Neutral Citation Number: [2025] EWHC 1092 (Comm)

Claim No: CL-2025-000007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2025

Before :

MR JUSTICE FOXTON

- -

Between :

A CORPORATION	**Claimant**
- and -	
(1) FIRM B	
(2) MR W	**Defendants**

- -
- -

Richard Millett KC and **Ellen Tims** for **the Claimant**
Nicholas Vineall KC for **the Defendants**

Hearing dates: 3 April 2025
Further evidence: 8 April 2025
Further written submissions: 11, 15 and 16 April 2025
Draft judgment to the parties: 16 April 2025

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Approved Judgment

Rev 1

This judgment was handed down remotely at 10.30am on 08 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

Mr Justice Foxton :

1. This is an application by the Claimant ("**A Corporation**") for various categories of interim injunctive relief requiring:

   i) the First Defendant ("**Firm B**"), including any of its branches, to cease acting for C Corporation in an ongoing arbitration reference against D Corporation involving Vessel 2 and defined by the parties as the "**Vessel 2 Reference**";

   ii) Firm B to procure a partner with no previous involvement in that reference to "cleanse" the files held by Firm B in relation to the Vessel 2 Reference of "any confidential information", being information said to be subject to a duty of arbitral confidentiality in another, concluded, arbitration reference between A Corporation and B Corporation involving Vessel 1 and defined by the parties as the "**the Vessel 1 Reference**";

   iii) Firm B to refrain from providing any confidential information to C Corporation or anyone assisting C Corporation in relation to their claims in the Vessel 2 Reference; and

   iv) an affidavit to be sworn by the Second Defendant ("**Mr W**"), a partner in Firm B's London Office, giving details of the extent to which he, Ms X of Firm B and other fee earners based in Firm B's London office involved in the Vessel 1 Reference had provided information to persons working in Firm B's Asia office, C Corporation or others.

   By way of further explanation of the individuals and entities referred to:

   v) Mr Y is a partner in Firm B's Asia Office and is acting for C Corporation in the Vessel 2 Reference.

   vi) Mr Z is a partner in Firm A's London Office, who acted for A Corporation in the Vessel 1 Reference and continues to act for D Corporation in the Vessel 2 Reference.

   vii) A Corporation and D Corporation are companies in the same ultimate ownership.

The test to be applied

2. Being an application for interim relief, it is common ground that this application is to be determined in accordance with the familiar test in *American Cyanamid v Ethicon Ltd* [1975] A.C. 396:

   i) The applicant must show by way of a threshold requirement that there is a serious question to be tried.

   ii) If that requirement is satisfied, the court must ask whether damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?

   iii) If the answer to that enquiry is no, the court must ask where the balance of convenience lies.

3. As to (i), where the grant of refusal of an injunction at the interlocutory stage will, in effect, dispose of the action finally in favour of whichever party is successful in the application, an additional factor comes into play. That is, "the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial": *NWL Ltd v Woods* [1979] 1 WLR 1294, 1307. This does not involve a trial of the action, but allows the court to take account of the apparent likelihood of the cause of action being established when determining whether to grant relief, and in what terms. Where an injunction is sought to restrain someone from acting in a manner which it is alleged involves a conflict of interest, this additional factor is usually in play: C Hollander KC and S Salzedo KC, in *Conflicts of Interest* (6th Edn), (Sweet & Maxwell 2020), §8-002 and *Generics (UK) Ltd v Yeda Research & Development Co Ltd* [2013] Bus. L.R. 777, [16].

The confidentiality obligations at play in this case

4. The witness statements filed by A Corporation for the purposes of this application, and the correspondence sent on A Corporation's part once the dispute arose, referred at various places to five potential sources of an obligation of confidentiality:

    i) Contractual confidentiality provisions in the various Memoranda of Agreement ("MOA"s) entered into by B Corporation as buyer, which provided that "all negotiations and eventual sale are to be kept strictly private and confidential", with a carve out for disclosure "in connection with and for the purposes of any litigation, arbitration or other proceedings or dispute".

    ii) The confidentiality clause in the Co-operation Agreement of 31 October 2023, the terms of which are set out in Annex 1(confidential).

    iii) The confidentiality clause in the MOA entered into by B Corporation as seller under the transaction just referred to, which was similar to that quoted in i), save that the relevant carve-out was "for the purposes of any litigation or disputes in respect of the Vessel in which the Sellers are a party or are involved".

    iv) The Settlement Agreement of 22 September 2024 between A Corporation and B Corporation which provided that "this Settlement Agreement and the terms recorded herein are private & confidential to the Parties and their advisers, and are subject to the same ongoing duties of confidentiality that apply to the Arbitration and shall not be disclosed by either Party, their servants or agents to any third party without the express written consent of the other Party, except: (a) to any legal or regulatory authority as may be required by law, tax, or such regulatory authority or corporate reporting/listing requirement; (b) to its auditors, lawyers, bankers or insurers where it is necessary for obtaining legal or other professional advice or assistance, on terms which preserve confidentiality; or (c) to protect or pursue any legal right or to enforce this Settlement Agreement, or implement any of its terms."

    v) The implied obligation of confidentiality in relation to arbitrations arising under English law.

5. However, the principal focus was on this last category, which was the only legal source of an obligation of confidentiality addressed in A Corporation's skeleton argument. In opening, Mr Millett KC briefly mentioned clause 6 of the Co-operation Agreement, but

did not press the matter when asked by the court about the fact that the issue had not been addressed in his skeleton argument (and, in consequence, in Mr Vineall KC's sequentially served skeleton). Mr Millett KC referred briefly to clause 6 in his reply, but the construction arguments which might arise in relation to clause 6 were not developed by either party before the court. This was no doubt because, as Mr Millett KC confirmed, while he was able to advance the case at the hearing that Mr W fully appreciated the obligations of confidentiality which arise in relation to all arbitrations seated in this jurisdiction, the injunction application had not been formulated by reference to any different obligation arising under clause 6 and what Mr W may have known of it.

6. In these circumstances, and subject to the issue I consider in the next paragraph, I will consider the injunction application based on the general arbitral duty of confidentiality. Nor is it necessary to consider any argument as to whether the content of that duty in this particular case had been modified by any express contractual confidentiality provision (and to what effect).

7. The exception arises from a concession made by the Defendants that there had been a breach of a confidentiality obligation in passing on certain information derived from settlement discussions, which obligation Mr Vineall KC explained in oral argument was not accepted to be an incident of the general duty of arbitral confidentiality, but a duty of confidentiality arising under English law in relation to the contents of such discussions. While "without prejudice privilege" generally restricts the deployment of documents in adversarial proceedings, I accept that the receipt of information in this context is capable of generating an enforceable obligation of confidentiality. This is consistent with the decision in *Glencairn IP Holdings Ltd v Product Specialities* [2020] EWCA Civ 609, [75], to which I will return, and the fact that the jurisdiction to restrain the use of documents subject to legal professional privilege rests upon the court's ability to restrain breach of confidence: *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (Ch), [74]. I will therefore proceed on the basis that this further obligation of confidentiality may be engaged.

The factual position

8. Given the concerns about confidentiality in this case, I have dealt with the history of the two references and the detail of my conclusions in three confidential Annexes to this judgment. In addition, when anonymising this public version of the judgment, I have made certain editorial changes to maintain the original meaning. In those annexes and this judgment, when dealing with disputed facts, I have expressed views about the strength and weaknesses of particular issues having regard to approach in *NWL v Woods*.

The legal principles relating to the obligation of confidentiality in relation to arbitral proceedings

Introduction

9. There remains some debate as to whether the obligation of confidentiality in respect of any arbitration seated in England and Wales arises as an implied term of the agreement to arbitrate (thereby engaging issues as to the existence of such an obligation under the applicable law), or as part of the so-called *lex arbitrii* (the procedural law of the arbitration arising from its seat): see the discussion in *Mustill and Boyd: Commercial and*

Investor State Arbitration (3rd), (LexisNexis, 2024), [11.45] to [11.52]. Either route, in this case, leads to the law of England and Wales.

10. It is common ground that, as a matter of English law, the default rule is that the parties to an arbitration agreement will be taken to have impliedly agreed to an obligation of confidentiality. This has been described as an obligation implied from the nature of arbitration, and, in effect, a substantive rule of arbitration law masquerading as an implied term: *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184, [81], [84], [85] and [106].

11. In *Ali Shipping v Shipyard Trogir* [1999] 1 WLR 314, 326-27, Potter LJ observed that "the obligation of confidentiality, whatever its precise limits, arises as an essential corollary of the privacy of arbitration proceedings". He suggested that the boundaries of the obligation of confidence were best delineated "by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement."

12. However, in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co f Zurich* [2003] UKPC 11, [20], the Privy Council expressed reservations about that approach because "it runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality." That nudge towards a more granular consideration of arbitral confidentiality is helpful, because, as discussed below, the obligation of arbitral confidentiality embraces different types of document and information, some inherently more confidential or sensitive than others.

13. I accept that this application is best approached by asking two questions:

    i) what material does the obligation of arbitral confidentiality extend to; and

    ii) to the extent that the obligation of arbitral confidentiality is engaged, what are the relevant exceptions?

To what documents and information does the obligation of arbitral confidentiality extend?

14. The authorities establish that the obligation of arbitral confidentiality extends to the following categories of documents or information:

    i) The hearing or hearings in the arbitration (*Emmott*, [62]) which would include transcripts or notes of the hearing (*Emmott*, [81], [105]; *Hassneh Insurance v Mew* [1993] 2 Lloyd's Rep 243, 247).

    ii) Documents disclosed by a party in the arbitration to other parties in the arbitration in the hands of those other parties (*Emmott*, [79]). *Hassneh Insurance*, 247; *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd) (LexisNexis, 2024), [11.53]).

iii) Documents "generated" or "prepared for" and then used or produced in the arbitration (*Emmott*, [79]. [81], [105]; *Hassneh Insurance*, 247). This would extend to pleadings, witness statements and expert reports, written submissions and correspondence between the parties or their representatives relating to the arbitration.

iv) The arbitral award (*Emmott*, [105]; *Hassneh Insurance*).

15. I also accept that to the extent that those documents are themselves the source of confidential information, information derived from documents is itself subject to the arbitral obligation of confidentiality. Mr Millett KC referred to C Phipps (et al) (eds), *Toulson & Phipps on Confidentiality* (4th) (Sweet & Maxwell 2020), [22-026]:

> "The starting point is that parties to an arbitration agreement are to be taken as impliedly agreeing to treat documents *and information* emanating from the arbitration as confidential. The implication arises from the nature of the arbitral process, i.e. that it is an essentially private process, and from what the courts have accepted to be the long held assumptions of those who use arbitration..." (emphasis added).

16. That view is supported extra-judicially by Sir Stephen Males in "Confidence in Arbitration" [1998] LMCLQ 245, 248-249 where he expressed the view that the duty "applies not only to the documents disclosed but also to the information contained in such documents" (referring to two cases on what I accept is, in this respect, an analogous area of law on the undertaking to use documents disclosed by another party in litigation only for the purpose of the proceedings in which they were disclosed: *Sybron Corp v Barclays Bank Plc* [1985] Ch 299, 318 and *Crest Homes PLC v Marks* [1987] AC 829, 854).

17. However, a party's own documents which came into existence independently of the arbitral process do not become subject to a limiting obligation of confidence in the hands of the party whose documents they already are merely because that party discloses or relies upon them in the arbitration. Parker LJ in *Dolling-Baker v Merrett* [1990] 1 WLR 1205, 1213 referred to "the implied obligation of a party *who obtains documents on discovery* not to disclose or use for any purpose other than the dispute in which they were obtained" (emphasis added) and stated that "the fact that a document is used in an arbitration does not *confer* on it any confidentiality or privilege which can be availed of in subsequent proceedings" (emphasis added). I do not understand the reference in *Emmott*, [79] to an obligation preventing the "dissemination of documents deployed in the arbitration" to suggest otherwise.

18. In addition, the fact that a commercial dispute leads to the commencement of an arbitration does not of itself make the existence of the dispute and the events which gave rise to it confidential. For example:

i) If a shipowner delivers a charterer's cargo in defective condition, the fact of the contract, its performance or the charterer's complaint are not confidential simply because an arbitration is thereafter commenced in respect of the charterer's claim.

ii) If a party buys goods which it concludes are defective, that fact does not become confidential simply because the buyer commences an arbitration against the seller.

iii) This is also the case where one party alleges it has been induced to enter into a defective transaction by the other party's fraud.

19. It will be noted that the effect of the law as stated in the previous two paragraphs is that although, in each of the three examples in [18], the complaining party is not subject to a duty of confidentiality in respect of the fact of its complaint and the events giving rise to it, it will not be able to disseminate the particulars of claim filed in the arbitration asserting that complaint, even if no other information has been drawn on in preparing them. Similarly, if a party deploys a witness statement in the arbitration setting out the facts relating to its dealings with the other party, or an expert report addressing the condition of the damaged cargo or defective goods, those documents will be subject to the obligation of arbitral confidentiality even though they did not contain or derive from inherently confidential information or information obtained from any other party.

20. That divide reflects the fact that, as *Emmott*, [79] makes clear, the implied obligation of arbitral confidentiality is not premised on the inherent confidentiality of the material to which it attaches, but arises from the private nature of the process – it is not the information itself which benefits from arbitral confidentiality in this particular context, but the fact and manner of its deployment in the arbitration. There are also sound practical reasons for the approach. "Lifting the arbitral veil" in respect of documents prepared for and deployed in the arbitration risks further disclosures (e.g. by the other party seeking to "even" the informational playing field by disclosing its particulars of defence or responsive expert report, and so on). In addition the rule reduces the risk of documents prepared for and used in the arbitration being disseminated when it may be suggested that their contents are not exclusively derived from "pre-arbitration" information of the party who prepared them, but from material filed in the arbitration by the other party. That does not mean, however, that all material to which arbitral confidentiality attaches will necessarily justify the same level of protection from the courts, nor that the same degree of necessity or cogency will be required to establish an exception to the obligation.

21. That sentiment can usefully be examined by reference to the question of whether the mere fact of an arbitration is caught by the obligation of arbitral confidentiality. In *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2003] 1 WLR 2885, Cooke J observed, at [51], that:

> "There can in my judgment be no breach of duty in disclosing the fact of commencement of an arbitration, the existence of an arbitration or the result of that arbitration where there is any legitimate reason to do so. Equally, the existence of any challenge to an award, the existence of litigation relating to it and the result of that litigation would for similar reasons not amount to a breach if disclosed."

The words "where there is any legitimate reason to do so" suggest that Cooke J may have had in mind a case where a legitimate exception to the obligation of confidentiality could be invoked. The editors of *Russell on Arbitration* (24th) (Sweet & Maxwell 2015), [5-217] refer to these comments as *obiter* and suggests that they "perhaps reflect a more liberal approach than some would consider warranted". However, an alternative approach might be that rather less is required to relieve a party from any obligation of arbitral confidentiality in relation to that very limited set of information than would be the case, say, for material disclosed by the other party in the arbitration (such that what the "interests of justice" require, or what is "reasonably necessary for the protection of the

legitimate interests of an arbitrating party" may vary depending on the sensitivity of the information concerned).

22. Similarly, the disclosing of a parties' own filings or reports is, all other things being equal, less intrusive than disclosure of material produced by another party or which draws on that material (with material produced by that other party under legal compulsion in the arbitration coming at or near the most sensitive end of the spectrum). The idea of a sliding scale of arbitral confidentiality, with the ease of establishing exceptions and the appropriateness of injunctive relief varying accordingly, is supported not simply by the Privy Council in *AEGIS* but by Lawrence Collins LJ's statement in *Emmott* [107] that "the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue." It is also consistent with the judgment of Briggs J in *John Milsom v Mukhtar Ablyazov* [2011] EWHC 955 (Ch) who distinguished between Mr Ablyazov's own documents (Class A) and the other arbitrating party's documents provided to Mr Ablyazov in the arbitration (Class B). At [30] he observed:

> "As to Class A, the deployment by Mr Ablyazov of his own documents or of his own information in an arbitration, whether in a statement of case, a witness statement or by exhibiting the documents themselves, does not make the information itself confidential if it was not originally of the inherently confidential type. Arbitration confidentiality in that context means only that the fact of its use in the arbitration is confidential."

23. I accept that it is strongly arguable that the obligation of arbitral confidentiality extends to so-called "derived" information (i.e. that obtained with the use of confidential information, albeit the "derived" information does not disclose or incorporate the confidential information itself). I was referred in this regard to the decision in *Ocular Sciences Ltd v. Aspect Vision Care Ltd* [1997] RPC 289, 401-404. Sir Stephen Males in "Confidence in Arbitration" [1998] LMCLQ 245, 249 noted that the obligation of confidentiality "may also apply to material which is derived from, or obtained with the assistance, of those sources, even if such material does not itself disclose the information disclosed in the arbitration".

24. Finally, it is important to distinguish between information protected by the obligation of arbitral confidentiality, and the experience which lawyers inevitably acquire from conducting arbitrations:

    i) This is particularly necessary in an area of disputes practice which involves a relatively small group of specialist practitioners such as those involved in maritime arbitration. This is a context which involves repeat litigating parties on a significant scale; a recurrence of similar complaints; and a cadre of solicitors and counsel who regularly feature on both sides of particular questions, sometimes for the same client (someone arbitrating as a buyer or charterer in one case will frequently be a seller or disponent / actual owner in another, in a context in which chains of contracts are clear), or for and against the same party in different disputes.

    ii) This can, without limitation, involve acquiring knowledge about the type of documents generally available in relation to particular types of issues; more specifically how major players and "repeat litigators" in this field structure their businesses or record-assembly and keeping; the litigation strategies of particular

opponents and their approach to certain contested issues; which document requests have and have not yielded results; and the outlook on issues such as the construction of contracts, readiness to find dishonesty, disclosure, amendments and security for costs, of particular arbitrators acting in this field.

iii) Counsel may often find themselves cross-examining a factual and (a fortiori) expert witness that they have previously cross-examined or seen cross-examined in an earlier arbitration (I certainly did during my career as an advocate), and shape their cross-examination strategy accordingly.

25. In *Merck & Co v Interpharm* [1992] 3 FC 774, 777 (Canada), Gile ASP observed of the implied undertaking only to use disclosed documents for the purposes of the proceedings in which they were disclosed (which is one element of the duty of arbitral confidentiality):

> "A lawyer who takes cases regularly must have acquired a great deal of information subject to implied undertakings. In these days of specialised education and long work hours for junior lawyers, it is possible that a significant percentage of a lawyer's general knowledge will have been acquired in his practice of law, there having been little other opportunity for him to acquire the same. It is equally possible that a large portion of that general knowledge will be subject to implied undertakings. If the defendant's submissions are correct, few lawyers who have been called for any length of time will be able to take part in litigation. It is to be remembered that the undertaking is to the court and is not limited to deploying information in cases involving one or more of the same parties."

26. Those observations were endorsed by the Court of Appeal in *British Sky Broadcasting Plc v Virgin Media Communications Ltd* [2008] EWCA Civ 612, [23], and they are an important reminder that not everything a lawyer learns from acting in an arbitration is "off limits" for subsequent application because of the obligation of arbitral confidentiality. That is not an easy line to articulate, but experienced lawyers generally have a good sense of which side of it they are.

Exceptions to arbitral confidentiality

27. It is not necessary for the purposes of this hearing to undertake a comprehensive survey of the exceptions to arbitral confidentiality. *Emmott*, [107] identified the following:

> "the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."

28. The third of those exceptions ("where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party") has been held to extend to:

i) founding an issue estoppel from an award against the arbitrating party in other proceedings (*Associated Electric and Gas Insurance Services, supra*) or alleged privies of those parties (*CDE v NOP* [2021] EWCA Civ 1908, [8]);

ii) permitting statements, reports or transcripts to be deployed where witness or expert evidence is being deployed in one arbitration which is contrary to evidence from the same individual in a prior arbitration (*Mustill & Boyd*, [11.62]); and

iii) for the purposes of making claims against or defending claims by a third party (*Mustill & Boyd*, [11.63]).

29. It is also obvious that dissemination (rather than "publication") must be permissible for the purpose of advancing a party's case in the subject arbitration in which the obligation of confidentiality has arisen. That would include disclosing material to lawyers, factual witnesses and experts for the purpose of preparing an arbitrating party's case and evidence in an arbitration. For example, it must be permissible to interview a non-party whom the other party alleges said or did something, or would have done so in some legally relevant counterfactual, to elicit their evidence, and to appraise them of the other party's case, relevant witness evidence, and disclosed documents, when doing so.

30. I am also satisfied that it is very strongly arguable that it must be permissible to use at least some of the material falling within the scope of arbitral confidentiality for the purpose of seeking to elicit similar fact evidence from a third party who is believed to have similar complaints against the opposing party. This is a recognised category of admissible evidence in civil proceedings (*O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 53), and one which can be very powerful in rebutting allegations of ignorance, accident or coincidence. It would be very surprising if the ability to advance a case of this kind was made more difficult in commercial arbitration than court proceedings. It would also, to my mind, be striking if confidential material could be deployed to attack the credit of a witness (an issue over which courts generally exercise greater control when deciding what material can be obtained and deployed, and to what degree), but not for the purpose of obtaining and adducing evidence positively and directly probative of an arbitrating parties' case.

31. That strongly arguable exception is of particular importance here for the reasons set out in paragraphs 1 and 2 of Annex 3.

Do any relevant exceptions apply to the obligation of confidentiality inherent in "without prejudice" negotiations?

32. Charles Hollander KC, *Documentary Evidence* (15th), (Sweet & Maxwell, 2024), [20-10] identifies eight exceptions to "the 'without prejudice' principle", albeit the focus of this discussion is understandably on the question of when evidence of such negotiations can be deployed in legal proceedings, rather than on the right to communicate the information to a third party. Understandably, none of the "deployment" exceptions embrace the position where use is reasonably necessary for a party to advance its case: that exception would swallow the rule whole.

33. The issue of whether "without prejudice" privilege can be disseminated to someone other than the original parties without breaching the attendant obligation of confidentiality is not one which is discussed in the authorities, or at least not in material to which I was taken. There must be some such entitlement – for example disclosure of an offer to a costs or liability insurer concerned in the claim, or to an actual (and, perhaps, a prospective) litigation funder.

34. A concern in this case arises from the suggestion by Mr W that he was seeking to try and co-ordinate the settlement of the two references, and that there was some form of agreement along these lines with Mr Y. To take a hypothetical example, two parties involved in similar claims with a common enemy might reach an agreement to co-ordinate their settlement strategies, to avoid being "picked off", and in the belief that if they stood together, a better deal for both was likely to be achieved. The issue of whether the sharing of information about "without prejudice" settlement negotiations in such circumstances would breach the inherent obligation of confidentiality does not strike me as wholly straightforward. It is not necessary to express any view on it, because the case was conducted before me on the basis that the Defendants did not challenge the conclusion that disclosure by Mr W to Mr Y of the terms of A Corporation's settlement offers involved a breach of confidence. However, I mention the issue because it is important to keep the nuanced nature of this issue in mind, when considering Mr Millett KC's submissions as to what conclusions the court should draw from those admitted breaches when determining what relief the court should order.

The alleged misuses of confidential information

35. The various respects in which A Corporation allege that the Defendants misused material which is subject to a duty of arbitral confidentiality are addressed in Annex 3. On that basis, my current assessment of the strength of A Corporation's claims is as follows:

    i) I am not persuaded A Corporation has an arguable complaint about the disclosure by the Defendants to Firm B Asia office of the identity of B Corporation's own counsel and experts, nor of the identity of its party-appointed arbitrator, or in recommending C Corporation appoint that arbitrator.

    ii) To the extent the Defendants discussed the issues and allegations in the Vessel 1 Reference with Firm B Asia office, there was an arguable communication of information subject to arbitral confidentiality, but the Defendants have the better of the argument that this would fall within one of the exceptions to arbitral confidentiality to the extent it went beyond the facts of the pre-arbitration complaints and the events giving rise to them.

    iii) The Defendants have the better of the argument that they were reasonably entitled to conclude that they were permitted to pass on Mr Z's comments about C Corporation's claim on 2 May 2024 to Firm B Asia office for transmission to C Corporation, alternatively that this information fell within an exception to the obligation of arbitral confidentiality having regard to the common interest and ongoing co-operation between B Corporation and C Corporation.

    iv) It is conceded that the Defendants breached obligations of confidentiality in passing on A Corporation's settlement offer as communicated on 26 July 2024. On the premise of that concession, it is strongly arguable that the Defendants breached an obligation of confidentiality in informing Firm B Asia office that a "serious settlement offer" had been made on 18 September 2024 (but Mr W's expression of a view as to why such an offer had been made has no independent significance for confidentiality purposes).

    v) It is arguable that Requests 1 to 9 and 29 in C Corporation's early disclosure request were to some extent influenced by confidential information in the Vessel 1

> Reference, but the link with confidential material is weak, and the Defendants have the better of the argument that no enduring advantage was derived from that fact, as the Requests would have been made at some point in any event. The Defendants have the better of the case that A Corporation has no legitimate grounds for complaining that some early requests for disclosure in the Vessel 1 Reference were not repeated in the Vessel 2 Reference.

vi) A Corporation does not have an arguable claim that the Defendants breached confidentiality by informing Firm B Asia office that the Vessel 1 Reference had settled, and that B corporation were pleased it had.

vii) A Corporation does not have an arguable claim that confidential information was misused when Mr W advised Mr Y to seek to tie off any security for costs issue when agreeing security for C Corporation's claim.

The application for injunctive relief

The legal principles

36. I accept that solicitors who are instructed by parties to an arbitration owe a similar duty of confidentiality to both parties: *Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch), [25]. I also accept that such a solicitor can be restrained in an appropriate case from deploying material which is subject to arbitral confidentiality for a non-permitted purpose.

37. The principal injunction which is sought in this case is one which would restrain Firm B, B Corporation's solicitor, from acting for C Corporation. This is a very different context from that more usually encountered, where a former client seeks to restrain their former solicitors from acting for a third party by reason of confidential information acquired and held by those solicitors in the course of their retainer (i.e. the scenario addressed by Lord Millett in *Bolkiah v KPMG* [1999] 2 A.C. 222, 235).

38. Applications for injunctions by party A, to restrain solicitors who received confidential information from party A when acting for party B in contested litigation between them, to prevent those solicitors from acting for party C, have been considered in three authorities in this jurisdiction.

39. The first, chronologically, is the judgment of HHJ Hallgarten QC in *Adex International (Ireland) Ltd v IBM United Kingdom Ltd* (Unreported, 17 November 2000), an ex tempore judgment, but from a judge with great experience of commercial litigation. Solicitors acting for Time Group in a dispute with IBM were party to confidential information exchanged in the course of "without prejudice" negotiations in a dispute about the performance of a particular IBM product. After that case had settled, the same solicitors were retained by Adex, bringing a similar claim against IBM which appears to have concerned the same product. IBM sought and obtained an injunction to prevent the solicitors from acting for Adex. The injunction was granted even though the solicitors had confirmed that they would not pass on any confidential information to Adex. HHJ Hallgarten KC appears to have concluded he had no or little discretion in the matter, stating:

> "Once the defendants have established, as I think that they have, (a) that there is a duty of confidentiality not to disclose the contents of the settlement agreement; and

> (b) that there is a real risk of the knowledge of the contents of that settlement agreement being employed wittingly or unwittingly to the defendants' advantage, I do not believe that I have any discretion to exercise."

40. He was, however, willing to contemplate that it might be possible to have an arrangement in which the solicitors (or at least the relevant individuals) continued to act until the Adex claim reached the stage of negotiations, and bowed out at that point, or from that process. It is not clear from the judgment whether such an arrangement was agreed and approved.

41. The next case is *British Sky Broadcasting plc v Virgin Media Communications Ltd (formerly NTL Communications Ltd)* [2008] 1 WLR 2854. In that case, the claimant brought proceedings against the defendant alleging abuse of a dominant market position, at the same time as proceedings between the same groups were underway before the CAT and a review into the same issue by the Office of Communications was ongoing. The claimants were represented by the same solicitors in all three contexts, all of which were concerned with the same underlying events. Issues arose as to the extent to which documents disclosed in the High Court litigation could be used by the receiving party in the other contexts. The defendants sought an injunction to restrain the individuals at the claimant's solicitors involved in the other two sets of proceedings from having access to the disclosed documents. The injunction was refused at first instance and on appeal, on the basis that the restrictions on the use of disclosed documents under the CPR were sufficient.

42. At [6], Lord Phillips CJ described the order sought as "without precedent in this jurisdiction" and said that it would prevent the respondent "from continuing to use the individual lawyers of their choice in more than one set of proceedings." At [20], the Court stated, "that it is desirable that a litigant should be free to instruct the lawyer of his choice". At [22], Lord Phillips stated in relation to material disclosed in court proceedings:

> "It is usually enough to rely upon the recognition by a solicitor of the duty not to make any ulterior use of information obtained by disclosure. The *Adex International cas*e (unreported) 17 November 2000 was correctly decided, but it is a rare example of a situation where a solicitor was precluded from acting for a different claimant against the same defendant in respect of a similar claim as a result of confidential information obtained about the defendant in the earlier proceedings. The approach of the Court of Appeal of New Zealand in the *Carter Holt Harvey Forests* case [2001] 3 NZLR 343 was adopted in a case involving an express confidentiality agreement in mediation. It is not an approach that can be generally applied whenever information has been obtained by lawyers in a case as a result of disclosure."

43. I would note that the suggestion that *Adex* can be justified on the basis that it involved an express duty of confidentiality and that this is somehow different from an implied obligation cannot stand in the light of the decision of the Court of Appeal in *Glencairn IP Holdings Ltd v Product Specialities Inc* [2020] EWCA Civ 609, [72] and [74] rejecting such a distinction.

44. The next decision is *Glencairn IP Holdings Ltd v Product Specialities* [2019] EWHC 1733 (IPEC). The facts giving rise to the case were very similar to those in *Adex*, save that an "information barrier" had already been put in place between the team who had

participated in the mediation in the former case and those conducting the second case. Both cases involved allegations of infringement of the same registered design. No injunction was granted. At [40], HHJ Hacon identified an important difference between the case before him, and the fact pattern in issue in *Bolkiah*:

> "The policy in both cases is that parties must retain the freedom to be candid, in the one circumstance to their solicitors and in the other, in a mediation. Those freedoms should not be eroded. However, it seems to me that the two freedoms are not identical. Candour in a mediation will take the form of disclosing information to an adversary or potential adversary. Candour on the part of a client to his lawyer, whose duty and interest lies in promoting the cause of his client, is likely to be the product of little or no inhibition and a complete assumption that the information disclosed will go no further without the client's consent. It would follow that higher safeguards against the wrongful disclosure of information are proportionate in the *Bolkiah* type of case when compared to a case of the present type."

45. He held that, in cases of the kind before him, it was relevant to consider the impact of any injunction on the current client (i.e., in this case, C Corporation) ([51]). He held that the overall burden of proving that an injunction was required remained on the party seeking it ([53]), and that the likelihood of confidential information passing to the new client was "very low", whereas there would be undoubted prejudice to the new client if an injunction was granted ([95]).

46. An appeal against that decision was rejected at [2020] EWCA Civ 609. At [66], Flaux LJ emphasised the difference between "the position of a solicitor who formerly acted against the applicant (the former opponent case) with that of a solicitor who was formerly acting for the applicant (the former client case)." At [68], he cited with approval the observations of Lightman J in *In re A Firm of Solicitors* [1997] Ch 1, 13:

> "Where there has been the previous relationship of solicitor and client and the solicitor at the date of his proposed new retainer possesses relevant confidential information, in the ordinary course the court will in my view grant an injunction restraining the solicitor acting, as in *In re A Firm of Solicitors [1992] QB 959* .... But, in the case where without any such previous relationship a party's solicitor illegitimately becomes possessed of confidential information of the other party to the suit or dispute, in the ordinary course the court will merely grant an injunction restraining the solicitor making use of that information: it will not prohibit his continuing to act."

47. At [69], he noted that in "no relationship cases", the burden did not lie on the respondent to prove that there is no risk of disclosure of confidential information. Rather the burden of proof remained on the applicant "to show that there is a real risk of prejudice to him from the other party's solicitor having had access to confidential or privileged information." At [74]-[75], he held that this was also the correct approach in cases where confidential information was deliberately provided to an opposing party's solicitor in a confidential context as well as when such information was accidentally disclosed.

48. At [76], Flaux LJ referred to *Adex* when discussing the burden of proof, saying it was unclear whether the *Bolkiah* burden of proof had been applied, and, if not, "the case overall may have been correctly decided on its own particular facts" but that:

> "In any event, the judgment was ex tempore and is of limited assistance, not least because it is apparent from the end of the judgment that the judge may not in fact have imposed an injunction restraining the opposing solicitors firm from acting, but may have accepted an undertaking that the particular partner involved in the previous Time mediation would not be involved in any settlement discussions in the *Adex* litigation."

At [77], Flaux LJ stated "that the decision of the Court of Appeal of New Zealand in *Carter Holt* [2001] 3 NZLR 343 does not represent English law", and he noted that "the actual order made as it appears from para 36 of the judgment is surprising, as it imposed an injunction not just on the three lawyers involved in the previous mediation but the entire firm."

49. At [80], Flaux LJ approved the judge's conclusion that in a "no relationship case", the court must conduct "a balancing exercise taking account of the prejudice to the opposing party if such an injunction were to be granted and of whether some less onerous form of injunctive relief, such as an injunction to restrain the use of the privileged, confidential information, would protect the applicant sufficiently."

The position at the point the injunction is sought

50. Taking those breaches which are conceded or follow from those which have been conceded first (i.e. in relation to the settlement offers received):

    i) On the evidence, the figure of the first offer, and the fact and the description of the second offer, have already been passed onto C Corporation. Removing Firm B Asia office from the picture will not change the position nor can an injunction be granted preventing communication of that which has already been communicated.

    ii) A Corporation has settled its claim with B Corporation, and there can be no prejudice to it from the communication of this information.

    iii) Assuming that prejudice to D Corporation as a company in the same ultimate ownership as A Corporation is relevant (and cf. *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314, 329), the significance of the information provided is very limited, and so is any prejudice to D Corporation. The first offer made was of limited relevance, for reasons which appear in the confidential annexes. No other figures crossed the line. The quantum claimed in the two references was significantly different, and driven by facts particular to each vessel (its physical condition, what repairs were done, trading opportunities lost etc). The total claimed by B Corporation was a multiple of the figure in C Corporation's letter before action. Further, Mr Z was at pains to make it clear at all times that these references were seen by his clients as very different cases, and C Corporation's case significantly weaker, not least because of what were said to be significant differences in the pre-sale report, the absence of many of the repairs found on the Vessel 1 which were said to demonstrate knowledge of issues and the different terms of the MOAs. The two cases here are markedly less similar than those in issue in *Adex International (Ireland) Ltd v IBM United Kingdom Ltd*; *British Sky Broadcasting plc v Virgin Media Communications Ltd;* and *Glencairn IP Holdings Ltd v Product Specialities*.

iv) D Corporation will, in any confidential discussions with C Corporation, know a great deal more than C Corporation about the settlement history of the Vessel 1 Reference – the amount of each offer and counteroffer, and the amount and terms of the final settlement. This further minimises any prejudice to D Corporation.

51. In relation to those alleged breaches which I have found to be arguable, I am satisfied that the Defendants have the better of the argument that there has been no breach, through a combination of the fact that the factual allegations as to Vessel 1's condition on delivery and the information provided to B Corporation prior to entering into the MOA are not subject to the obligation of arbitral confidentiality (see [17]-[18] above) and because it is strongly arguable that the sharing of information for the purpose of establishing similar events and complaints relating to both vessels falls within one of the exceptions to arbitral confidentiality ([30] above). I would also note that the legal team instructed for D Corporation in the Vessel 2 Reference will know a great deal more about the events in the Vessel 1 Reference, being, as I understand the position, essentially the same team who acted in that reference.

52. In any event, C Corporation must already be aware of the alleged similarities in the sales so far as they concern certain features of the vessels' conditions and the information provided pre-sale. Mr W's evidence is that C Corporation already had some awareness of issues surrounding The Vessel 1 as a result of "market chatter" even before C Corporation approached Firm B Asia office. C Corporation was asked to co-operate with B Corporation in relation to the Vessel 1 Reference (Mr Y having said he would recommend this to his clients). C Corporation clearly accepted that recommendation, to the extent of providing a statement from one of its employees (the "**CCC Statement**") and 1,000 pages of documents for use in the Vessel 1 Reference. There is no evidence from Mr Y as to what he told C Corporation when explaining the benefits of the co-operation and securing their agreement to provide evidence in support of B Corporation, because confidentiality concerns on A Corporation's part have meant that it has not been possible to inform Firm B Asia office of the detail of allegations made by A Corporation in this application. However, it cannot seriously be denied that information about the alleged similarities between the two cases, and the potential relevance of the CCC Statement and supporting documents to those alleged similarities, will already be known to C Corporation, and will not cease to be known if Firm B Asia office are ordered to cease acting for C Corporation.

53. It might be said that confidential information at a more detailed level may have been passed to Mr Y, but not yet passed to C Corporation. As to this:

i) It is accepted that a section from the report of one its experts in the Vessel 1 Reference report addressing the Vessel 2, the CCC Statement and the attached Vessel 2 documents were passed to Mr Y. It seems likely that this was passed onto C Corporation (it did, after all, concern C Corporation's witness, vessel and documents). In any event, any suggestion that A Corporation had a legitimate expectation that passages of a draft expert report prepared by B Corporation in this very particular set of circumstances using this material (which could not have come from A Corporation) would nonetheless be kept confidential from C Corporation is weak.

ii) I accept that Mr W passed on the view of his expert that the UTM readings provided for Vessel 1 were false and an extract from the report of another expert that the

ballast tank coating applied to the vessel in 2008 would have required replacement in 2018, and that this was done after Firm A response to C Corporation's Letter of Claim of 17 May 2024 was shared with Mr W. I do not know if Mr Y passed this information on to C Corporation, but there must be a real risk that he would have done so. The CCC Statement referred to UTM measurements provided for the Vessel 2 and attached a ballast tank condition report from October 2023 stating, "refer to the UTM report which provided by DDD dated November 2021, it shows the max diminution of the related area is only [X]%, there was obvious falsification, and cause owner heavy financial losses." The Letter of Claim sent on C Corporation's behalf on 30 April 2024 had already complained that the extent of corrosion was misdescribed by D Corporation before the sale, and the actual corrosion inconsistent with the UTM readings D Corporation had provided. The letter also complained of the condition of the ballast tank coatings, attaching a tank condition report. So, I think it likely that the substance of this information will already have reached C Corporation, with the Defendants having the better of the argument on this issue.

iii) In any event, the information already available to C Corporation independent of this material makes it most unlikely that it derived any enduring advantage from these disclosures. C Corporation was clearly alive to the issues generally, given the terms of its Letter of Claim as set out above. It obtained its own expert report suggesting that the Vessel 2 UTM results were forged on 10 June 2024 and had access to expert evidence on the issue of the tank coatings. It is likely that experienced maritime solicitors (whatever the firm) would have followed these questions with the aid of experts (whoever the experts).

54. What of the risk that more information which is arguably confidential and does not arguably fall within a relevant exception has crossed the line than Mr W's evidence reveals? As to this:

i) Mr W has provided evidence to the court identifying what information he passed to Mr Y relating to B Corporation's claims against A Corporation. While I cannot reach a final decision, I feel able to place considerable reliance on Mr W's evidence as it now stands.

ii) A Corporation has suggested that I should be wary of Mr W's approach. It is said "his grasp of the boundaries of arbitral confidentiality is less than secure". However, Mr W's understanding of the requirements of arbitral confidentiality accords, in the main, with what I regard as the better view of the scope of, and exceptions to, that doctrine. In relation to the communication of settlement offers, it has been conceded that this involved a breach of arbitral confidentiality, but the position here was nuanced, rather than being an obvious disregard of a clear rule (see [34] above).

iii) A Corporation also suggest that Mr W's account of what he told Mr Y has involved additional detail emerging over time, the most recent example being the additional witness statement served after the hearing at my request. I am not persuaded, however, that this reflects any conscious reluctance on Mr W's part to set the complete position before the court, but the greater focus which the intensity of forensic scrutiny inevitably brings and the fact that the information which is being sought relates to matters a solicitor would not expect to have to disclose to the other

side in litigation (viz communications undertaken for the purpose of advancing their client's claim). The court having specifically sought a further and final witness statement, I am not persuaded that there is a real risk that Mr W held anything back.

iv) A Corporation also points to the fact that Mr W did not initially put his cards on the table with Mr Z about the fact that he and Ms X had been working on the Vessel 2 Reference prior to the settlement of the Vessel 1 Reference. I accept that criticism, and the terms of Mr W's email were unwise. However, the material before me suggest that throughout Mr W was seeking to walk what he understood to be the appropriate line between what could and could not be said to Mr Y. The fact that he did not wish to have his homework marked by an as experienced and "front foot" a litigator as Mr Z is not wholly surprising.

v) In particular, Mr W raised the need to comply with confidentiality obligations at the outset in his first conversation with Mr Y and in his advice to B Corporation, B Corporation's P&I Club and counsel. He ensured from the outset that no documents produced by A Corporation in the Vessel 1 Reference were provided to Mr Y. He only provided an extract from one of B Corporation's expert's report dealing with the Vessel 2, not the whole report, and only the conclusions from another report, and the only settlement figure he passed on was the first, which he regarded as wholly non-serious. He put in place an information barrier on the Vessel 1 file, which meant information contained in it could not be accessed by Firm B Asia office save where, having applied his mind to it, he thought it appropriate. This was not someone who was oblivious to the need to respect arbitral confidentiality, but someone who had it well in mind.

vi) If information at a more granular level was passed, it is likely to have left a trace in the Vessel 2 file in the form of reports, emails or attendance notes. That file has been reviewed and cleansed by Mr W, whose evidence to the court is provided with the benefit of that review.

55. I am satisfied that going forward, there is no realistic possibility of any further information relating to the Vessel 1 Reference reaching C Corporation or its solicitors:

i) Mr W and Ms X agreed to stand down from the Vessel 2 Reference on 24 October 2024. It has been confirmed that the same is true of any other personnel who worked on the Vessel 1 Reference, with the exception of the court clerk, head of costs and senior costs draftsperson ("**the Excepted Personnel**"), who perform firm wide roles but who are not involved in the conduct of litigation outside these specialist and limited roles.

ii) Mr W and Ms X (who I accept are the individuals best placed to do so) have reviewed the Vessel 2 file and deleted all emails between Firm B London office and Firm B Asia office and from Firm B Asia office and C Corporation relating to communications concerning B Corporation's claim, and have confirmed that there are no attendance notes or other documents recording exchanges on these matters. They are now willing to be locked out of the Vessel 2 file. I am satisfied that there is nothing to be gained by ordering another partner at Firm B to review or supervise that work and am sceptical as to the ability of someone without prior involvement in the dispute to conduct this exercise effectively.

iii) It has been agreed that the Vessel 1 counsel team will not act in the Vessel 2 Reference.

56. Mr Millett KC rightly reminded me of Lord Millett's observations in *Bolkiah*, 237-238 that:

> "There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm. In *MacDonald Estate v Martin*, 77 D.L.R. (4th) 249, 269 Sopinka J. said that the court should restrain the firm from acting for the second client 'unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur.' With the substitution of the word 'effective' for the words 'all reasonable' I would respectfully adopt that formulation." (emphasis added)".

57. However, the Firm B personnel here work in two different offices located in two different continents. It is for A Corporation to persuade me that there is a real risk of confidential information crossing from Firm B London office to Firm B Asia office in the circumstances as they now pertain, and it has not done so.

58. That leaves the issue of Firm B Asia office. To injunct Firm B Asia office from the case, I would have to be satisfied that there was a real possibility that they already have access to confidential information deriving from the Vessel 1 Reference (given that I have not been persuaded that there is a realistic possibility of further disclosure), which arguably does not fall within an exception to confidentiality, which has not already been passed onto C Corporation, and that the balance of prejudice justifies an injunction.

i) With the exception of the settlement information, the Defendants have the stronger of the argument that there has been no breach.

ii) The settlement information has already reached C Corporation, and is of limited utility.

iii) The broad effect of other information where there is an arguable case of breach is likely already to be known to C Corporation (e.g. the alleged similarities in the cases), and the remainder is information which is unlikely to have offered C Corporation any enduring advantage.

iv) There is no prejudice to A Corporation in the status quo, and limited prejudice to D Corporation as compared with the position that the arguable breaches had not occurred.

v) Granting the injunction would involve real prejudice to C Corporation, who would be deprived of their choice of lawyer (reached for reasons unconnected with the Vessel 1 Reference), who has been acting for them for a year, and would do so without C Corporation having any opportunity to oppose the application.

vi) It would, however, leave in place lawyers acting for D Corporation who know a great deal more about the Vessel 1 Reference (and about what the arbitrator common to both references knows about the Vessel 1 Reference) than the lawyers involved in the case for Firm B Asia office.

vii) Applying the *American Cyanamid* test, but having regard to the likelihood of A Corporation succeeding at trial given the consequences of granting interim relief, I am satisfied that granting an injunction would occasion significant prejudice to Firm B (given its pre-existing client relationship with C Corporation) and to C Corporation, whereas not granting the injunction will not occasion any prejudice to A Corporation, and very limited prejudice to D Corporation.

59. Turning to the specific orders sought:

i) First, A Corporation seeks an injunction restraining Firm B through any of its offices acting for C Corporation in the Vessel 2 Reference. For the reasons given in the preceding paragraph I am not persuaded that it would be just and equitable to grant this relief. Firm B has confirmed that no lawyer who acted in the Vessel 1 Reference will act for C Corporation in the Vessel 2 Reference, save for the Excepted Personnel, and have offered an undertaking to the court to this effect. The requirements for a mandatory injunction preventing Firm B Asia office from continuing to act are not made out.

ii) Having regard to the review conducted by Mr W and Ms X, and the "cleansing" of the Vessel 2 file they performed, I am not persuaded that there would be any utility in ordering another partner to repeat that task, or requiring the task to be repeated under such a lawyer's supervision.

iii) I am satisfied that there is no realistic possibility of lawyers who worked on the Vessel 1 Reference providing confidential information to C Corporation going forward. So far as information already known to Firm B Asia office is concerned, either the information or its general gist has already been provided or is known to C Corporation, or, to the extent that it is arguable it is not, I am not persuaded that injunctive relief is appropriate, as (i) the Defendants have the better of the argument that no improper transfer of information has taken place; (ii) I am not persuaded that there is a real risk of prejudice to A Corporation or D Corporation, on the basis that any such information would confer no enduring advantage to C Corporation; and (iii) it would, in any event, require a more compelling case to grant injunctive relief before I would be willing to do so without having heard the evidence and position of the Firm B Asia office lawyers.

iv) At the court's request, the Second Defendant has sworn a short affidavit confirming the contents of his first, second and third witness statements, taken as a whole. This having been done, I am satisfied that no further affidavit is required.