Neutral Citation Number: [2023] EWHC 224 (Comm)

Case No: CL-2022-000530

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

Rolls Building
Fetter Lane
London
EC1A 1NL

Date: 01 February 2023

Before :

MR CHRISTOPHER HANCOCK KC
Sitting as a High Court Judge

- -

Between :

CHIA-HSING WANG	**Claimant**
- and –	
(1) FLOREAT PRIVATE LIMITED	**Defendants**
(2) FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED	
(3) LV II INVESTMENT MANAGEMENT LIMITED	
(4) FLOREAT INVESTMENT MANAGEMENT LIMITED	
(5) FLOREAT REAL ESTATE LIMITED	

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Charles Béar KC and Nik Yeo (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Claimant**
Andrew Hunter KC, Tom Mountford and Timothy Lau (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing dates: 13, 14 December 2022

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 13 February 2023 at 10:30am.

MR CHRISTOPHER HANCOCK KC
Sitting as a High Court Judge:

Introduction and relief sought.

1. The Claimant, Mr Wang, is a high net worth individual. Between 2014 and 2020 he was in a relationship with advisers known as "**Floreat**" which was controlled by three "**Floreat Principals**".[1] It is common ground that as part of that relationship, the First Defendant "**FPL**") assisted Mr Wang in obtaining legal advice. It is also common ground that the First Defendant and other Floreat entities thereby obtained access to substantial quantities of Information, including instructions to lawyers and advice from lawyers.

2. The Claimant now seeks an order for an interim injunction to restrain the Defendants from using that confidential and (in some instances) legally privileged information (referred to below as "**Information**"), and for associated relief. The claim is based on breach of confidence.

The background facts.

3. Mr Wang engaged FPL in late 2014 to provide a comprehensive suite of private office services on terms set out in a document termed the Supply of Services Agreement, or the SOSA.[2] Chief among them were services relating to the management of Mr Wang's global legal and litigation requirements. This included (at Service Proposals H and K) the "*provision of professional advisors including, but not limited to tax, legal, accounting and immigration*", "*analysing the Primary Representative's professional service needs, obtaining quotes and engaging third party advisors*", and "*liaising with multiple advisors and coordinating the relevant advice and workstreams*".

4. As Mr Wang himself describes, he has required a substantial amount of legal advice since his late father transferred significant wealth to his control in 2000. Mr Wang has experienced a range of legal challenges including multiple legal cases relating to his family's assets, in

[1] Hussam Otaibi, his brother Mutaz, and James Wilcox: see PoC §2 **[HB1/4/13]**. Save where otherwise stated, this judgment will use "Floreat" to refer to the collection of businesses controlled by the Floreat Principals (including each of the Ds).

[2] The contractual relationship between Floreat and Mr Wang was initially governed by a supply of services agreement dated 11 December 2014 between FPL and Mr Wang ("**2014 SOSA**"). The 2014 SOSA was replaced by an agreement (under which substantially similar services were provided) dated 14 December 2018 (i.e. the SOSA) between FPL and a company stated to be under Mr Wang's control, Amida Group Holdings ("**Amida**"). Although Mr Wang was not a party to the SOSA, the services provided thereunder were for the benefit of what the agreement termed the "*Primary Representative*". That person was Mr Wang.

different jurisdictions including Switzerland, Luxembourg, the Isle of Man, Liechtenstein and Jersey.

5. Floreat assisted Mr Wang with the various legal proceedings around the world as well as how he might be able to structure his family's assets to protect them from the risk of enforcement of any future judgments obtained against them.

6. In the course of providing services to Mr Wang, FPL had access to information which was confidential and some privileged information. In many cases, FPL was the person responsible for procuring legal advice for Mr Wang or his associated entities. It is common ground that it was part of FPL's role to consider that advice in order to best advise Mr Wang or his entities as to how to manage the litigation and/or structure his investments.

7. On Floreat's advice, and as part of the investment strategy created for Mr Wang by Floreat in line with the legal advice received, Mr Wang and his family invested (via nominees including Credit Suisse London Nominees Limited ("**CSLN**")) in the following funds (the "**Funds**"):

   7.1. Principal Investing Fund I Limited ("**PIF**"), a closed-ended Cayman fund. PIF's management shareholder is D2, a Cayman incorporated company. The beneficial interest in the Fund is owned as to 100% by Mr Wang.

   7.2. Long View II Limited ("**Long View**"), an open-ended Cayman fund. Long View's management shareholder is D3, a Cayman incorporated company. The beneficial interest in the Fund is owned as to 99.5% by Mr Wang.

   7.3. Global Fixed Income Fund I Limited ("**GFIF**"), a closed-ended Cayman fund. GFIF's management shareholder is D4, a Cayman incorporated company. The beneficial interest in the Fund was owned as to 95% by Mr Wang until 2019.

   7.4. Real Assets (RA) Global Opportunity Fund I Limited ("**RAGOF**"), an open-ended BVI fund. RAGOF's management shareholder is D5, a Jersey incorporated company. The beneficial interest in the Fund is owned as to 97.2% by Mr Wang.

8. The SOSA permitted FPL to provide its services through Personnel, defined as "*its directors, partners, members, officers, advisers, accountants, consultants, employees, staff, agents, contractors and subcontractors and their employees, agents, consultants, staff, contractors and sub-contractors*" and to disclose information to associated companies. During the course

of the relationship between Mr Wang and FPL, FPL generated and held documents and information recording or relating to the legal advice which they were obtaining and coordinating for him. Such information, the Defendants alleged, was accessible to those Floreat personnel (including at other Floreat entities) where they were involved in providing the various services to Mr Wang. The documents held included those created by FPL / Floreat staff or secondees.

9. The nature of the services provided by Floreat – from litigation management to investment and structuring advice as well as the making of actual investments – and the unique risks faced by Mr Wang in relation to potential seizure and enforcement of his assets meant, the Defendants alleged, that various Floreat entities necessarily required access to at least some of Mr Wang's otherwise confidential and privileged information. That is why, the Defendants alleged, it was not just FPL but Floreat more broadly who came to form an integral part of Mr Wang's wider advisory and legal team.

10. The Defendants stressed that Mr Wang himself acknowledged and consented to the way in which Floreat operated in this respect by a letter dated 21 June 2019 ("**2019 Confirmation Letter**"). This provided:

> *"As you know, Floreat [defined in the letter as "Floreat [i.e. FPL] and the Floreat Group"] have been assisting me with various aspects of my affairs since 2015. In the course of this engagement, I have asked Floreat to assist me (inter alia) in obtaining legal and other professional advice in respect of various aspects of my and my family's affairs, including (and not limited to) various pieces of litigation, in various jurisdictions.*
>
> *As such, Floreat are, and at all times have been, instructed and authorised by me to obtain and receive legal advice on my behalf.*
>
> *I should acknowledge that the confirmation provided above states the obvious; Floreat's instruction and authorisation to obtain and receive legal advice on my behalf are of course clear from the instructions which I have provided by email, in person, and by telephone throughout, and from the scope and nature of Floreat's engagement by me.*
>
> *This letter of confirmation is provided strictly for the avoidance of doubt and by way of further confirmation of the position."*

11. In late 2020, Mr Wang intimated that he wished to part company with Floreat. At that time, it is said that Mr Wang had a very significant amount of fees still owing to Floreat and its related entities (approximately USD 80 million), which he refused to pay. Accordingly, by notice on 20 April 2021, FPL suspended provision of services to Mr Wang and the Defendants say that the SOSA will terminate on 31 December 2022.

12. The deterioration of the parties' relationship has led to the following proceedings (together "**the Proceedings**"):

    i. Pre-action disclosure. In March 2021, Mr Wang, and two companies controlled by him (Blue Water Limited ("**Blue Water**") and Amida) issued a pre-action disclosure application in the English High Court against 15 respondents including FPL, the Third Defendant, the Floreat Principals as well as other Floreat group entities. The applicants sought documents "*relating to the arrangements for the engagement of other persons relating to the performance of services under the SOSA*". The application was dismissed.

    ii. LCIA arbitrations. In October 2021, following unsuccessful attempts to resolve the payment dispute with Mr Wang in pre-action correspondence, FPL and the Third Defendant initiated LCIA arbitral proceedings against Blue Water and Amida seeking payment of overdue sums ("**the LCIA Arbitration**"). In response, Blue Water and Amida counterclaimed bringing into issue the services provided by FPL under the SOSA. This arbitration has been fixed for trial commencing on 15 May 2023. Initial exchange of document productions took place on 4 October 2022 and witness statements were exchanged very recently, on 5 December 2022.

    iii. St Dalfour arbitration. In June 2022, a company owned by Hussam Otaibi (one of the Floreat Principals) engaged a separate LCIA arbitration against Mr Wang and his mother concerning services provided by St Dalfour Private Limited to recover certain assets from an individual called Richard Ritter and/or entities under his control, which assets had escaped the Swiss asset freeze, on behalf of the Wangs.

    iv. The BVI Proceedings. There are a suite of related applications issued in the BVI courts (together, the "**BVI Proceedings**") relating to Mr Wang obtaining the *ex parte* appointment of joint provisional liquidators over RAGOF, and at the same time issuing a winding up petition in respect of it. RAGOF's management shareholder is the Fifth Defendant. On 19 August 2022, Wallbank J sitting in the BVI Commercial Court delivered a judgment discharging the Orders obtained by Mr Wang *ex parte* for the appointment of joint provisional liquidators on the ground of non-innocent material non-disclosure and breach of the duty of full and

frank disclosure and fair presentation. The Court granted leave to appeal and stayed the discharge pending appeal. The appeal was heard in early November 2022.

v. The Cayman Proceedings. Analogous proceedings to the BVI Proceedings have been brought in Cayman (the "**Cayman Proceedings**") in respect of PIF, Long View and GFIF (the "**Cayman Funds**"). Disclosure took place in those winding up proceedings from 13 October 2022. Witness evidence was exchanged on 22 November 2022 with extensive although not necessarily exhaustive exhibits. The trial of these proceedings is due to take place over six weeks beginning in April 2023.

The recusal application in Cayman.

13. An important part of the background is a relatively recent Recusal Application in the Cayman Proceedings. The background is as follows:

i. On 6 October 2021, the Cayman Defendants applied to discharge the appointment of joint provisional liquidators over the Cayman Funds. This application was dismissed by the Judge in April 2022. The Judge also refused permission for the Defendants to intervene in associated receivership proceedings and then proceeded to set a timetable for the action which the Defendants regarded as unnecessarily tight.

ii. In early August 2022, one of Floreat's principals, Mr Wilcox (a former solicitor) was informed that the Judge had been employed by Cains, an Isle of Man firm of solicitors. This prompted a recollection that Mr Wilcox had been involved (as part of his role in providing services to Mr Wang pursuant to the SOSA) in the potential instruction of Cains to provide advice to Mr Wang. Mr Wilcox therefore instructed a Floreat paralegal to search for documents related to the instruction of Cains within FPL's records.

iii. In the course of this search certain documents ("**the Cains Documents**") were found. In particular, there were two attendance notes ("**Attendance Notes**") that are said to have demonstrated that at a meeting in August 2019 between Mr Wang, Mr Tom Lowe QC (as he then was) (Mr Wang's adviser and witness in the Cayman Proceedings) and Cains, it was suggested that the Judge (in his capacity as an employee of Cains) should be asked to provide formal advice to Mr Wang, which would provide assistance to him going forward. It was not known whether any advice was in fact obtained by Mr Wang from the

Judge, but the Cayman Defendants stated that this was the third occasion on which a potential or actual issue of this nature (connection between a Judge and Mr Wang) had arisen in the various Proceedings with the Judge granting the *ex parte* orders in the BVI having thereafter recused himself for connections to the Wang family.

iv. Forbes Hare (the Cayman Defendants' Cayman counsel) then wrote to Appleby (the Claimant's Cayman counsel) (copying the Judge's PA) on 9 August 2022 raising the alleged connection and requesting full details of all of Mr Wang's connections with Cains so that the position could be considered. The Claimant asserts that the account given of how the material had been discovered was a misleading one, but I do not feel able to express a concluded view on this.

v. On 10 August 2022, the Judge wrote to the parties that he "*feels obliged to recuse*" and that the "*parties should make the appropriate arrangements for the reassignment of these cases*".

vi. However, following representations from Mr Wang, on 19 August 2022, the Judge set aside his original decision on recusal and made an order, which among other things gave directions for the making and hearing of a Recusal Application. He also directed that the parties provide further information as to the source of the assertions made by the Cayman Defendants.

vii. In accordance with the 19 August 2022 Order, the Cayman Defendants filed and served the second affidavit of Mr Alan Quigley of Forbes Hare dated 24 August 2022, which exhibited the Attendance Notes.

viii. On 1 September 2022 Skadden Arps ("**Skadden**") on behalf of Mr Wang sent Herbert Smith Freehills ("**HSF**"), Floreat's solicitors, a letter raising issues of legal professional privilege relating to the Attendance Notes. The letter stated that there was "*no conceivable basis on which any Floreat party could have considered itself entitled now to review*" and requested that Floreat "*cease forthwith all use of Mr Wang's privileged material ("Material") and to give an undertaking to that effect*". "Use" was said to include reading the "Material" (or purported "Material") itself. A response was requested from HSF by 5 September 2022.

ix. HSF responded by letter dated 5 September 2022. In that letter, HSF refused to give the undertakings on "*ceasing use*" of Mr Wang's allegedly privileged material. Such material

could not, it was said, be easily identified and the process of identifying such material would itself involve "*use*" that Skadden claimed was impermissible. Providing an undertaking would, it was said, also prevent Floreat from complying with their disclosure obligations in the various Proceedings.

x. On 28 September 2022, the Cayman Defendants filed the Recusal Application, which was supported by the third affidavit of James Wilcox. Mr Wilcox stated that he believed:

> "… that there is no basis for Mr Wang to prevent **any use** of the documents within Floreat's control or, **alternatively, any use for the purposes of** these Recusal Applications, the [winding-up] Proceedings and other **proceedings involving Mr Wang or his connected parties** in other jurisdictions."

xi. The applications were heard on 10 November 2022 and judgment handed down on 23 November 2022. The Judge decided that he should recuse himself, and ordered that the Cayman Proceedings be assigned to another Judge. However, this was not on the basis that he had given advice to Mr Wang, but instead that Cains had been involved in structuring, on Floreat's behalf, a predecessor fund to that which Mr Wang invested in.

14. Mr Wang also relies on the fact that there have been other disclosures, as follows:

14.1. In one of the LCIA arbitrations, the First and Third Defendants have disclosed further material which is Information (i.e. confidential and legally privileged, and clearly so):

14.1.1. A confidential and privileged handwritten note of a 2016 meeting in which is recorded legal advice given to Mr Wang by Tom Lowe QC. The meeting note also records a discussion with a lawyer instructed by Mr Wang in Switzerland.

14.1.2. An email chain recording advice which Mr Tom Lowe QC gave in a follow-up to the meeting referred to above. That email also records legal advice from another leading counsel to Mr Wang.

14.1.3. Written tax advice from Wedlake Bell LLP. This had been procured for Mr Wang and his family by one of Mr Wang's banks, just as the same bank had done on a previous occasion.

14.2. In the Cayman proceedings, Hussam Otaibi, one of the Principals, has exhibited and specifically relied upon two documents which, it is said, were clearly privileged and confidential documents in his Third Affidavit:

14.2.1. An agenda for a meeting held between Mr Wang, Mr Otaibi and a lawyer instructed by Mr Wang in Luxembourg in the context of contentious legal proceedings. That agenda discloses, at paragraph 3, Mr Wang's instructions to the Luxembourg lawyer to give legal advice.

14.2.2. A further privileged and confidential document, which was prepared for the dominant purposes of instructing the Luxembourg lawyer in those legal proceedings.

15. In addition to the claims summarised above, I was told that since 1 September 2022, three new claims have been articulated against Floreat in connection with the services provided to Mr Wang. These are: (i) a claim issued on 1 September 2022 in the English High Court by 23 claimants, including the joint provisional liquidators of each of the Funds, against the Floreat Principals and fourteen other entities including the Second to Fifth Defendants in relation to purported losses suffered due to management of the Funds; (ii) the present breach of confidence claim first articulated to HSF on 7 October 2022; and (iii) on the same day that the Particulars of Claim in this action were served on 10 November 2022, Skadden sent a purported pre-action letter to a company owned by Hussam Otaibi, Mount Tai Limited, threatening further litigation in England in the form of a Part 8 claim for an account in common form. I have not seen any further details of any of these claims.

16. It is against this background that the current application is made. Essentially the Claimant is concerned that the documents that have been provided to the Defendants in confidence will be used against him in proceedings between the parties, both in arbitration and in Court. The Claimant is therefore seeking an injunction to prevent that from happening.

The parties' submissions.

<u>The Claimant's contentions.</u>

The Information was confidential.

17. The Claimant's argument started from the proposition that there could be no real doubt that any material in the nature of the "Information" pleaded was from its origin confidential to Mr Wang and (at least in some cases) legally professionally privileged for his benefit. It was (as pleaded):

    17.1. information concerning legal advice received by Mr Wang or instructions given in relation to such advice, whether recorded in the form of email or other correspondence, attendance or other notes, advices or opinions or other records of such legal advice or instructions to lawyers;

    17.2. work product of Mr Wang's legal advisers in carrying out their instructions from him, including drafts of evidence in respect of relevant legal proceedings; and

    17.3. documentary records containing or evidencing communication of such advice or instructions or their gist in whole or part (whether between Mr Wang and/or the Floreat Principals or each of them and/or other advisers or employees or agents of Floreat entities).

18. In this regard, I was referred to *Toulson & Phipps on Confidentiality*, 4th ed., paragraphs 18-001 and 18-004-18-006.

19. All this Information came to FPL because – in the language of the SOSA - FPL was engaged to (a) analyse Mr Wang's professional service needs, obtaining quotes and engaging third party advisers and (b) liaise with multiple advisers, coordinating the relevant advice and workstreams. Indeed, the Claimant said, the Defendants have accepted that they only received Information pursuant to the SOSA, in HSF's letter of 5 September 2022, which said:

    "… *one of the services which was provided pursuant to the* [2014 and 2018 SoSA] *Agreements was the management of Mr Wang's global legal and litigation requirements. That is obvious on the face of the Agreements. … As a result of the services provided, material which you say is privileged (but which is not, at least as against Floreat for the reasons given in this letter) lawfully came into Floreat's possession*".

20. As such, FPL (the only Floreat party to the SOSA) received and held Mr Wang's information subject to an obligation of confidence applying the criteria of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, namely that (1) such information had the necessary quality of confidence about it and (2) it was imparted in circumstances importing an obligation of confidence. Mr Wang also contended that the third element required for a cause of action under *Coco* is

present, namely an unauthorised use or a misuse of the information. I deal with this latter below.

21. Alternatively or in any event, all such information of which FPL was a recipient was Confidential Information as defined by the SOSA and so held by FPL subject to the obligations imposed on a "Recipient" by cl. 26. Those obligations included to use the Confidential Information solely in connection with the performance of its obligations or exercise of its rights under the SOSA (cl. 26.1(c)(i)). The Claimant also pointed out that any disclosure of the Confidential Information was permitted only to Related Undertakings and Personnel, and only to the extent necessary for the performance of FPL's obligations or the exercise of its rights under the SOSA (cl. 26.3(a)); or to any extent required by law (cl. 26.3(b)).

22. So far as concerned the Second to Fifth Defendants, to the extent they had received such Information to date (or do so in the future) that can only be in circumstances in which the *Coco* criteria apply. Mr Wang's legal advice is self-evidently confidential to him and privileged for his benefit; that will be obvious to any of the Defendants as and when they receive any of it (and the Floreat Principals' knowledge can be attributed to the Defendants in any event). All of the Defendants therefore owe obligations of confidence to Mr Wang in respect of such Information and are obliged to respect his legal professional privilege.

23. Overall, whilst HSF on behalf of FPL have stated that "*the Floreat team came to form an integral part of Mr Wang's wider legal team… the Floreat team managed and co-ordinated the various Mr Wang's (sic) complex legal needs*." The essential point is that Floreat were acting on behalf of and for Mr Wang in respect of legal advice, and all such advice and instructions which they handled came to them in that role. Information was therefore only disclosed for the purpose of allowing FPL to fulfil its contractual obligations under the SOSA.

Confidential information cannot be used for a purpose other than that for which it was disclosed.

24. The Claimant then argued that where privileged information is disclosed to a particular person for a particular purpose, that purpose defines the extent of use which the recipient can make of privileged material. A very recent summary of the principle of limited waiver is in *Jinxin Inc v Aser Media Pte Limited* [2022] EWHC 2856 (Comm):

[42] The principle that information can be confidential (or private) as against certain persons, and in relation to certain uses of it, as opposed to having to be absolutely secret or else unrestricted, is important in the law of privilege.

[43] The non-binary nature of the relevant assessment has more than one aspect. First, privilege is not lost merely because its owner shows the privileged document to one or more third parties: Gotha City v Sotheby's [1998] 1 WLR 114 at 118H to 120B; USP Strategies Plc v London General Holdings Limited [2004] EWHC 373 (Ch) at paragraphs 18 to 21.

[44] Secondly, privilege in a document is not lost generally against even one of the persons to whom it is shown or given if it was disclosed only for a limited purpose: Berezovsky v Hine [2011] EWCA Civ 1089, at paragraphs 28 to 29.

[45] Since confidentiality is a necessary condition for privilege, these authorities indicate that confidentiality itself is not simply a quality which information either has or does not have, but may be viewed as a relationship between information, persons and uses. The relationship must be identified from all the circumstances, which indicate to a reasonable person what, if any, kinds of use that person is or is not entitled to make of the information."

25. Earlier authorities amply bore out this summary, it was said.

25.1. Aldous LJ in Bourns Inc v Raychem Corp [1999] 2 Cost LR 626, 636:

> *"As to Mr Bloch's 'cat', in all cases where there is disclosure upon terms the 'cat is out of the bag'. There is no need to put it back. Documents disclosed for a limited purpose can only be used for that purpose."*

25.2. Drawing on this, the Privy Council in B v Auckland District Law Society [2003] 2 AC 736, held at [68]:

> *"It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see* British Coal Corpn v Dennis Rye Ltd (No 2) [1988] 1 WLR 1113 *and* Bourns Inc v Raychem Corp [1999] 3 All ER 154. *The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it".*

25.3. In *Berezovsky v Hine* [2011] EWCA Civ 1089, draft witness statements[3] prepared for B's action against A were disclosed to P for the purposes of P's asylum application. The Court held this did not permit P to use those statements in a subsequent action against B, since they were disclosed for a limited purpose. As the Court commented at [42]:

> *"it seems inconceivable that the parties can possibly have envisaged that the draft statements could be deployed by [P] in proceedings in which [A] was a party, and in particular the very proceedings on which the privilege was based and for which it was particularly essential".*

At [43] the Court addressed a directly analogous situation to this case:

> *"The possibility of [P] deploying the draft statements against [B] was not in the parties' minds at the time: they were staunch allies, and appear to have been for many years. While that is a point which in one sense cuts both ways, it does highlight the fact that there would have been possible uses to which [P] might wish to put the draft statements to which neither party would have put his mind. On the facts of this case, I think that that supports the notion that [B] would have intended a very limited waiver, and that [P] would have appreciated that".*

25.4. In *Eurasian Natural Resources Corporation v Dechert LLP* [2016] 1 WLR 5027, the CA stated at [53] that:

> *"the concept of limited waiver is of general application, designed to ensure that the loss of LPP (given its fundamental importance) is limited to that which is necessary to protect other interests".*

25.5. In *Candey Ltd v Bosheh* [2022] 4 WLR 84, CA, Arnold LJ held at [122]

> *"[I]t is possible to have a limited waiver of privilege where privileged documents are only disclosed for a specific purpose, such as the assessment of costs* [or here, performance of a services agreement] *and cannot thereafter be used for another purpose, such as different proceedings… the limitation on the use of the documents means that the information remains confidential…"*

Coulson LJ likewise noted at [80] that

> "[e]*ven if it was accepted that there was no confidentiality as between solicitor and client, that does not mean that there was no confidentiality at all*",

[3] One of the statements was a draft witness statement of P himself, although it was sent (among other things) to a solicitor acting for both B and P in his capacity as solicitor for B not P.

commenting that

"*whatever the position as between client and solicitor, there would be an obligation not to disclose the material to a third party which would, for these purposes, include the court*".

26. Finally, it should be noted that once a document qualifies for legal professional privilege, the privilege (*per* Lord Scott, cited in *Farm Assist Ltd v Sec. of State* [2009] PNLR 16, [49]) –

"cannot be overridden by some supposedly greater public interest… There is no balancing exercise that has to be carried out… [Privilege] cannot be set aside on the ground that some other higher public interest requires that to be done."

27. Here, the Claimant said, the purpose for which disclosure was made to Floreat manifestly did not extend to allowing Floreat to use Information in litigation against Mr Wang.

28. Despite this, the Claimant argued, HSF's letter of 5 September 2022 took the position that their clients were entitled to use any material relating to Mr Wang's legal advice. Indeed they made such use of Mr Wang's privileged Information in the course of the 5 September 2022 letter itself. HSF argued that this was lawful use because:-

28.1. There is no confidentiality *"as between Floreat and Mr Wang"*. The argument appears to be that Mr Wang consented to Floreat obtaining and retaining copies of legal documents as part of its agreed provision of services, and therefore as between Mr Wang and Floreat any confidentiality has been lost: "*the fact of our clients holding that material demonstrates that it is not confidential as between them and Mr Wang so that privilege could never be asserted"*. In this regard, reference was made to *Gotha v Sothebys*, referenced below.

28.2. By making allegations that there was a conspiracy and that unjustified fees were extracted, Mr Wang had *"put in dispute the legal and litigation management services of Floreat"* such that Mr Wang is now unable to assert privilege.

28.3. Evidence given by Mr Wang or served on behalf of the petitioners in the Cayman proceedings was false, misleading, incomplete or incorrect.

28.4. In any event, the use of the Cains Material Documents did not involve any privileged information.

29. As regards the first argument, the Claimant contended that it was ruled out by the decision in *Candey* cited above. As Arnold LJ said at [2021] 4 WLR 84, [116]:

"The effect of privilege is to confer an enhanced degree of protection for a particular genus of confidential information. Thus privilege enables the party (or one of the parties) entitled to the privilege to obtain an injunction to restrain use of the information, including use of the information by a person who has knowledge of it (in particular, where that person either already has copies of privileged documents or has come into possession of them) in legal proceedings (at least provided that the injunction is obtained before the information has been adduced in evidence at trial)".

30. The relevant position here was that (1) confidentiality and privilege is maintained as between FPL and the rest of the world – which includes any Court or Arbitral Panel; and (2) use is permitted only for the purpose for which disclosure was made (i.e. the now defunct relationship under the SOSA).

31. The Second to Fifth Defendants obviously cannot be in any better position than FPL. In fact, their position is even weaker: there is and never was any reason for supplying them with any Information, because they were not involved in supplying any relevant services to Mr Wang. As investment managers, they had nothing to do with facilitating his legal advice.

Waiver.

32. Turning to waiver, the Claimant pointed out that the Defendants had emphasised two of the five methods of waiver identified by Leggatt J in *Serdar Mohamed v Ministry of Defence* [2019] EWHC 4478 (QB) at [14] - first where "cherry-picking" is to be prevented and, secondly, where a party, by suing its legal adviser, puts their confidential relationship in issue.

33. The leading case on the latter point is *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183, which involved a negligence action brought by a finance company against their former solicitors, who had acted for them in a series of mortgage securitisation transactions. The decision is aptly summarised in the headnote, which states as follows:

"When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly

bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware."

34. The Claimant argued that the exception in ***Paragon*** did not arise as a result of the intention of the parties. Rather the Court of Appeal in ***Paragon*** held that since "*the client brings that formerly confidential relationship into the public domain",* privilege was lifted was a result of "*an implication of law".* In other words, it is a policy-driven exception to privilege.

35. But, the Claimant argued, the present is not a case in which a party is suing his legal adviser and has not put their confidential relationship in issue:

35.1. There is here no lawyer-client relationship between Mr Wang and FPL (or any of the other Defendants). The relevant lawyer-client relationship in each instance is between Mr Wang and the legal adviser from whom services were obtained. It is from such relationship that Mr Wang's privilege arises; and in respect of which he might be expected to waive privilege if he was, for example, attacking the services provided by the lawyer in question. But that is not the case here. It was for this reason, the Claimant argued, that Ramsey J in ***Farm Assist Limited*** held that the waiver implied when a client sues his solicitor did not apply to cases not involving legal advisers, when he said:

50. Accordingly, as confirmed by the Court of Appeal decision in Paragon Finance , the implied waiver in Lillicrap v Nalder only arises in proceedings between a solicitor and client. The rationale for an implied waiver in proceedings ****334*** *between a party and its solicitor is that the party cannot, as a matter of fairness, subject the confidential relationship with its solicitor to public scrutiny and at the same time seek to preserve the confidentiality of that relationship.*

51. English law does not follow the approach in the United States decision in Hearn v Rhay and in the Australian decisions such as Wardrope v Dunne which impose a wider implied waiver based on fairness. The approach of Neill C.J. in Hearn v Rhay was to say that there is implied waiver where it would be unfair for a party to assert privilege and put in issue information protected by privilege through some affirmative act for his own benefit.

52. In Wardrope v Dunne Derrington J. said that where a state of mind, such as whether a person was induced by a misrepresentation, is in issue and that state of mind may or may not have been influenced by the privileged material, it is necessary to investigate all relevant matters in that person's mind at the time, including privileged

information, in order to determine whether he was induced by the alleged representations. The reason is that it would be " grossly unjust " to deny a party access to the privileged information in order that the party might investigate and test the claim.

53. Rather, English law maintains the right of a party to maintain legal privilege. Whilst a person's state of mind and also that person's actions may well have been influenced by legal advice, there is no general implied waiver of privileged material merely because a state of mind or certain actions are in issue. This means that, in the absence of disclosure of the privileged legal advice, the other party is precluded from being able to put that legal advice to a person to show that the advice influenced the state of mind or actions of that person. In many cases it could be said that privileged legal advice might be relevant to establishing an issue and that, in this way, the privileged material could be said to be put in issue. That is not the approach taken in English law. Rather, the underlying policy considerations for creating privilege to protect communications between a client and solicitor are treated as paramount even if some potential unfairness might occur.

54. The test in English law is therefore based neither on general principles of fairness nor on relevance. Implied waiver arising from particular proceedings or pleading allegations in those proceedings is, in my judgment, limited to proceedings between solicitor and client as set out in Lillicrap v Nalder and Paragon Finance ."

35.2. As noted in ***Paragon*** at p. 1188 *per* Lord Bingham CJ, even in the case of litigation between a client and its former solicitor, any waiver only arises "*so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound"*. So, too, in *Eurasian Natural Resources Corporation*, [57] the Court of Appeal firmly rejected the argument that, in suing his solicitors, the client had impliedly waived privilege for all purposes,[4] emphasising the "*absolute nature of LPP"*. Finally, in *Candey* [81] it was recognised that where a client sues a solicitor, that does not result in any event necessarily in an implicit waiver of privilege existing over all communications between client and solicitor. The Court went on: "*the correct approach on the authorities is to focus on the potential exceptions to the otherwise inviolate rule as to privilege*". One such exception is where a client sues his former solicitor.

35.3. If Floreat are contending that another exception exists, and that privilege is waived by implication of law whenever one person sues another who happens to be privy to the first person's privileged information, that is incorrect. There is no such exception: *cf. Farm Assist Limited* (above) and *Digicel v Cable & Wireless plc* [2009] EWHC 1437

[4] Rather, the Court of Appeal held that the principle of limited waiver could apply between solicitor and client.

(Ch), Morgan J. That is hardly surprising given the special status that advice from lawyers is given in the law: *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] 2 AC 185; *Candey*; *Jinxin*.

36. So far as concerns "cherry-picking", the Defendants have not identified at all in what respects that by deliberately deploying material Mr Wang himself has lost the right to assert privilege in relation to other material relating to the same subject-matter. Instead:

    36.1. Mr Wang's counterclaim in the LCIA Arbitration against FPL and the Third Defendant does not raise any question as to the quality or content of the legal advice that Mr Wang received. Moreover, such legal advice was explicitly not provided by FPL, since its role was merely to coordinate the obtaining of such advice from others qualified and licensed to give it.

    36.2. The winding-up proceedings have nothing to do with FPL (which is not even a party to any of the Cayman or BVI proceedings) or its role in facilitating Mr Wang taking legal advice. So far as concerns the use of Information the Second to Fourth Defendants in the Cayman Court, therefore, the ***Paragon*** point seems entirely beside the point.

37. Ultimately, of course, it would be open to Floreat in any of the Proceedings to bring an application for specific disclosure in the normal way, alleging a collateral waiver of privilege and seeking further disclosure of documents within the opposing party's control. But this would not involve the Defendants using Information in their possession, still less choosing themselves on which issues privilege was to be waived. Even if such collateral waiver were to have occurred, its consequence would involve Mr Wang/his associated party being required to disclose documents within their control. The self-help approach taken by the Defendants here is no more permissible (indeed, less so) than was the case in the leading authority on breach of confidence, *Imerman v Tchenguiz* [2011] Fam. 116, CA. In that case, the Defendant, who was the brother of the wife of the Claimant, in the context of the breakdown of their marriage, had taken it upon himself to access the Claimant's computer files and obtain copies of potentially relevant financial information. The Court of Appeal held that the documentation had to be returned to the Claimant's solicitors, on the basis that the documentation in question was confidential, and that it was not open to the Defendant to employ, in effect, self-help. The Court said:

"69. In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy. Without the court having the power to grant such relief, the information will, through the unauthorised act of the defendant, either lose its confidential character, or will at least be at risk of doing so. The claimant should not be at risk, through the unauthorised act of the defendant, of having the confidentiality of the information lost, or even potentially lost….

… 141. In the present case, there is no real doubt but that the defendants have substantially breached Mr Imerman's rights of confidence in relation to much, and probably the great majority, of the information obtained through accessing it through the server on some nine occasions in early 2009. Furthermore, there seems to be a substantial possibility that the information was all obtained as a result of some of the defendants committing a breach of statutory duty or even a crime. In the absence of good reason to the contrary, Mr Imerman could reasonably expect the court to order that all the documents so accessed, and any copies thereof, whether in electronic or paper form, be delivered up to him or destroyed, and that the defendants be enjoined from using any information obtained from those documents. Again, in the absence of good reason to the contrary, and as Mrs Imerman did not receive the seven files as a bona fide purchaser without notice, Mr Imerman could reasonably expect similar orders against her (and her servants and agents, to use the traditional language, thereby including Withers) in respect of the documents and information in the seven files.

142. Of course a claim for breach of confidentiality may be defeated by showing that the documents or information revealed unlawful conduct or intended unlawful conduct by the claimant: see Istil's case [2003] 2 All ER 252 . But in the instant appeal it is not suggested that the documents themselves disclose measures taken to defeat the wife's claim. Rather it is the external evidence of Mr Imerman's intentions as revealed to the brothers on which reliance is placed. If that was sufficient to establish such an intention then Mrs Imerman should have sought a freezing injunction and/or a search order. It would not have been open to her to take the law into her own hands, and it was not open to her brother to do so for her benefit. If she had sufficient evidence to obtain a search order from the court, it cannot be right for a judge effectively to sanction her committing a legal wrong by by-passing the court's procedures and hacking into her husband's computer records stored on the server. If she did not have sufficient evidence to obtain a search order, it would be even more offensive if a judge effectively sanctioned her (or her brother) hacking into her husband's computer records.

143. We also emphasise that it was not open to her to pre-empt consideration of the husband's disclosure in form E. We have already concluded that there are no rules which dispense with the requirement that a spouse obeys the law. The only remedy which can vindicate Mr Imerman's right to preserve the confidentiality of his documents and information until such time as the law requires him to make full and frank disclosure is to require Mrs Imerman to deliver up the copies containing the information she obtained prematurely and unlawfully.

144. It is also right to bear in mind that this was an extreme case of wrongful access to confidential material. Not only does it seem quite possible that the accessing of Mr Imerman's documents involved breach of statutory duty and statutory crimes under the 1990 and 1998 Acts, but it took place on nine occasions outside the family home, at his place of business, and it involved a vast number of documents (the majority of which will have had no bearing on the ancillary relief proceedings, let alone the Leconfield House issue), which were then electronically copied, and, in many cases, copied onto paper. Moylan J described the case in his judgment of 13 January 2010 [2010] 2 FLR 802 , para 43 as being "at the extreme end of the range of behaviour which I have seen during the course of the last 30 years". What happened in this case was an invasion of privacy in an underhand way and on an indiscriminate scale.

145. We emphasise that, at this stage, it is not possible to say that Mr Imerman has failed in his form E to reveal all his assets, or that he has sought to divest himself of any assets for the purpose of his ancillary relief liabilities. In saying this, we have taken into account the forensic accountant's report, prepared on Mr Zaiwalla's instructions, to which we were taken by Mr Browne on behalf of the defendants in the Queen's Bench proceedings, in the absence of Mrs Imerman and her representatives (and with their agreement).

146. Mrs Imerman should not be entitled to benefit in any way from the wholesale, wrongful, and possibly criminal, accessing and copying of Mr Imerman's confidential documents, particularly as she could have been expected to apply for a peremptory order (given that the expense of applying for and enforcing such an order would appear to be proportionate in this case, at least on the information we have seen). It would be unrealistic to make too much of this latter point in this case, as the notion that a wife should seek peremptory relief in this sort of case appears, for some reason, to have been thought to be inappropriate as a matter of general practice. Having said that, we should emphasise that, in future, this should not be seen as a good reason for not having sought peremptory relief.

Form of relief

147. We have concluded that the right order to make in relation to the seven files is that they (together with any copies, whether electronic or paper) should be handed over to Mr Imerman's solicitors, Hughes Fowler Carruthers, on terms that, unless Mrs Imerman's solicitors agree in writing, they are not to part with any of those documents without the permission of the court. So long as Hughes Fowler Carruthers continue to act for Mr Imerman, they will be obliged to take reasonable steps to consider and advise on any documentation which is provided to them, with a view to ensuring that their client complies

with his disclosure obligations, whether under the Rules or pursuant to orders of the court, and whether in relation to assets or documents. In case Mr Imerman ceases to instruct Hughes Fowler Carruthers (whether for normal or sinister reasons), Mrs Imerman should be entitled to know that they will be obliged to retain the papers, unless the court otherwise orders or she otherwise agrees."

38. In this connection, the Claimant went on to argue, the Defendants have identified nothing about the disclosure regimes in either the LCIA arbitration or the Cayman or BVI winding up proceedings which would mandate them to override the preservation of Mr Wang's confidentiality and privilege in his information if he is otherwise correct to say that he retains such entitlements. Still less is it open to the Defendants to pool documents, in the manner which it said has happened in fact.

39. Four points are said to operate against the grant of an injunction as a matter of convenience. None of these points is sustainable. Taking them in the order in which they are stated:

    39.1. Would an injunction serve a purpose? Yes it would, namely to protect Mr Wang's Information from further unauthorised use, disclosure etc until such time as the English Court is able to resolve the *ex hypothesi* serious issues between the parties.

    39.2. Is there evidence of further threatened misuse? There is indeed. Mr Wilcox himself states in effect that the Defendants do intend to use Information for the purposes of reviewing for relevance to the ongoing proceedings and making disclosure as a consequence. That in itself would be – on Mr Wang's case – in breach of Mr Wang's confidence and legal professional privilege.

    39.3. The Defendants have entirely failed to explain why, if they are required to respect Mr Wang's assertion of confidentiality and privilege, that would put them in breach of any document preservation or disclosure obligations. In the context of this dispute, the suggestion is absurd. The Defendants have not been complying with any obligations, but deploying (and internally reviewing) Information for their own purposes.

    39.4. Contrary to the suggestion that this matter should be dealt with by the other tribunals, the present dispute cannot most conveniently be resolved at "local" level on an *ad hoc* basis.

39.4.1. Mr Wang is not a party to the Cayman or BVI proceedings or the London arbitration.

39.4.2. In any case, it is the receivers who have control over the winding up proceedings in both Cayman and the BVI, not companies which Mr Wang controls.

39.4.3. While Mr Wang could presumably bring a breach of confidence claim in Cayman in respect of the misuse of Information in the Cayman proceedings, it is not apparent what advantage this would have over the present claim. On the contrary, there would be disadvantages in terms both of the Cayman Court's lack of personal jurisdiction over the First and Fifth Defendants and the relative lack of resources of the Grand Cayman Court. By contrast the present application is in the right place: the centre of gravity of both the confidential information and its misuse.

39.4.4. The Tribunal in the LCIA Arbitration has no jurisdiction over any breach of confidence or privilege claims Mr Wang has in connection with the misuse of his Information, and its powers would be limited to regulating the conduct of the proceedings by the parties immediately before it. The Tribunal would have no power to issue injunctions to restrain a breach of confidence or privilege.

39.4.5. By contrast, the Commercial Court is by these proceedings seized of a significant matter of principle between Mr Wang and these Defendants and has all relevant parties before it. It is common sense that the dispute arising from the Defendants' approach to Mr Wang's confidential and privileged Information should be resolved once and for all in a forum in which the dispute is squarely raised.

Comity.

40. Whilst Foxton J. (at the earlier hearing in these proceedings) was concerned that the order sought from the Court might be considered an interference with the Proceedings elsewhere, that concern is misplaced. If a party to foreign or arbitral proceedings is seeking to rely on evidence in a way which itself constitutes an infringement of another's legal or equitable

rights enforceable by the English Court, then that other is entitled to an injunction to prevent the infringement of his rights.

40.1. Foxton J. was concerned that privilege is a matter for the *lex fori*. There are a number of responses to that. First and fundamentally, the cause of action is for breach of confidence. The ability to resist compulsory disclosure under the rules of each forum is, as Arnold LJ said in Candey, *"not a complete statement of the nature of the right"*: *cf.* [116]. The right is given effect by the law of confidence, which Mr Wang here seeks to enforce. Second, the case involves the Defendants making use of material already in their possession. Resisting compulsory disclosure is not the point. And third, Mr Wang is concerned with internal reading and review as well as deployment in the other *fora*.

40.2. As has often been repeated since stated by Lord Taylor CJ in *R v Derbyshire Magistrates Court Ex p. B* [1996] AC 487 at 507, legal professional privilege is much more than an ordinary rule of evidence, but is a fundamental condition on which the administration of justice as a whole rests. The Claimant relied on this for the suggestion that separate *fora* respond with piecemeal deployment rulings, as the wider litigation proceeds would be unsatisfactory.

Delay.

41. In response to the suggestion that the Claimant's application was made too late, and that, as a matter of discretion, the delay in making such should lead to the dismissal of the application, the Claimant relied on the fact that it had only become clear that such an application was necessary when the Recusal Application was made, since it was only at that stage that it was perceived that the Defendants were misusing the Claimant's confidential information.

Are Damages an adequate remedy?

42. Firstly, SOSA clause 26.5 itself records FPL's agreement that damages may not be an adequate remedy for breach of SOSA clause 26.

43. Secondly, the normal response to a threatened breach of confidence is an injunction, since the essence of the wrong consists in the very fact of unauthorised use: *cf.* *Imerman v Tchenguiz*, above; *Candey*, above. Even for the Defendants to review material, or show it to their lawyers for their internal consumption, would be unlawful, let alone the deployment which Mr Wang is unaware of.

44. Mr Wang cannot know himself what future reading, reviewing, deployment and other use of his Information will (absent restraint) take place, or what past internal review has already occurred, but he does know that through Mr Wilcox all the Defendants have asserted their entitlement collectively and individually to use such Information against him within the confines of the Proceedings.

The Defendants' contentions.

The relevant test.

45. First, the Defendants submit that the test that I should apply is that laid down in *Autostore Technology AS v Ocado Group plc* [2022] 1 WLR 561, since, although framed as an interlocutory injunction, this is in effect an application which is for a final injunction, bearing in mind considerations of timing. That is because no trial in Court can take place before the documents will have to be demployed. In that case, Sir Geoffrey Vos MR, speaking for the majority of the Court of Appeal, in a similar situation, said the following:

"What legal test should be applied to the facts?

78. As Nugee LJ has already said, the parties are agreed that the court should apply a higher test to the likelihood that Ocado would succeed at trial than the "serious issue to be tried" test set out in American Cyanamid . The competing positions are the "high degree of probability" test applicable to anti-suit injunctions and utilised by the Judge, and the approach adopted by Ocado which was that "in addition to the question of serious issue to be tried, a reference to the merits was appropriate in light of the potential that interim relief might have final effect" (see Cambridge Nutrition Ltd v. BBC [1990] 3 All E.R. 523 at 534-5). Ocado said that its approach was subject to Jackson LJ's qualification in Araci v. Fallon [2011] EWCA Civ 668 at [39] to the effect that "[w]here the defendant is proposing to act in clear breach of a negative covenant, in other words to do something which he has promised not to do, there must be special circumstances … before the court will exercise its discretion to refuse an injunction".

79. In my judgment, in the light of the parties' agreement that their US law discussions were to be governed by FRE 408, there is, as the Judge said, an analogy with the situation with which the court deals in considering the grant of an anti-suit injunction, where the court requires the applicant to show a high probability of success in establishing an arbitration agreement, exclusive jurisdiction agreement, or agreement not to litigate elsewhere (see Ecobank at [89] and [91], Hamilton-Smith v. CMS Cameron McKenna LLP [2016] EWHC 1115 (Ch) at [18 (1)], and British Airways Board v Laker Airways Ltd [1985] AC 58 at 95D). Such injunctions are, as Nugee LJ has already said, "interfering, albeit indirectly, with the working or output of a foreign court" (Ecobank at [91]).

80. In my view, the Judge was right to think that an injunction in this case would interfere with the conduct of the ITC proceedings, albeit to a lesser extent than an anti-suit injunction. The judge in the ITC would be deprived of deciding whether an exception to FRE 408 applied so as to allow AutoStore to admit the Document on the question of the

alleged equitable estoppel. Moreover, Ocado had itself stipulated for the application of FRE 408. It seems, in those circumstances, particularly unjust that it should now be able to sweep away the application of FRE 408 in precisely the kind of proceedings to which it must have apprehended it might in the future be relevant.

81. For these reasons, I accept AutoStore's argument that in a case of this unusual kind, the court should not grant an injunction which has the final effect of preventing a foreign court deciding whether, according to its own law and procedures, the Document should be admitted, unless Ocado can show a high probability of establishing its case at trial."

The merits of the claim.

46. Second, whatever be the test, the Defendants submit that there is either no serious issue to be tried on the merits of the claim or there is no high probability that the case will be established at trial. The documents and information created and held by FPL were and are held pursuant to the terms of the SOSA. They are not confidential as between the Defendants and Mr Wang. The use of such information for the purposes of the Proceedings about the SOSA and the relationship between Mr Wang and Floreat plainly falls within the range of permissible uses having regard to the terms of the SOSA and the relationship between the parties. Mr Wang is accordingly not entitled to assert confidentiality or privilege (to the extent it exists) in that information as against the Defendants in respect of such use.

47. Starting with the position during the relationship, the SOSA and the wider relationship between Mr Wang and Floreat provided that otherwise confidential documents could be held or created by FPL and Floreat. The contractual arrangements governing the relationship between Mr Wang and Floreat permitted both FPL and a wide range of Floreat entities to have access to Mr Wang's documents and information, which was otherwise (at least, prima facie) confidential and privileged information against third parties.

48. Thus, the SOSA expressly provided that otherwise confidential and privileged information can be disclosed to FPL's "*Related Undertakings and Personnel to whom disclosure is required for the performance of the Recipient's obligations or the exercise of its rights under this Agreement, but only to the extent necessary to perform such obligations or exercise such rights*" (clause 26.3(a)). "*Related Undertaking*" in relation to FPL is defined to mean "*any subsidiary or holding company [of FPL] or any subsidiary of any such holding company or any affiliated or related company of [FPL]*". Each of the Second to Fifth Defendants fall within both definitions.

49. Still further, by the 2019 Confirmation Letter, Mr Wang expressly agreed and consented to entities comprising the Floreat group, not just FPL, having access to his confidential and privileged information. The letter records:

    49.1. Mr Wang's express agreement that he has a relationship with "*Floreat [ie FPL] and the Floreat Group*", which he defines compendiously as "*Floreat*". The Second to Fourth Defendants fall within the term "Floreat Group" for these purposes.

    49.2. Mr Wang's express agreement that Floreat (ie FPL and the Group) has assisted him in obtaining legal advice in the course of FPL's provision of services.

    49.3. Mr Wang's express agreement that, in the course of that engagement, Floreat (ie FPL and the Group) have been authorised by him to obtain and receive any advice procured in the context of the provision of services to him.

    49.4. The fact that Mr Wang himself did not and does not distinguish between the different Floreat entities, and no distinction is drawn by him for the purposes of the Injunction Application.

50. As a result of the above, no confidentiality or privilege can be asserted by Mr Wang against Floreat in relation to use in the Proceedings. As a matter of well-established law, any confidential and privileged information created or provided in the course of FPL / Floreat discharging their obligations under the SOSA (for example, the Cains Documents) is not confidential or privileged as between Mr Wang and FPL (or Floreat).

51. This is a classic example of the position described in ***Gotha City v Sothebys (No. 1)*** [1998] 1 WLR 114 at 118-119 (per Staughton LJ) citing the then 6th edition of Hollander:

> "*… But it is important to bear in mind that it is possible for a document to cease to be confidential as between some parties and not others. If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world*."

52. That passage in Hollander has been retained in subsequent editions and approved in subsequent cases: see ***Re One Blackfriars Ltd (in liq)*** [2019] EWHC 3865 (Ch) at paras 65-67:

"…Again, it does not seem to me there is any dispute about the law here. Privilege requires confidentiality and if authority were needed for that proposition, it can be found in the judgment of Leggatt J in the case of Serdar Mohammed v Ministry of Defence [2019] EWHC 4478 (QB) at paragraph 14 (iv) in which Leggatt (as he then was) summarised some of the legal principles in relation to the waiver of privilege and at (iv) he said this: "Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed…"

53. The question then becomes what use is FPL or Floreat entitled to make of the confidential and privileged information in circumstances where there is no confidentiality and privilege in those documents as between Mr Wang and FPL or Floreat. As to this, the relevant principles were recently set out in ***Jinxin*** [2022] EWHC 2856 (Comm) at §§42-45 (per Simon Salzedo KC (sitting as a Deputy High Court Judge)). I have set out those principles above, in paragraph 24.

54. Thus, the Defendants contended, as confirmed by ***Jinxin***, the legal question is what use, given the relationship between Mr Wang and FPL / Floreat (which expressly permitted FPL and Floreat to receive and hold Mr Wang's otherwise confidential information), would a reasonable person consider FPL and Floreat were entitled to make of the information.

55. The use which is in issue in this case is use in the Proceedings. Mr Wang's pleaded position is that the use or threatened use which he seeks to restrain comprises "*reading, reviewing, copying, deploying in legal proceedings or disclosing*" his alleged confidential and privileged information. As set out above, the parties are engaged in multiple Proceedings, which each give rise to various disclosure, document production and discovery regimes to which the Floreat companies (and Mr Wang) are subject. Those regimes oblige the parties to:

    55.1. Preserve potentially relevant documents for review;

    55.2. Collect potentially relevant documents from custodians and/or repositories that are within their control;

    55.3. Review those documents for relevance by reference to the issues in dispute in the particular Proceedings;

    55.4. Disclose those documents that, following review, fall to be disclosed; and

    55.5. Give (on a continuing basis) disclosure of documents that may be adverse to their case or otherwise materially significant to their case, as and when they are identified

(though disclosure in the Cayman Proceedings is broader and given on the train of enquiry basis).

56. Applying ***Jinxin***, the question is whether a reasonable person aware of the relationship between Mr Wang and Floreat would conclude that use for the purposes of Proceedings between the parties about their relationship was permitted. The answer to that question is plainly yes:

56.1. Such use does not in fact involve (and certainly does not necessarily involve) disclosing material to third parties (save for the Court). That is because appropriate confidentiality restrictions can be agreed or imposed (as happened with the Cains Documents in the Recusal Proceedings). Use of documents by reviewing them for disclosure in the Proceedings is not therefore a breach of confidence at all, applying ***Gotha City***.

56.2. Clause 26 of the SOSA sets out the parties' express contractual obligations in respect of confidential information provided by Mr Wang to FPL/Floreat in the course of FPL's provision of services. There is a general provision that such confidential information shall be kept confidential (clause 26.1(a)) and shall be used "*solely in connection with the performance of [Floreat's] obligations or exercise of its rights under this Agreement*" (clause 26.1(c)(i)). Even without more, a reasonable person would conclude that this would extend to use in connection with *litigation about* the performance of such obligations.

56.3. This general restriction is in any event subject to an express exception which expressly confirms that use for the purposes of complying with disclosure rules is permissible. Thus confidential and privileged information which would otherwise be restricted can be disclosed (emphasis added) "*if, and to the extent that, such information is required to be disclosed … **by the rules of** any stock exchange, **a court, tribunal** or by any governmental, statutory, state, regulatory or supervisory body or person (including, without limitation, any Taxation Authority) **or court of competent jurisdiction** (Relevant Authority) to which the Recipient is subject, provided that the Recipient shall, if it is not prohibited by law from doing so, provide the Disclosing Party with prompt notice of any such requirement or request*" (clause 26.3(b)). This provision clearly permits the disclosure of Mr Wang's confidential information where it falls to be disclosed in accordance with the applicable disclosure regime under any of the Proceedings. Notice

prior to disclosure was not given but it was not required given that Mr Wang (or his related companies) were party to the Proceedings and would be aware of what the disclosure regime provided for.

57. The above conclusion does not require the Court to determine the precise boundaries of the extent of permissible use of Mr Wang's otherwise confidential and privileged information. What is clear is that the use that has so far occurred and will occur in the future – ie the deployment of the Cains Documents in the Recusal Application and the continuing review of documents held pursuant to the SOSA for the purposes of the Proceedings (and to make disclosure of them in those Proceedings as appropriate and as required) – is clearly permissible and does not give any grounds for the grant of injunctive relief.

Waiver.

58. Further and in any event, any confidentiality or privilege that existed in Mr Wang's information has, as a matter of well-established law, been waived by the act of Mr Wang raising allegations in the Proceedings to which such information is relevant. Mr Wang is not able to assert confidentiality and privilege against any Floreat entity at the point in time when legal proceedings are commenced between those parties in which he raises allegations about Floreat's conduct and services as provided to him (to which Mr Wang's confidential and privileged information would be relevant). Floreat is entitled to make use of the information for the purposes of that litigation as between the parties.

59. This basic principle was set out in ***Paragon*** [1999] 1 WLR 1183 at 1188E, which established the principle that a party who by suing its legal adviser puts their confidential relationship in issue cannot claim privilege in relation to information relevant to the determination of that issue. The relevant statement of principle is set out above, in paragraph 33.

60. The Defendants contend that the allegations pleaded by Mr Wang in the Cayman Proceedings, for example, led to the following issues being identified, namely: "*what is the background to and nature of the relationship between Mr. Wang and the Floreat Principals/Floreat*"; "*what were Mr Wang's reasons for investing in the Funds?*"; and "*did the Floreat Principals threaten (as alleged at paragraphs 32 and 37.15 of the PIF WUP) to use their alleged control of the Funds to prejudice Mr. Wang?*". In the BVI Proceedings, similarly, the revised Points of Claim contain statements that: "*Floreat effectively assumed control of virtually every aspect of the management of Mr Wang's wealth and financial*

affairs"; "*pursuant to Floreat's advice and directions, Mr Wang has invested in at least four investment funds managed and controlled by Floreat*"; and the Floreat Principals threatened to "*take steps to prevent him from accessing the assets held in the Floreat Funds or otherwise prejudice his position if he continued to try to seek information about their management and operation*". In the LCIA Arbitration, the respondents have made related allegations in their Statement of Defence and Counterclaim involving breaches of fiduciary duty and dishonest and conspiratorial charging of fees under the SOSA.[5]

61. Accordingly, in all of the various Proceedings, Mr Wang puts directly in issue the way in which FPL and Floreat provided their services to him. That, in turn, will necessarily require the courts (or Tribunal) which consider such issues to consider some of Mr Wang's (otherwise) confidential and privileged information.

62. The extract from ***Paragon*** is a general statement of principle. It is "*an implication of law*", and the expressed "*rationale*" (i.e. "*A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality*") is of general application. It applies to this case where the relationship is between a client and a service provider whose services include obtaining and coordinating legal advice.

63. Further or alternatively, the information, where relevant to an issue in dispute between the parties, is required to be disclosed under various of the disclosure regimes in the Proceedings. The SOSA expressly permits disclosure of information that is legally required to be disclosed.

No evidence of use or threatened use other than in the Proceedings

64. The Defendants say that this is a straightforward point. They say that the only misuse identified was the specific use of the Cains Documents and use by way of disclosure in the Proceedings as described above. The Claimant, as I have said, denies this and also argues that there may be future usage.

65. The Defendants' evidence is that the only use which they propose to make of the documents and information held by Floreat custodians which is (otherwise) confidential to Mr Wang is

[5] The Court of Appeal has left open the question in ***Berezovsky v Hine*** [2011] EWCA Civ 1089 at §§46-47 whether a party against whom the claimant had made an implied waiver of privilege nonetheless had an absolute right to deploy the waived material as they honestly and reasonably wished, or whether it was open to the court to carry out a balancing exercise, which would have involved effectively considering the benefit of deploying the statements against the disadvantage to the claimant if that happened, and deciding, in all the circumstances, where the interests of justice lay. There does not appear to be any further authority on this point.

to comply with disclosure requirements. Furthermore, during the course of the hearing, the Defendants indicated that they were willing to give undertakings to the Court to this effect.

Balance of convenience.

66. Third, and in any event, the balance of convenience is unequivocally against the grant of such intrusive injunctive relief.

67. The injunction will serve no purpose other than to disrupt the Proceedings. The only actual deployment of information (the Cains Documents explained above) has already taken place. Disclosure in most of the Proceedings has already occurred. The injunction sought by Mr Wang would serve only to disrupt those Proceedings (by requiring disclosure to be revisited) and to interfere with disclosure processes which have yet to occur. In relation to disclosure, the position is as follows:

    67.1. In the Cayman Proceedings, the formal disclosure process has already occurred and factual witness statements were filed on 22 November 2022. Reply evidence is presently was due on 16 December 2022.

    67.2. In the first LCIA Arbitration, the final tranche of document production was provided on 25 October 2022 and factual witness statements were filed on 5 December 2022.

    67.3. The BVI Proceedings are in abeyance following the discharge decision of Wallbank J on 19 August 2022 (and pending hand down from the Eastern Caribbean Court of Appeal of its judgment on Mr Wang's appeal against that decision).

    67.4. The remaining threatened English proceedings had yet to be served and so disclosure has yet to commence. Statements of case have not yet closed in the other LCIA arbitration relating to St Dalfour.

68. Against that background, the effect of an injunction in the terms now sought would be as follows:

    68.1. To interfere with the Cayman and LCIA proceedings where disclosure has already been given as it may require disclosed documents which are said to be confidential (such as the Cains Documents) somehow to be segregated and recalled.

68.2. To interfere with the ongoing duty of continuing disclosure (and any supplementary disclosure requirements) in those proceedings.

68.3. To interfere with document reviews in the BVI and English proceedings in the event that those proceedings progress to that stage.

69. The interference with these disclosure processes would obviously be prejudicial to the Floreat parties (as well as amounting to a breach of comity as set out below). Where disclosure has been given, it would potentially prevent those cases proceeding to trial by reference to all disclosed relevant documents. Where disclosure has yet to be given, it would potentially interfere with the ability of Floreat parties properly to comply with disclosure obligations. In particular:

69.1. The Defendants in the Proceedings have obligations to preserve documents and give proper disclosure. In particular, each of the litigation proceedings involving the Defendants (all of which are before common law courts) involve both a duty to preserve documents and an ongoing duty of disclosure.

69.2. The effect of an injunction from this Court preventing the Defendants from reviewing Mr Wang's confidential information (or any information which might be confidential) risks placing the Defendants in breach of their respective disclosure obligations that they are subject to in each of the Proceedings.

70. In contrast there is no tenable case of prejudice to Mr Wang if an injunction is not granted. If he had any legitimate objection to make about any particular disclosed document in any Proceeding, it would be open to him to apply in that Proceeding for the document to be excluded. Strikingly, he has made no such application in any of the Proceedings.

71. The only specific alleged risk of prejudice identified by Mr Wang in his original application was the use of the Cains Documents in the Recusal Applications. That has already occurred (without Mr Wang's Cayman lawyers making any objection to the Cayman Court). In the event, the Recusal Applications were successful. When the fact Mr Wang had not identified any further threatened use was pointed out to him in responsive evidence, Mr Wang sought in reply evidence to point to various examples of alleged "continuing misuse" of his privileged material. However, all such examples of "use" relate to documents disclosed in accordance with the applicable disclosure regimes in the Proceedings. That use does not constitute misuse for the reasons already given.

72. Next, under this heading, the Defendants argued that HSF and Forbes Hare have already made sensible and pragmatic proposals in a good faith attempt to deal with Mr Wang's concerns about confidential information going forward. I do not think it necessary to deal with these in detail.

73. The Defendants then argue that the injunction sought is too vaguely drafted to be certain, workable or fair, it being elementary that injunctive relief must be sufficiently precise and certain in its terms that a party subject to it is able clearly to identify what compliance with the injunction requires. I do not think it necessary to lengthen an already lengthy judgment by going into the details of the assertions made in this regard.

Breach of comity

74. Fourth, Mr Wang's application represents an ongoing attempt to interfere with the procedure of other jurisdictions and is a serious breach of comity. That was not the correct course. The admissibility of these documents is for the Cayman and BVI Courts and the London tribunals.

75. The injunction sought would in effect mean that the English Court is deciding what documents should or should not be before the foreign courts and arbitral tribunals who the parties are already presently before in various Proceedings (or how such documents could or could not be deployed in those Proceedings). That would be an impermissible breach of comity.

76. In ***Autostore*** [2022] 1 WLR 561, the Court of Appeal decided (by majority) that a final injunction should not be granted to prevent the content of without prejudice discussions in English proceedings being disclosed by the claimant in parallel proceedings in the US. The parties had agreed that the parts of the discussions concerning the US proceedings would be governed by the US Federal Rules of Evidence r.408. It was a critical part of the Court's reasoning not to grant an injunction that such a course would constitute a breach of comity and "*interfer[e], albeit indirectly, with the working or output of a foreign court*" (at 582 §79 (citing with approval ***Ecobank Transnational Inc v Tanoh*** [2016] 1 WLR 2231 at §91)). The grant of injunctive relief would constitute a breach of comity as the English Court would be usurping the role of the foreign court in determining whether the material could be deployed in the foreign proceedings (at 582 §§80-81, 583 §85):

"In my view, the Judge was right to think that an injunction in this case would interfere with the conduct of the ITC proceedings, albeit to a lesser extent than an anti-suit injunction. The judge in the ITC would be deprived of deciding whether an exception to FRE 408 applied so as to allow AutoStore to admit the Document on the question of the alleged equitable estoppel. Moreover, Ocado had itself stipulated for the application of FRE 408. It seems, in those circumstances, particularly unjust that it should now be able to sweep away the application of FRE 408 in precisely the kind of proceedings to which it must have apprehended it might in the future be relevant.

For these reasons, I accept AutoStore's argument that in a case of this unusual kind, the court should not grant an injunction which has the final effect of preventing a foreign court deciding whether, according to its own law and procedures, the Document should be admitted, unless Ocado can show a high probability of establishing its case at trial. …

It would be a breach of comity for the English court to interfere with those US proceedings by imposing English without prejudice rules, when Ocado had expressly stipulated FRE 408 should apply. It should be held to its bargain. Moreover, as the Judge said, if the injunction is not granted, the ITC will be able to decide the admissibility of the Document on the basis of FRE 408 which it seems most likely the parties agreed should apply."

77. In the present case, the comity concerns are equal to or even greater than in ***Autostore***. The following factors are of relevance:

77.1. The effect of the English court granting the injunction would be to prevent the LCIA Tribunals, the Cayman Court and the BVI Court each considering whether Mr Wang's confidential and privileged information could be deployed in the Proceedings before those fora. Although this is not as intrusive an interference as preventing a party from having recourse to a foreign court or arbitral tribunal, it is still an interference with the process of justice in or the working of the foreign court or arbitral tribunal to prevent it ruling on the admissibility of evidence to be used in proceedings before it (***Autostore*** at 575 §47).

77.2. Whether a document is capable of being privileged is determined as a matter of conflicts law by the *lex fori*: ***Suppipat v Wilkie Farr & Gallagher (UK) LLP*** [2022] EWHC 381 (Comm) at §26. In the context of the Cayman Proceedings, the Cayman Court would apply Cayman law to determine whether the materials the subject of the Injunction Application could be deployed in the Cayman Proceedings. There is no reference in the Injunction Application to any Cayman law on privilege.

77.3. The foreign courts and arbitral tribunals that have already been seised by the Proceedings could arrive at an inconsistent decision with the English Court on whether Mr Wang's allegedly confidential and privileged information is in fact confidential and

privileged and/or should be deployed. There is no suggestion that those foreign courts or arbitral tribunals are not competent or capable of determining, according to their own rules, procedures and laws, whether Mr Wang's allegedly confidential and privileged material can be deployed or otherwise used in the Proceedings before them.

77.4. In fact, the alternative fora are better placed than the English Court to determine this question because whether a confidential and privileged document could be used might also in turn depend on an understanding of the issues that arise in those Proceedings before those fora.

My conclusions.

78. I have concluded that, in the exercise of my discretion, I should not grant the injunctive relief sought. I have reached this conclusion for, essentially, two reasons.

78.1. First and foremost, I agree with Foxton J that the English Court should be circumspect in granting such relief as is sought here which would have the effect of cutting across proceedings taking place in other fora, whether foreign courts or domestic arbitral tribunals. Considerations both of comity and practicality militate against the grant of such relief. As a matter of comity, the English Court should not arrogate a decision making power to itself; and as a matter of practicality, quite apart from any issues arising from different laws that may be involved, the alternative forum is likely to be better placed, by reference to its knowledge of the issues before it, to deal with considerations of relevance, confidence and privilege.

78.2. As a related issue, this application is made very late in the day, and will inevitably therefore interfere with the orderly disposal of the various other proceedings in which the parties are embroiled, which have all been going on for lengthy periods of time. Whilst I appreciate that the Claimant contends that he did not know that an application was necessary until the recusal application revealed that information was being misused (if that be the case), then that does not detract from the impact on the other proceedings that this Court granting injunctive relief would have.

78.3. I do, however, take the view that the Defendants should enter into the undertakings offered in the face of the Court, which I have already referred to. The precise wording of these undertakings will need to be either agreed or ruled on. However, they should

provide the Claimant with at least some protection against the misuse of information of which complaint is made.

79. In the light of the fact that I have refused to grant the injunctions claimed on these essentially discretionary grounds, then I take the view that it would be undesirable for me to comment to any greater degree on the substance of the arguments put forward by the parties. Whether disclosure of confidential material should be granted and if so on what terms will be a matter for the relevant Court or tribunal, as will questions of privilege.

80. It remains only for me to thank Counsel and their respective teams for their interesting and helpful arguments.