMA (where failure to comply may be treated as contempt: FSMA section 177). It must, therefore, provide sufficient protection for documents required to be provided in Tribunal proceedings without such a sanction.

160. The Authority has duties to advance its statutory objectives. Those objectives are: ensuring that financial markets function well; securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system, and promoting effective competition: see ss. 1B-1E FSMA. The Authority has a wide range of public functions as prescribed by statute: these include regulatory, investigatory, supervisory, enforcement and prosecution functions.

161. The Authority (alongside the Prudential Regulation Authority or "PRA") has wide-ranging information gathering powers, in Part XI FSMA, which feed into its regulatory functions and require it to obtain and process information: see the Witness Statement at [22]-[29]. Section 348 FSMA applies to 'confidential information' obtained by the Authority. Confidential information is defined (at s. 348(2)) as information which relates to the business or other affairs of any person and which was received by the Authority for the purposes of, or in the discharge of, any of its functions under FSMA, unless it has already been made available to the public.

162. This definition would cover non-public information, received by the Authority in Tribunal proceedings eg. the provision of information to the Authority by a regulated person which has not been referred to in public hearings. The limitations on the use of confidential information apply to the Authority as a 'primary recipient', but also to any person obtaining the information from the Authority: s.348(1). Accordingly, any information disclosed to the Authority by an applicant within Tribunal proceedings remains subject to s. 348 FSMA, unless and until referred to in public hearings.

163. Before the initiation or continuation of Tribunal proceedings, the Authority will typically have investigated matters, and obtained documents and information from a regulated person under its statutory powers. It may have issued a Warning Notice and Decision Notice, or (in other cases) Supervisory Notices.

164. Tribunal references are catered for by various provisions in FSMA such as section 133. Following the resolution of the references, the matter will be dismissed or remitted back to the Authority (for non-disciplinary references); or the Tribunal will determine the appropriate action for the Authority to take and remit it to the Authority to take that action (for disciplinary references): see s.133 FSMA.

165. Documents received by the Authority in Tribunal proceedings form part of a continuum of documents received by the Authority. The Tribunal process itself is part of the regulatory process in which those documents are obtained. In *Seiler* at [48] Fraser LJ, citing *Frensham v FCA* [2021] UKUT 222 (TCC), stated: 'the Tribunal is part of the regulatory process and in many respects stands in the shoes of the Authority when considering he subject matter of references'. At [77] (Fraser LJ): 'the joint purpose both of the Upper Tribunal, and the FCA as regulator, to ensure that the integrity of the financial markets is protected and confidence in them is maintained; that persons who are not fit and proper persons are prohibited from carrying on business in those markets; and that persons who are fit and proper are permitted to do so. '

166. The statutory scheme works as a coherent whole, without room for the importation of further collateral use rules applicable to documents in Tribunal proceedings. Indeed, the statutory scheme would be less coherent if a collateral use rule applied.

167. The proper interpretation of section 348 FSMA is that it is a 'ringfencing' rule to the effect that it prevents the Authority making onward disclosure outside the ringfence of the Authority itself to any other person or organisation unless the owner of the information consents or an exception under section 349 FSMA applies. However, it does not prevent the Authority using the material it receives (confidential information) for all its regulatory purposes and statutory functions so that it can lawfully make internal disclosure to all departments or teams within the Authority (its ringfence) of the confidential information it has received so long as it is in fulfilment of its public functions.

168. In making use of confidential information internally, the Authority is not making any onward disclosure to any other person of that information and section 348 simply provides a protective ring. It provides statutory authority for the use of the information by any worker or for teams within the Authority to have access to and be disclosed the material in the exercise of any of it public functions. Even if I were wrong about that, and the internal cross-use of the material by the Authority is restricted by virtue of section 348 FSMA, the Authority would still be expressly authorised to disclose internally, circulate and use such confidential information for any of its public and statutory functions by virtue of section 349(1) FSMA and Regulation 3 of the 2001 Regulations.

169. In addition, the Authority (and any later recipient of the information) may disclose confidential information to third parties outside the Authority if the disclosure is for the purpose of facilitating the carrying out of any public function of the Authority, if it is permitted by s. 349(1) FSMA and Regulation 3 of the 2001 Regulations.

170. Further, Regulation 5 of the 2001 Regulations permits the Authority, for example, to disclose to the parties to one set of Tribunal proceedings, confidential information received in another set of Tribunal proceedings (assuming it was relevant – such as to meet the statutory test of being 'for the purpose of proceedings'). By virtue of Regulation 5(1)(a) one team of the Authority might receive confidential information, whether filed or served in a set of tribunal proceedings or otherwise, and rely on it to initiate other Tribunal proceedings. By virtue of regulation 5(1)(b) the Authority might receive confidential information, for example served upon it or disclosed to it in one set of proceedings, and thereafter disclose it in another set of Tribunal proceedings so as to comply with its disclosure duties under paragraphs 4 and 6 of Schedule 3 to the Tribunal Rules. In other words, confidential information received from an applicant in one set of reference proceedings might be material that the Authority serves and relies upon against other persons or applicants in other specified civil or Tribunal proceedings or it might be material that the Authority discloses in those other proceedings as undermining its case. In either example, it would be relevant material that the Authority is empowered to lawfully disclose into the other set of proceedings.

171. Regulation 5 of the 2001 Regulations would therefore permit the use by the Authority or disclosure by the Authority into one set of Tribunal proceedings of confidential information received from an applicant in another set of proceedings. It would also permit disclosure to, for example, an applicant's legal team: such disclosure would also be for 'for the purposes of proceedings'.

172. The Authority is empowered by section 349 FSMA and the 2001 Regulations to use and disclose confidential information for public functions or other Tribunal proceedings, in the absence of the consent of the owner of the material and in the absence of the Tribunal's permission. However, there are limits and restrictions within FSMA and 2001 Regulations as circumscribed therein. Any person who discloses information in contravention of section 348 or the 2001 Regulations is guilty of an offence, and liable on conviction to imprisonment of a term not exceeding two years, or a fine, or both: section 352 FSMA.

173. This statutory interpretation accords with the purpose of the legislative scheme as to the Authority's functions and the practical needs of its operation as regulator, supervisor, investigator and law enforcement agency. As Mr Peacock submits, a single Authority case could involve: supervisory liaison with a firm and third parties (stage 1); an investigation process by the Authority's Enforcement and Market Oversight Division (stage 2); written submissions from the firm (stage 3); a warning notice (stage 4); a Regulatory Decisions Committee process (stage 5); the issuance of a decision notice (stage 6); a reference and determination to the Tribunal (stage 7); and remittal to the Authority and a further regulatory decision process (stage 8).

174. Using this example, it would be very odd indeed if an implied undertaking applied to documents received at stage 7, but not other stages. Stages 1 and 2, in

particular, may well have included compelled information requirements imposed by the Authority, but there can be no basis for suggesting that an implied undertaking applies to those documents. There is no principled basis for suggesting that documents voluntarily disclosed in the Tribunal require some greater level of protection than those earlier documents.

175. An implied undertaking at stage 7 would also create a significant blind spot for the Authority in respect of one small category of documents. All the other documents could be ingested into (or referred to within) the Authority's intelligence systems to assist with general market surveillance, to identify individuals involved in the relevant events, or for any number of other purposes. The Witness Statement at [25] explains that the Authority has invested considerable resources into enhancing its information-management systems so that relevant information is available to be used when necessary. Indeed, the absence of missing documents, which could not be used by reason of an implied undertaking, might mislead the Authority and lead to incorrect conclusions.

176. Once a document was referred to in an open hearing, it could presumably be ingested into (or referred to within) the Authority's intelligence systems, but this would require close analysis of precisely which documents have been read or referred to (something easier said than done, given how many documents may have been referred to in writing rather than orally: see *Lily Icos v Pfizer (No 2)* [2002] EWCA Civ 2, [2002] 1 WLR 2253 at [7]-[8]). There would still be blind spots, however, and not all references lead to a public hearing – for example proceedings can be withdrawn or settled.

177. The alternative, which is contrary to the statutory scheme, is that the Authority applies to the Tribunal for permission to use disclosed documents for general regulatory purposes. The Authority will either have to be selective in its application, and risk missing out on intelligence that would have been helpful in due course; or the Authority will apply to be released from the implied undertaking for every document in every case. Both approaches would be time-consuming for both the Authority and for the Tribunal, and unnecessary on the analysis above.

178. Furthermore, even then, if there were an implied undertaking and documents were required to be released from it, there could remain dangers for the Authority, depending on the terms of the release. Absent a blanket release, any future 'use' of the documents could amount to a contempt of court. For example, the information might be relevant to a request from another investigating authority. It is not in the public interest to create additional obstacles or risks for the Authority in carrying out the work that Parliament has entrusted to it. Sections 348-349 and the 2001 Regulations already provide all the necessary safeguards.

179. If there is a particular document or piece of information where it is thought that section 348 FSMA provides insufficient protection, then the Tribunal could make an appropriate order for that document restricting its use, disclosure or publication (for example, such as under Rules 14 or 15). The mere fact that the Authority did not require permission to use or disclose a document received would not automatically mean that it was admissible in any set of Tribunal proceedings. The admission or exclusion of

documents would always be subject to relevance and fairness tests which would be supervised and controlled by the Tribunal such as under Rule 15.

180. Therefore, a blanket collateral use rule would be contrary to the statutory scheme and is unnecessary. Further, there is little actual prejudice to applicants in the Authority not being required to seek a party's consent or the Tribunal's permission to use or disclose documents. First, it may to be their advantage if material is automatically disclosed that undermines the Authority's case in any proceedings. Second, if material is to be deployed against a party to Tribunal proceedings, having been received by the Authority from another individual or from other proceedings, there is always the further protection offered to applicants in any proceedings that they may object to the admission of material. The Tribunal has the power to admit or exclude documents in any proceedings under Rule 15 taking into account what is just and fair.

181. In conclusion, even if any implied undertaking or collateral use rule existed by virtue of the common law, they are displaced by express statutory authorisation under sections 348-349 FSMA and 3-5 of the 2001 Regulations. The statutory scheme permits the Authority to use and disclose all material (confidential information) received by it in reference proceedings for the purpose of fulfilling its statutory or other public functions, including as regulator or for the purposes of collecting intelligence or undertaking a criminal investigation or prosecution. Further, the Authority is expressly authorised by section 349(1) and Regulation 5 to disclose the confidential information received from an applicant, the documents disclosed by Ancean in this case, in some other civil cases and all reference proceedings before the Tribunal.

182. Second and alternatively, even if the statutory scheme did not displace the common law, the common law implied undertaking would not prevent the Authority using or disclosing the documents or information it has received from Ancean. Ancean, like other applicants to references, is not compelled to disclose any documents at all to the Authority under Schedule 3 to the Tribunal Rules. Paragraph 5(3), of Schedule 3 to the Tribunal Rules, merely require an applicant to provide a list of documents upon which the applicant relies. As Judge Blackwell noted in *Frederiksen*, this is not the type of compelled disclosure which triggers the implied undertaking. Ancean was perfectly entitled not to produce any documents in these proceedings. Its production of documents was voluntary rather under compulsion (as understood in *Prudential Assurance*) and does not engage a common law implied undertaking.

183. The position in respect of any witness statements Ancean may yet provide is similar. Again, section 348 FSMA provides all the protection that an applicant or a witness requires. The production of witness statements is, again, voluntary – in the sense that failure to comply would not meet with criminal sanction or contempt of court. As noted above, the Tribunal forms part of a continuum of regulatory action and section 348 FSMA provides the protections throughout that continuum.

184. Thus the Authority does not require Ancean's consent nor the Tribunal's permission to make use of any material provided by Ancean in these reference proceedings in furtherance of all its public functions, or in fulfilling disclosure obligations in the Enforcement References or in other cases or even seeking to rely on the material in those proceedings. However, the admissibility of material as evidence

relied upon by the Authority in other proceedings may be subject to a decision of the presiding Tribunal as to the exclusion of evidence under Rule 15.

4) Considering the objections raised by Ancean

185. Ancean opposed the Authority's application, for the reasons set out above. I reject the objections for the following reasons.

186. Ancean asserts that the use by the Authority of documents it had disclosed would infringe the rule from *Hollington v Hewthorn* [1943] KB 587. The rule in *Hollington* prevents reliance by one judge on findings of fact by another judge. It has no relevance to the collateral use of documents.

187. Ancean also suggests that the application is 'hypothetical'. This is also incorrect. As explained above, and in the Witness Statement, the Authority has received 54 documents provided by Ancean which have only been considered by a small team within the Authority and not more widely disseminated internally, let alone disclosed to any person outside the Authority[3]. This ruling decides whether the Authority may make use of those documents for all its statutory and public purposes including regulatory functions and whether it may disclose those documents in the Enforcement References, if relevant and meeting the disclosure test in Schedule 3.

188. The Enforcement References are active Tribunal proceedings where the Authority has the obligation to disclose documents which might reasonably be expected to assist the applicants' cases. At present, the team working on the Enforcement References has not looked at Ancean's disclosure to assess its relevance.

189. Some of the documents relate to Mr Ewing's understanding that the Glenfinnian and Pulteney Bonds were profitable and likely to return money to investors. The Enforcement team needs to consider whether such documents are relevant to the Authority's case in the Enforcement References that those investments (amongst others) paid high commissions; were high risk and illiquid; or made without adequate due diligence.

[3] There is one obvious exception to the fact that the Authority has not hitherto used the 54 documents it has received from Ancean nor disclosed them outside the team in the Authority tasked with responding to the Ancean Reference. This is that during the hearing the Tribunal was provided with a copy of the 54 documents and taken through them by Mr Temple so as to explain their potential relevance to either the ongoing Enforcement Reference or the fulfilment of the Authority's other public and regulatory functions. This was necessary in order that the Tribunal understood the factual context of the application. The Tribunal made a Rule 14 order prohibiting the disclosure, reporting or publication of those documents until the application was determined. Otherwise, the mere fact that the documents had been referred to in an open and public hearing, although no other person was present other than the parties, might have meant that any implied undertaking or rule against collateral use may already have been released which would render the application redundant.

190. Ancean makes further 'fairness' arguments: Ancean argues that 'the unstated purpose of the application is to use material from the Enforcement References in its case against the Applicant' . This is incorrect. The purpose of the application is to make Ancean's documents available to the Authority as a whole, not to rely on additional documents from the Enforcement References against Ancean. Even if the Authority were to change its position and disclose or seek to rely on additional documents from the Enforcement References in the Ancean Reference, Ancean would have the ability to object to their admission in these proceedings by virtue of Rule 15 of the Tribunal Rules.

191. Ancean also argues that 'it would be unfair for regulatory agencies to exploit the already decisive advantage they enjoy by making collateral use of information obtained from separate proceedings'. Again, this seems to rest on the misunderstanding that the Authority seeks to introduce further documents into Ancean's reference. In any event, there is no unfairness. If the information is relevant to the Authority's regulatory functions, it will be considered alongside other evidence that the Authority holds, and will be dealt with subject to the protections in section 348 FSMA.

192. Mr Botsman raised nine further objections to the Authority's application in his written submissions dated 17 October 2025 which he pursued during the hearing. I can address and dismiss these relatively shortly.

193. First, he submitted that the Collateral Use Rule applies in all Tribunal proceedings as a matter of common law, in particular relying on *MST*. I have addressed this above – the authorities do not speak with one voice but in any event they do not address the specific statutory scheme in FSMA which applies to these proceedings.

194. Second, he argued that there was no statutory 'override' or cross-use power comparable to section 17 CRCA in FSMA. As I set out above, the proper construction of sections 348-349 FSMA and Regulations 3-5 of the 2001 Regulations permit the cross-use and disclosure by the Authority of material provided to it by Ancean in these reference proceedings. The statutory scheme permits the Authority to use and disclose the confidential information provided by Ancean as part of its public functions without Ancean's consent or the Tribunal's permission.

195. Third, he contended that *Frederiksen* confirms the continuing force of the implied undertaking in common law. I have found that the decision supports the approach taken herein whereby relevant statutory provisions may displace the common law position.

196. Fourth, he argued that neither Regulation 3(1)(a) nor 3(2) of the 2001 Regulations applies to enable the Authority to disclose confidential information provided by Ancean in reference proceedings other than the Ancean Reference. As I have decided above, section 348 FSMA empowers any team within the Authority to consider the material for the purpose of its regulatory functions or to consider the material for disclosure in other proceedings. Regulation 5 specifically authorises the Authority to make disclosure of or even rely upon Ancean's material in other reference proceedings such as the Enforcement Reference, if the material is relevant. The

Authority is exercising a public function for the purposes of section 349 FSMA when participating in references.

197. Fifth, he contended that the Tribunal proceedings are independent and adversarial, not a continuation of the Authority's functions. There is no doubt that reference proceedings are proceedings before an independent tribunal exercising a judicial function but a public function is being exercised by the Authority in using or disclosing material provided to it for regulatory purposes or other reference proceedings.

198. Sixth, he argued that disclosure given by applications in references is not truly voluntary as the Tribunal Rules require the parties to provide the documents and witness statements and the Tribunal routinely gives directions in such terms. As above, I have decided that this does not mean that an applicant's disclosure is given under compulsion – there is no criminal nor contempt of court sanction should an applicant choose not to comply. The consequences for failure to provide documents are such that the disclosure made by Ancean are deemed voluntary for these purposes.

199. Seventh and eighth he submitted that fairness, proportionality and the overriding objective require the application to be refused. He argued that the Authority's approach would produce procedural inequality , duplication of cost and an unmanageable evidential burden that is unnecessary for the fair disposal of the Ancean Reference. I do not accept this. The Tribunal has case management powers to control fairness and admissibility of material in the Ancean Reference (as it does in the Enforcement References).

200. Ninth he contended that the declaration sought is ultra vires and misconceived. I do not accept this. The application is not hypothetical as it concerns specific documents provided by Ancean in these proceedings. The nature of the remedy to be granted, given I agree with the Authority's analysis of the law in principle, is considered below.

5) <u>Even if I am wrong and the implied undertaking and collateral use rule do apply despite the provisions of FSMA, I give the Authority permission to use and disclose the documents provided by Ancean for its public functions</u>

201. Even if, contrary to my decision above, an implied undertaking and collateral use rule apply by virtue of the common law and notwithstanding FSMA, I give permission to the Authority to be released from the effect of such rule in relation to the documents provided by Ancean. The Authority is granted permission to use and disclose the documents for its public functions. The cogent and compelling reasons are set out above. They are to enable the Authority to use the documents to pursue its statutory functions generally, including its regulatory functions, and in particular to review the documents provided by Ancean for the purpose of considering disclosure to the Enforcement Subjects in the Enforcement References in case they undermine the Authority's case.

202. Plainly, if an implied undertaking exists, it should be released at least so as to enable the Authority to consider the relevance of documents disclosed by Ancean in the Enforcement References. In addition, there is no good reason to limit such use to the Enforcement References. As set out above, there is a public interest in ensuring that the Authority is able to access relevant information for all of its regulatory functions. The documents relate to Mr Ewing's businesses and investments, into which it is alleged that UK investors have invested and lost significant sums. There is a public interest in the Authority being able to investigate and to take action where appropriate or to ingest relevant information into its intelligence systems and act accordingly.

6) Remedy to be granted on the application: a direction rather than a declaration

203. The Authority originally applied for a declaration in the terms set out at paragraph 4. In a post hearing note it sought to reframe the declaration in the following terms:

> 'IT IS DECLARED THAT: Insofar as documents, information and witness statements provided by the Applicant [Ancean] to the Authority in this reference constitute confidential information, as defined by section 348 of the Financial Services and Markets Act 2000 ("FSMA"), they are held by the Authority in accordance with sections 348 and 349 of FSMA. Otherwise, such documents, information and witness statements are not subject to any restriction preventing the collateral use thereof by the Authority.'

204. Mr Peacock and Mr Temple made submissions as to why the Tribunal has power to make declarations due to its status as a superior court of record (see s.3(5) TCEA) with the powers of the High Court in all other matters incidental to its functions (see 25(2)(c) TCEA). They submitted that, provided that a declaration is in respect of a matter incidental to the Tribunal's functions, the Tribunal has jurisdiction. They contended that the declaration sought by the Authority is incidental to the Tribunal's functions: it is sought in the context of documents disclosed within the Tribunal references. As to whether a declaration is appropriate, the Tribunal should consider the same issues as the High Court. They argued that a declaration is appropriate in this case. It would serve a useful function in clarifying the law and setting out a clear basis for the Authority to make use of documents in the conduct of its regulatory functions. They referred me to a line of authorities from the courts on the extent of the Tribunal's jurisdiction.

205. My provisional view is that the Tribunal may have jurisdiction to make declarations in proceedings generally (in references and appeals), even though there is no explicit power granted to the Tribunal within the TCEA or Tribunal Rules to do so nor is there any authority from the Tribunal or courts on the point. The Tribunal's only explicit power under s.15(1)(c) TCEA is to make declarations in judicial review proceedings. Nonetheless the power may be implied by virtue of sections 3(5) and 25(2)(c) TCEA as the Authority submits. In any event, there is no need for me to consider the argument in further detail or reach a concluded view on the point. This is because I have decided it is not necessary nor proportionate to make a declaration in this case when I can make directions in response to the application in similar terms.

**Conclusion and Directions**

206. I make a direction in relation to the specific documents provided to the Authority by Ancean in similar effect to the declaration sought. For the reasons set out above I direct that:

> 1.Insofar as documents, information and witness statements provided by the Ancean to the Authority in this reference constitute confidential information, as defined by section 348 of the Financial Services and Markets Act 2000 ("FSMA"), they are held by the Authority in accordance with sections 348 and 349 of FSMA and may be used and disclosed by the Authority as permitted by those provisions and in accordance with the 2001 Regulations. Otherwise, such documents, information and witness statements are not subject to any restriction preventing the collateral use thereof by the Authority.

207. It follows that I also direct that:

> 2. Permission is not required from the Tribunal, nor is consent required from Ancean, for the Authority to use the documents provided by Ancean for its regulatory and other public functions or for the Authority to disclose them, if relevant, in other reference proceedings. This is subject to the restriction that in using or disclosing documents the Authority must be exercising its public functions as empowered, and restricted, by sections 348-349 FSMA and the 2001 Regulations.

208. I make these two directions for the reasons set out at paragraphs 155-183 above and in line with the conclusions reached.

209. I further direct that:

> 3.If wrong and the Tribunal's permission is required, in the event that the statutory scheme under FSMA and the 2001 Regulations does not displace any common law restrictions imposed by implied undertakings or any rule against collateral use, I grant the Authority permission to use and disclose the documents provided by Ancean in the exercise of its regulatory and other public functions.

210. This is for the reasons set out at paragraphs 200-201 above and in line with the conclusion reached.

211. I grant the Authority's application in so far as I treat it as an application for directions rather than for a declaration.

212. The Rule 14 order I made during the hearing in respect of the documents was framed so as to lapse on the determination of this application. I will consider on the papers any other consequential matters that may arise.

**JUDGE RUPERT JONES**

**UPPER TRIBUNAL JUDGE**

**RELEASE DATE 05 December 2025**