

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Royal Courts of Justice, Rolls Building,  
Fetter Lane, London, EC4A 1NL

Date: 29 October 2021

Before :

**MR ASHLEY GREENBANK**  
**(sitting as a Deputy Judge of the High Court)**

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Between :

- |   |                           |
|---|---------------------------|
| (1) Chia Hsing Wang                     |                           |
| (2) Blue Water Limited                  |                           |
| (3) Amida Group Holdings                | <b><u>Applicants</u></b>  |
| - and -                                 |                           |
| (1) Hussam Otaibi                       |                           |
| (2) Mutaz Otaibi                        |                           |
| (3) James Charles Wilcox                |                           |
| (4) Floreat Merchant Banking Limited    |                           |
| (5) Floreat Wealth Management Limited   |                           |
| (6) Floreat Private Limited             |                           |
| (7) Mount Tai Limited                   |                           |
| (8) LVII Investment Management Limited  |                           |
| (9) Floreat Principal Investing Limited |                           |
| (10) Floreat Capital Markets Limited    |                           |
| (11) Floreat Holding Limited            |                           |
| (12) Floreat Real Estate Limited        |                           |
| (13) Studio 51 North Limited            |                           |
| (14) Floreat House Limited              |                           |
| (15) Spring Farms Services Limited      | <b><u>Respondents</u></b> |

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**John Wardell QC and Tom Roscoe, counsel (instructed by LK Law LLP) for the Applicants**  
**Andrew Hunter QC and Tom Mountford, counsel (instructed by Herbert Smith Freehills**  
**LLP) for the Respondents**

Hearing dates: 16 and 17 September 2021  
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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 29 October 2021 at 10.30am.

Ashley Greenbank

**Ashley Greenbank (sitting as a deputy judge of the High Court):****Introduction**

1. The applicants, Mr Chia Hsing Wang, who is known as “Bruno Wang”, and two companies controlled by him, which are incorporated in the Cayman Islands, apply for pre-action disclosure under CPR 31.16.
2. The respondents are Mr Hussam Otaibi, Mr Mutaz Otaibi and Mr James Wilcox and various companies, which the applicants assert, are owned and/or controlled by one or more of them. Mr Hussam Otaibi, Mr Mutaz Otaibi and Mr Wilcox are the principals in an investment management and advisory business known as the “Floreat group” and many of the respondents (but not all) are companies which undertake the investment management and advisory business or fund vehicles established and managed by them. The parties referred to Mr Hussam Otaibi, Mr Mutaz Otaibi and Mr Wilcox together as the “Floreat principals” and I will do the same.
3. There are no current proceedings between the parties. The application for pre-action disclosure relates to possible claims which the applicants say they may bring against the respondents arising from the management of Mr Wang’s financial and other affairs by the Floreat group in the period between 2014 and 2020.

**Background to the application**

4. Mr Wang is a Taiwanese national. Mr Wang owns, or has effective control on behalf of his family of, a large portfolio of assets a significant proportion of which derive from his late father. For reasons which I do not need to expand upon, the portfolio of assets which derive from his father has been the subject of extensive litigation in several jurisdictions and Mr Wang's access to and freedom to deal with the portfolio has been restricted. In particular, the portfolio was for a long period of time subject to an attachment and freezing order in Switzerland. I am told by the applicants that that order has recently been released, but I have seen no evidence in that respect.
5. In the Autumn of 2014, Mr Wang entered into discussions with Mr Hussam Otaibi and Mr Wilcox about the possibility of the Floreat group assisting Mr Wang with family office and investment advisory services. At this time, many of the restrictions to which I have just referred were fully in place and Mr Wang and his family were experiencing significant difficulties in gaining access to the assets and income from the portfolio to support their lifestyles and meet their ongoing expenses.

6. Following these discussions, from late 2014, Floreat group companies provided, inter alia, investment advisory and family office services to Mr Wang and the other applicants pursuant to:
  - i) an Investment Advisory Agreement of 11 December 2014 between the fourth respondent, Floreat Merchant Banking Ltd (“FMB”), the fifth respondent, Floreat Wealth Management Ltd (“FWM”) and Mr Wang (the “2014 IAA”);
  - ii) a Supply of Services Agreement of 11 December 2014 between the sixth respondent, Floreat Private Ltd (“FPL”) and Mr Wang (the “2014 SOSA”);
  - iii) an Investment Advisory Agreement dated 19 January 2016 between the eighth respondent, LV II Investment Management Ltd (“LVII”) and Blue Water Limited (the second applicant) (the “2016 IAA”); and
  - iv) a Supply of Services Agreement dated 14 December 2018 between FPL and Amida Group Holdings (the third applicant) (the “2018 SOSA”).
7. The services provided under these agreements were wide-ranging. The respondents say that the services provided to Mr Wang and the applicants were of great benefit to them and that substantial fees are due under the agreements, which Mr Wang and the other applicants have failed to pay. Steps are now being taken to commence arbitration under those agreements.
8. Mr Wang and the other applicants, however, say that under those agreements and in related transactions, assets in the portfolio were invested in structures and arrangements that were designed primarily to benefit the Floreat principals or to acquire assets (principally art and real estate) for the benefit of the Floreat principals or which have been enjoyed by the Floreat principals. Some of the facts are hotly disputed. It is not the purpose of these proceedings to decide upon them.
9. The applicants say that the application for pre-action disclosure is intended to assist them in clarifying their potential claims against the respondents, primarily the Floreat principals, and to enable them to plead their case more accurately.

### **Procedural background**

10. The application was made on 23 March 2021. In the application, the applicants applied:
  - i) for an order under section 33(2) of the Senior Courts Act 1981 and CPR 31.16 for pre-action disclosure of documents within nine classes of documents set out in the schedule to a draft order attached to the

application in connection with “proceedings in respect of matters set out in Mr Wang’s first witness statement”; and

- ii) for orders under CPR 5.4C and CPR 39.2 to preserve the confidentiality of matters set out in the second witness statement of Mr Wang.

11. The application was supported by two witness statements made by Mr Wang.

- i) Mr Wang’s first witness statement provided background to his relationship with the Floreat principals, the 2014 IAA and the 2014 SOSA with the Floreat companies, the changes to those arrangements leading to the 2016 IAA and the 2018 SOSA with the second and third applicants, and the investments made under these arrangements. It set out the “main categories of complaint” which Mr Wang asserts may give rise to future proceedings and provides some detail of the various matters of alleged wrongdoing on which Mr Wang relies. I have set out more details of these matters later in this judgment, but in summary they are:
  - a) the classification of Mr Wang as a “professional investor” or a “professional client” for the purpose of the IAA 2014 and IAA 2016;
  - b) representations made to Mr Wang that the funds, in which the portfolio was invested, were established funds in which other high-net worth individuals had invested;
  - c) investments made by those funds in real estate assets – namely an estate in Berkshire called “Springs Farm”, office premises and residential apartments at 33 Grosvenor Street, London, and land in Mexico referred to as “Isla Holbox” (or “Holbox Island”) – which the Floreat principals have used or enjoyed for their own benefit or which Floreat group companies have occupied;
  - d) the arrangements for the payment of expenses of Mr Wang and his family through a company called Mount Tai Limited (“Mount Tai”), which is owned by Mr Hussam Otaibi (the first respondent);
  - e) the mismanagement of Mr Wang’s assets and the charging of excessive fees; and
  - f) the failure by the respondents to provide details of the investments when requested.

The exhibits to Mr Wang’s first witness statement include copies of the IAA 2014, the 2014 SOSA, the 2016 IAA, the 2018 SOSA, filings at

HM Land Registry relating to the property at 33 Grosvenor Street, and correspondence concerning Mr Wang's attempts to obtain information about the investments and solicitors' correspondence in relation to the proceedings.

- ii) Mr Wang's second witness statement provides background to the imposition of the freezing and attachment orders that have been imposed on the portfolio, the steps that have been taken to secure the lifting of those orders and details of the portfolio. The exhibits include documents relating to the imposition of the freezing and attachment orders and a detailed report prepared by FFP (Cayman) Limited ("FFP"), a corporate and trustee services firm in the Cayman Islands, for the purpose of these proceedings, setting out their findings concerning transactions involving the assets in the portfolio undertaken by the respondents.
12. I have set out more details of the application for the order for pre-action disclosure later in this judgment. The application has not been served on the eighth respondent, LVII.
  13. On 10 June 2021, FMB, FWM and FPL (the fourth, fifth and sixth respondents) made a cross-application to strike out the application in so far as it related to them for lack of jurisdiction. This was on the grounds that those respondents were parties to advisory and service agreements with the applicants (i.e. the 2014 IAA, the 2014 SOSA and the 2018 SOSA), which contained binding arbitration provisions; that the matters raised in the application fell within the scope of those provisions; and that the Court had no jurisdiction in respect of any dispute which fell within those provisions. As a result, there was no likelihood of those respondents becoming party to proceedings in the High Court as required by CPR 31.16.
  14. At a hearing on 16 June 2021, I made directions for the application and the cross-application to be heard together and for the provision of evidence by the parties in relation to the application and the cross-application.
  15. The hearing of the application was listed for 16 and 17 September 2021.
  16. On 14 July 2021, the applicants filed a third witness statement of Mr Wang in support of their application. This statement concerned arrangements involving a Cayman Islands company known as Shanti Limited ("Shanti"), which is a subsidiary of one of the Floreat Funds<sup>1</sup>, Principal Investing Fund I Limited ("PIF"), in the purchase and loan of works of art. Mr Wang asserted in his witness statement that Shanti was a vehicle designed to purchase art for him and that funds had been improperly diverted to purchase works of art for use by the

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<sup>1</sup> Defined at [24(ii)] below.

Floreat principals. No amendment was made to the application or to the draft order and the related schedule of documents.

17. The respondents filed a witness statement of Mr Hussam Otaibi in response to the application and in support of the cross-application on 21 July 2021. In this statement, Mr Hussam Otaibi set out details of the background to the relationship between Mr Wang and the Floreat principals and the work undertaken by the Floreat group for Mr Wang and the other applicants, addressing in some detail (and refuting) the allegations set out in Mr Wang's first witness statement. He also addressed and again refuted the allegations made in Mr Wang's third witness statement in relation to Shanti, albeit not in the detail that he dealt with the other allegations on the grounds that no documents were requested in relation to Shanti as part of the application.
18. On 9 August 2021, the applicants filed a fourth witness statement of Mr Wang and witness statements of Thomas Lowe QC and Mr Harvey Knight in reply to the applicants' evidence.
  - i) Mr Wang's fourth witness statement replied to some of the evidence in Mr Hussam Otaibi's first statement. In particular Mr Wang responded to Mr Otaibi's suggestion that Mr Wang should properly be regarded as a sophisticated investor, to Mr Otaibi's assertions regarding the true purpose of the application, and to details of the arrangements surrounding the investments in Springs Farm, 33 Grosvenor Street, the artworks acquired through Shanti and for the payment of expenses by Mount Tai. The exhibits to the statement included a transcript of a telephone conversation between Mr Hussam Otaibi, Mr Wilcox and Mr Wang on 22 August 2020, which Mr Wang relied upon as evidence of Mr Hussam Otaibi's "abusive and patronising" attitude towards him, in support of his challenge to some of Mr Hussam Otaibi's statements in his first witness statement regarding the provision of documents, and in support of an assertion that Mr Otaibi had sought to mislead the Court in his evidence. The applicants also submitted a "clean" copy of a recording of that call.
  - ii) Thomas Lowe QC is a barrister at Wilberforce Chambers. He provided evidence in support of Mr Wang's assertion that he could not and should not have been designated as a professional investor.
  - iii) Mr Knight is a partner at Withers LLP. He provided evidence comparing the categorization of clients by firms that are regulated by the Financial Conduct Authority ("FCA") and the classification of clients under the regulatory regime that applies to providers of financial services in Switzerland.

19. On 24 August 2021, the respondents filed a second witness statement of Mr Hussam Otaibi in reply to the applicants' evidence. In his second witness statement, Mr Otaibi addressed (and again refuted) many of the specific points made in Mr Wang's fourth statement. He expressly denied any allegation that he had lied or sought to mislead the Court in his first witness statement and provided an alternative explanation for the conduct of the call on 22 August 2020.
20. On 10 September 2021, the applicants' solicitors wrote to the respondents' solicitors seeking the respondents' agreement to amend the original application. Their letter enclosed an amended application notice, a revised draft order and a revised schedule of documents for which disclosure was sought. I will address some of the changes in more detail below, but in summary, the proposed amendments:
  - i) expanded the proceedings to which the application was expressed to relate to include matters arising from Mr Wang's third witness statement;
  - ii) removed the fourth, fifth, sixth, and eighth respondents as respondents to the application;
  - iii) removed some documents from the schedule to the draft order attached to the original application; and
  - iv) added requests for other documents, which were not included in the schedule to the draft order attached to the original application.
21. On 13 September 2021, the respondents' solicitors responded to the applicants' solicitors' letter in some detail, refusing to consent to the proposed amendments.
22. On 14 September 2021, the applicants applied to the Court to amend their application for pre-action disclosure in the manner set out in the enclosures to the applicants' solicitors' letter of 10 September 2021.

## **The Application and the amendments to the Application**

### The Application

23. As I have mentioned above, in the application for pre-action disclosure, the applicants applied for an order for disclosure of documents set out in a schedule to a draft order attached to the application.

*The documents of which disclosure is requested*

24. The schedule runs to some ten pages and extends to nine classes of documents, which are broken down into 28 categories. I will not set out the schedule in full here, but, in summary, the classes of documents were:
- i) Class A: documents relating to the engagements of FMB and/or FWM, and LVII to provide investment advisory services pursuant to the 2014 IAA and the 2016 IAA;
  - ii) Class B: documents relating to the establishment, administration and management of various investment funds or fund entities managed by or advised by members of the Floreat group, which are referred to as the “Floreat Funds” (in particular, The Long View II Fund, Floreat Fixed Income SA (“FFISA”), PIF, Global Fixed Income Fund I Ltd (“GFIF”), and Real Assets Global Opportunity Fund I Ltd (“RAGOF”));
  - iii) Class C: documents relating to the applicants’ investment in a series of notes issued by FFISA referred to as the “Aviation Notes” representing an underlying investment in aircraft leases;
  - iv) Class D: documents relating to the investment by RAGOF in Springs Farm and the use or occupation of Springs Farm by members of the Otaibi family;
  - v) Class E: documents relating to the investment by RAGOF in the leasehold estate in 33 Grosvenor Street and the use or occupation of the property or any part of the property by any member of the Floreat group or any of the Floreat principals;
  - vi) Class F: documents relating to the investment by GFIF in real estate in Mexico known as Isla Holbox;
  - vii) Class G: documents relating to any loans between any entity in the Floreat group and Mr Wang, any member of his family, and any entity owned by Mr Wang or any member of his family;
  - viii) Class H: documents relating to any fees charged by and paid to the investment advisers under the 2014 IAA and the 2016 IAA, and documents recording the arrangements under which the investment advisers engaged other persons to assist the investment advisers with the performance of their duties under the 2014 IAA and the 2016 IAA;
  - ix) Class I: documents relating to the arrangements for the engagement of other persons relating to the performance of services under the 2014 SOSA and the 2018 SOSA and documents relating to charges by and

paid to Floreat group companies under the 2014 SOSA and the 2018 SOSA.

25. The brief summary of the various classes of documents that I have set out above does little justice to the breadth of the disclosure that is requested by the application. As I have mentioned, the schedule is lengthy and runs to some ten pages. Each of the nine classes of documents is broken down into various categories. For example, in relation to the Class A documents (which concern the engagement of FMB, FWM and LVII under the 2014 IAA and the 2016 IAA), the various categories include documents relating to the client inception procedures undertaken by the Floreat group in respect of those engagements, the preparation of the 2014 IAA and the 2016 IAA, the designation of Mr Wang as a “professional client” or a “professional investor”, the application of the FCA rules to the engagements, and correspondence with, information provided to, and advice given to, the applicants about those engagements and Mr Wang’s status as a “professional client” or a “professional investor” for the purpose of those engagements.
26. The drafting of the categories themselves is in broad terms. Class A category 1 (which concerns the engagement of FMB and FWM under the 2014 IAA) is expressed to extend to “All personal, internal or intra-Floreat Group correspondence, memoranda, notes, reports, minutes or other records, and any correspondence or written records of communications with any third parties concerning” the matters set out in the category. For the most part, the other classes and categories are expressed in similarly broad terms.

*The anticipated proceedings*

27. No draft particulars of claim was filed with the application and the evidence filed in support of the application does not contain a letter before action providing more details of the claims in support of which the pre-action disclosure order is sought. The only reference in the application to the anticipated proceedings in respect of which disclosure is sought is to “matters set out in Mr Wang’s first witness statement”.
28. Mr Wang’s first witness statement contains details of various matters which the applicants assert constitute evidence of wrongdoing on the part of one or more of the respondents.
29. In paragraph 17, Mr Wang sets out five “main categories of complaint” being the circumstances surrounding Mr Wang’s designation as a “professional investor” or a “professional client”, representations made to Mr Wang regarding the nature of and the other investors in the various funds in which the portfolio was invested, the interests of the Floreat Funds in properties which were used by the Floreat principals or Floreat group companies (33 Grosvenor Street, the

residential apartments at 33 Grosvenor Street, and Springs Farm), the high level of fees charged directly or indirectly to Mr Wang, and the evasive approach of the Floreat principals to Mr Wang's questions regarding the investment of the portfolio.

30. The only direct references to potential causes of action are in paragraph 18 of the statement. In paragraph 18, Mr Wang postulates that "in the circumstances" he and the other applicants have claims against the respondents which "might include mismanagement, misrepresentation, breach of contract, breach of fiduciary duty claims, and claims arising from breaches of regulatory obligations as well as potentially more serious claims". He then continues to describe his understanding that he may have claims which allow him to "trace and recover" sums of cash or assets which are in the hands of the Floreat principals or companies which they control.

#### The application to amend the Application

31. As I have mentioned above, on 14 September 2021, the applicants made an application to amend the application. In addition to the amendments which remove the fourth, fifth, sixth, and eighth respondents from the application for pre-action disclosure (and so abandon the application against them) and the amendment to the scope of the anticipated causes of action (see below), the amended application made changes to the documents for which disclosure was requested as set out in the schedule to the draft order.

#### *Amendments to the documents for which disclosure is sought*

32. The main changes to the application in terms of removing requests for disclosure were as follows:
- i) the removal of Class F of the original application, which related to investments in Isla Holbox;
  - ii) the removal of Class G in the original schedule, which concerned documents relating to loans made by entities within the Floreat group to Mr Wang, members of his family, and entities owned or controlled by Mr Wang or members of his family;
  - iii) the removal of Class H of the original schedule relating to investment fees charged by FMW, FWB and LVII under the 2014 IAA and the 2016 IAA;
  - iv) the removal of Class I of the original schedule, which included documents relating to fees charged under the 2014 SOSA and the 2018 SOSA.

33. In addition, the amended application deleted some of the individual categories within other classes or specific references to documents within some categories. It is not necessary to set out those changes in detail for the purposes of this judgment.
34. The main additions that were made to the schedule were as follows:
- i) the extension of the disclosures relating to the property at 33 Grosvenor Street in Class E to include the residential apartments at 3 King's Yard;
  - ii) the addition of an indemnity in relation to the acquisition of Springs Farm in Class D;
  - iii) the inclusion of valuations, and correspondence relating to valuations, for Springs Farm (within Class D) and the properties at 33 Grosvenor Street and 3 King's Yard (within Class E);
  - iv) the introduction of a new class of documents (as a new Class F) relating primarily to the acquisition and loan of artworks by Shanti; and
  - v) the addition, as a new Class J, of documents relating to the involvement of Mount Tai in the payment of expenses for and on behalf of Mr Wang and members of his family.
35. The new Class F relating to the acquisition and loan of artworks by Shanti is in the following terms:
- “17. All personal, internal or intra-Floreat Group correspondence, memoranda, reports, notes, minutes and resolutions of board meetings of any entity within the Floreat Group or other records or agreements or correspondence (or records of correspondence) with third parties or Shanti Limited (“Shanti”), “Modern Forms”, Liam Newnham or Nick Hackworth or records of any advice given to [the applicants] concerning:
- 17.1 the incorporation of Shanti;
- 17.2 the acquisition of artworks by or on behalf of Shanti, including the making or recommendations for and all the selection of such works;
- 17.3 the origin of funds for the purchase of such artwork;
- 17.4 the location(s) (other than [Mr Wang's home address]) that such artworks were to be stored, hung or displayed; and
- 17.5 the terms on which any artworks were held or displayed by any person at any location other than [Mr Wang's home address].

36. The new disclosures in relation to Mount Tai were in the following terms:

“29. Records of all payments made for or on behalf of [the applicants] or any of the Floreat Principals or other Floreat Entity by or on behalf of [Mount Tai].

30. Any agreements between Mount Tai and any other Floreat Entity or third party relating to the affairs of [the applicants] or of the first applicant’s family.”

*Amendments to the potential causes of action*

37. As regards the potential proceedings in relation which disclosure is sought, the amended application expands the reference in the amended application notice to include “matters set out in Mr Wang’s first and third witness statements”.

38. Mr Wang’s third witness statement does not expand upon the potential causes of action available to Mr Wang. It sets out Mr Wang’s concerns regarding the purchase and loans of works of art made by Shanti and the enjoyment of some of those works of art by the Floreat principals. In the context of the amended application, and assuming that the application to amend were granted, it represents therefore another “category of complaint” which may give rise to claims of the nature set out in Mr Wang’s first witness statement.

**Issues between the parties**

39. The applicants accepted that, without the agreement of the respondents, they would require the permission of the Court for the amendments to the application which introduced new disclosures which had not featured in the original application. The argument before me proceeded by reference to the revised draft order and attached schedule which was enclosed with the application to amend the original application for pre-action disclosure which was filed on 14 September 2021. I will proceed on the same basis.

40. The respondents nonetheless maintain their objection to the amendments to the application to include the additional disclosures, in particular, in relation to Shanti, and to the proposed extension of the scope of the potential proceedings. I have addressed arguments concerning the application to amend the original application towards the end of this judgment.

41. There was also some dispute between the parties as to whether or not it was open to the applicants to withdraw the application against the fourth, fifth, sixth and eighth respondents without filing and serving a notice of discontinuance under CPR 38. The respondents say that the application for pre-action disclosure is a “claim” for the purposes of the Civil Procedure Rules and that the removal of the application in respect of the fourth, fifth, sixth and eighth respondents is therefore a discontinuance to which the costs consequences in

CPR 38.6 should apply. Before me, the respondents withdrew their challenge, but on the understanding that the costs consequences would be equivalent to those which would follow a discontinuance under CPR 38.6. Mr Wardell accepted that approach on behalf of the applicants.

42. As a result of the withdrawal of the application against the fourth, fifth, sixth and eighth respondents, the cross application falls away.
43. Finally, as I mentioned above, the original application included an application by the applicants for orders under CPR 5.4C and CPR 39.2 to preserve the confidentiality of matters contained in the second witness statement of Mr Wang. Before me, Mr Wardell did not press the application under CPR 39.2 for part of the hearing to be held in private. This was on the basis that the parties would not refer in the proceedings to the amount of Mr Wang's net wealth or details of it. Mr Wardell did, however, pursue his application for a direction that the applicants should be given notice of any application by a non-party under CPR 5.4C(2) to obtain copies of Mr Wang's second witness statement or any of the exhibits to it.
44. I accept Mr Wardell's submissions that the material in Mr Wang's second witness statement and its exhibits are sensitive. The principle of open justice is, of course, a strong one, but there are nonetheless circumstances in which derogations from the principle are permitted in the interests of justice. In this case, it is difficult to determine that balance in advance of any application for copies of the documents. It seems to me appropriate for any arguments that the material in Mr Wang's second witness statement should not be disclosed to be considered in the light of the facts and circumstances surrounding any application that is made by a non-party under CPR 5.4C(2) for copies of any of the documents. I therefore propose to grant the direction that Mr Wardell seeks.

### **The legal principles**

45. The court's power to order pre-action disclosure is set out in CPR 31.16. It provides, so far as relevant:

#### **31.16— Disclosure before proceedings start**

- (1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started<sup>1</sup>.
- (2) The application must be supported by evidence.
- (3) The court may make an order under this rule only where—
  - (a) the respondent is likely to be a party to subsequent proceedings;

- (b) the applicant is also likely to be a party to those proceedings;
- (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
- (d) disclosure before proceedings have started is desirable in order to—
  - (i) dispose fairly of the anticipated proceedings;
  - (ii) assist the dispute to be resolved without proceedings; or
  - (iii) save costs.

...

46. It is clear from the case law authorities that the structure of CPR 31.16 requires a two-stage approach: the Court must first determine whether the jurisdictional thresholds set out in CPR 31.16(3)(a)-(d) are met; and, if so, the Court must then consider whether, as a matter of discretion, an order for pre-action disclosure should be made (see, for example, *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 at [10]). It is also clear that the tests in CPR 31.16(3) are merely pre-conditions to the exercise of the discretion. The fact that they are met does not give rise to any presumption that the discretion should be exercised in favour of the grant of disclosure (see, for example, *Black v Sumitomo Corporation* [2001] EWCA Civ 1819 (“*Black*”) per Rix LJ at [73]).
47. The parties were agreed that principles that are to be applied by the Court when considering whether to make an order for pre-action disclosure are accurately summarized in the judgment of Blair J in *Assetco plc v Grant Thornton LLP* [2013] EWHC 1215 (Comm) (“*Assetco*”) at [17]. Those principles are recited in the more recent judgment of Jacobs J in *Carillion plc (in liquidation) v KPMG LLP* [2020] EWHC 1416 (Comm) (“*Carillion*”) at [66]:

66. The relevant legal principles are conveniently summarised by Blair J. in paragraph 17 of *Assetco*. CPR 31.16 provides that the court may make an order for pre-action disclosure only if certain conditions are satisfied:

- i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely: *Black v Sumitomo Corp* [2002] 1 WLR 1562 at [71 – 72], Rix LJ, which is the leading case on the rule.
- ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in

the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.

iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16(3)(d).

iv) In considering whether to make an order, among the important considerations are the nature of the loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure (*Black v Sumitomo Corp* at [88]).

v) The anticipated claim must have a real prospect of success.

vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual.

48. In *Carillion*, following the passage from his judgment that I have quoted above, Jacobs J continues to identify three further guiding principles, which I have also taken into account.

- i) Any request for pre-action disclosure must be “highly focussed” and confined to what is “strictly necessary” for the purposes for which pre-action disclosure may be ordered (*Carillion* [67], citing *Hutchison 3G UK Ltd. v O2 (UK) Ltd.* [2008] EWHC 55 (Comm) (“*Hutchison*”) per Steel J at [40]).
- ii) The exercise of the discretion to make a pre-action disclosure order is in the nature of a case management decision. It requires the judge to take a “big picture” view of the application in question (*Carillion* [68], referring to the Court of Appeal in *Total E&P Soudan SA v Edmonds* [2007] EWCA Civ 50 (“*Total*”).
- iii) In exercising its discretion, at some point, the court must also “stand back and look at the matter in the round”. The question at that level “may include the general question: does the request for pre-action disclosure further the overriding objective in this case, or not” (*Carillion* [68], citing *Hands v Morrison Construction Services Ltd.* [2006] EWHC 2018 (Ch) per Michael Briggs QC (as he then was) at [30]).

## The jurisdictional thresholds

49. I will therefore turn to the first part of the test: the jurisdictional thresholds.

### The applicants and respondents are likely to be party to proceedings

50. I will take the first two requirements – that the respondent is likely to be a party to subsequent proceedings (CPR 31.16(3)(a)) and that the applicant is also likely to be a party to those proceedings (CPR 31.16(3)(b)) – together.
51. These two requirements do not require that proceedings are likely. They simply require that, if there are to be proceedings, the applicants and respondents are likely to be parties to them (*Black* [71], *Carillion* [66(i)]). As such, these requirements do not impose a high bar. The word “likely” means no more than “may well” (*Black* [72], [73]).
52. It is, however, important to the application of these requirements to be able to identify the nature of the proceedings to which the applicants and the respondents are likely to be parties. That issue is also critical to the third jurisdictional threshold (standard disclosure). For the most part, the parties addressed the question of the nature of the proceedings in the context of their arguments about that requirement. I intend to do the same. Once the nature of the anticipated proceedings has been identified, it should, in any event, be a relatively straightforward process to identify the potential parties to those proceedings. However, I will address some of the parties’ submissions on these first two requirements at this stage.
53. In his skeleton argument, Mr Hunter made the point that these first two requirements cannot be met to the extent that the anticipated proceedings are proceedings that fall within the scope of the arbitration provisions in the investment advisory and services agreements (the 2014 IAA, the 2016 IAA, the 2014 SOSA and the 2018 SOSA). In those cases, the Court has no jurisdiction and so there are no anticipated proceedings in respect of which the requirements can be met.
54. I did not understand Mr Wardell to challenge that particular submission. In any event, I agree with Mr Hunter on this point. The reference to “subsequent proceedings” in CPR 31.16(3)(a) and (b) must be a reference to anticipated High Court proceedings. The threshold is not met and the Court has no power to order pre-action disclosure in relation to anticipated arbitral proceedings in respect of which it has no jurisdiction (*Travelers Insurance Company Limited v Countrywide Surveyors Limited* [2010] EWHC 2455 (TCC) per Coulson J at [18]).
55. In the hearing, Mr Hunter, addressed this question by reference to the potential causes of actions that are referred to in paragraph 18 of Mr Wang’s first witness

statement (to which I referred at [30] above), namely, breach of contract, breach of FCA regulations, mismanagement, breach of fiduciary duty and misrepresentation.

56. He says that, of those five potential claims, three of them fall away with the removal of the fourth, fifth, sixth and eighth respondents as respondents to the application as they are the only potential parties to those claims: only the fourth, fifth and eighth respondents entered into contracts with the applicants; the only FCA regulated entity is the fourth respondent and its appointed representative is the fifth respondent; and, after the removal of the eighth respondent, none of the investment managers are parties to the application.
57. The remaining two potential claims are misrepresentation and breach of duty. Mr Hunter submits that it is clear from the evidence that the only potential parties to a claim for misrepresentation are the first applicant and the first respondent. As regards, the potential claim for breach of fiduciary duty, the applicants' case seems to be that this is a case of breach of personal fiduciary duty; the only potential parties are the first applicant and the first and third respondents.
58. Once again, I did not understand Mr Wardell to challenge those submissions. However, as I will come on to discuss in more detail, Mr Wardell articulated the anticipated proceedings in a rather different manner at the hearing. In short, as advanced at the hearing, the applicants' primary case involves a claim for conspiracy by unlawful means principally on the part of the Floreat principals to exploit Mr Wang's assets for their own benefit or related claims for breach of fiduciary duty by the Floreat principals. On that basis, Mr Wardell says that the anticipated proceedings would not fall within the scope of the arbitration provisions and that the application is not affected by the removal of the fourth, fifth, sixth, and eighth respondents.
59. On Mr Wardell's reformulation of the anticipated proceedings, the main parties to any possible proceedings are likely to be the Floreat principals (the first, second and third respondents). However, if there are proceedings of this nature the other respondents may well be parties to those proceedings, whether as alleged parties to any conspiracy or in relation to the application of any remedy. On that basis, I will treat these jurisdictional threshold requirements as having been met.

The documents sought must fall within the scope of the standard disclosure

60. The third jurisdictional threshold is that, if proceedings had started, the respondents' duty by way of standard disclosure (set out in CPR 31.6) would extend to the documents or classes of documents of which the applicants seek disclosure (CPR 31.16(3)(c)).

*Principles from the case law*

61. The fact that this threshold requires the application of the rules in CPR 31.6 to the documents of which the applicants seek disclosure means that at the time of the application, the issues must be sufficiently clear to enable the requirement to be properly addressed. In *Black*, Rix LJ, in setting out the principles that govern the application of this test, says this (at [76]):

76. In general, however, it should in my judgment be remembered that the extent of standard disclosure cannot easily be discerned without clarity as to the issues which would arise once pleadings in the prospective litigation had been formulated. This court touched on the question in *Bermuda v. KPMG* when Waller LJ there said (at para 26) that —

“The circumstances spelt out by the rule show that it will “only” be ordered where the court can say that the documents asked for will be documents that will have to be produced at the standard disclosure stage. It follows from that, that the court must be clear what the issues in the litigation are likely to be i.e. what case the claimant is likely to be making and what defence is likely to be being run so as to make sure the documents being asked for are ones which will adversely affect the case of one side or the other, or support the case of one side or the other.”

The point is reiterated by Blair J in *Assetco* (at [17]) and Jacobs J in *Carillion* (at [66(ii)]).

62. Once the issues in the anticipated proceedings have been identified, the other key issue is the application of the test in CPR 31.6 itself to the documents sought by the application. Standard disclosure within CPR 31.6 requires the disclosure of documents on which a party relies in support of its case and documents which, to a material extent, adversely affect a party’s case. It does not require the disclosure of other relevant documents, for example, those which describe the background to the case or so called “train of enquiry” documents which may lead to an enquiry enabling a party to advance their own case or to undermine the case of an opponent.
63. The case law authorities to which I have been referred suggest that, once the issues in the anticipated proceedings have been identified, the test in CPR 31.16 is to be strictly applied. Although CPR 31.16 expressly refers to “classes of documents”, it is not appropriate for an applicant to obtain disclosure of documents by pre-action disclosure that it would not in due course be able to obtain by standard disclosure. Also, it is not appropriate to require the respondents to identify which documents are within the scope of standard disclosure (*Total* [38], *Hutchison* [38]). Rather, it is incumbent upon the

applicant to ensure that an application is appropriately focussed and does not extend to any documents which are merely relevant background or train of enquiry documents (*Hutchison* [40]). Although the applicant's case by definition will not yet have been pleaded, it is for the applicant to show that it is "more probable than not" that the documents requested fall within the scope of standard disclosure in the context of the anticipated proceedings (*Hutchison* [45]).

64. As a final point, it is clearly open to the Court (as occurred in *Total*) to make a disclosure order in respect of some but not all of the documents in respect of which disclosure is sought. So this jurisdictional threshold can be met in respect of some but not all of the documents of which disclosure is requested.
65. I remind myself, however, that this is simply a threshold test which acts as a pre-condition to the exercise of discretion. There is sufficient flexibility within the exercise of discretion to allow the court to ensure that an order is only made in appropriate cases. The breadth of the issues which arise from the applicants' case and the scope of disclosure which is sought are matters that can be properly addressed at that stage. The question at this stage is simply whether the pre-condition to the exercise of that discretion is met.

*The application of CPR 31.16(3)(c) in this case*

66. As I have mentioned above, the application and the amended application identify the anticipated proceedings simply by reference to matters set out in Mr Wang's witness statements. Paragraph 18 of Mr Wang's first witness statement then identifies various causes of action which might arise from those matters.
67. In his skeleton argument and at the hearing, Mr Wardell, for the applicants, framed the anticipated causes of action in rather different terms. Mr Wardell says that the central cause of action is a claim of conspiracy by unlawful means on the part of the Floreat principals to exploit Mr Wang and his wealth for their own benefit through the creation of the various corporate and fund structures. The unlawful means on which the applicants rely are, in essence, the "categories of complaint" identified in Mr Wang's witness statements and include:
  - i) breaches of the FCA regulations under which Mr Wang was taken on as a professional client or a professional investor;
  - ii) misrepresentations by the Floreat principals and other respondents to Mr Wang of the nature of the funds and investments and the other investors in the funds;
  - iii) breaches of fiduciary duty in relation to the structure of funds and other investments into which Mr Wang's funds were invested for the benefit of the Floreat principals giving rise to excessive fees;

- iv) misrepresentations in the offering memoranda for some of the funds; and
  - v) the exploitation of assets (principally real estate and artworks) held in the Floreat Funds for the benefit of the Floreat principals and/or Floreat group companies.
68. Mr Wardell says the case can also be put in terms of separate breaches of fiduciary duty by the Floreat principals as a result of which the Floreat principals and other respondents may be required to account for benefits that they have received.
69. Mr Wardell took me to a great deal of evidence in support of these assertions. I do not intend to set out that evidence in detail in this judgment, but I have set out below, in summary, the main claims made by the applicants.
- i) The first complaint relates to the circumstances in which Mr Wang was taken on as a client by the Floreat group. The applicants' assertion is that, under the relevant FCA rules, the Floreat group could not have provided the investment advisory services to Mr Wang unless he was a "professional investor", that Mr Wang did not meet the criteria to be classified as a "professional investor", that, at best, the Floreat group relied on representations made by Mr Wang in the relevant agreements without undertaking any appropriate due diligence or, at worst, that the Floreat principals knew that Mr Wang did not meet the relevant criteria and the FCA rules were deliberately broken.
  - ii) As a general point, Mr Wang refers in his evidence to alleged representations made by Mr Hussam Otaibi that the funds in which the portfolio was invested were established funds with significant investment by other investors, including institutional investors and other high net worth individuals. In fact, the applicants assert that Mr Wang held the vast majority of the interests in the funds: a 95 per cent. interest in both GFIF and PIF; a 100 per cent. interest in The Long View II Fund; and a 97 per cent. interest in RAGOF.
  - iii) The applicants claim that the funds in which the portfolio was invested were structured to produce fees for the benefit of the Floreat group (and ultimately for the benefit of the Floreat principals) rather than for any commercial purpose. This is a common complaint in relation to most of the funds. By way of example, Mr Wardell took me to details of the investments made in The Long View II Fund, which it would appear invested primarily in "blue chip" equities. However, the structure of the fund, the terms for redemption of its units and its fee structure appear to be designed in a manner, which is more consistent with the structure of a private equity fund and to generate fees for the Floreat group

investment advisers and managers commensurate with that type of fund even though the assets of the fund are materially lower risk.

- iv) The applicants say that approximately 20 per cent. of the entire portfolio was invested in a single series of notes (referred to as “the aviation notes”) issued by FFISA and which provide an indirect investment in aircraft leases. Mr Wang holds 96 per cent. of the series partly directly and partly through GFIF. Mr Wardell says that the structure of the fund and the fees paid within it are not commercial and are designed to benefit the Floreat entities and through them the Floreat principals.
- v) In relation to the investment by RAGOF in the property in Mayfair at 33 Grosvenor Street, Mr Wardell took me to evidence relating to the acquisition of long lease of the property in 2016 by a subsidiary of RAGOF, which is incorporated in the British Virgin Islands, and which is known as RAGOF 33 Grosvenor Street Limited. The applicants say that the acquisition of the property and its subsequent renovation were financed by loans from the portfolio. The property has been leased to Floreat House Limited (“FHL”), the fourteenth respondent, a Floreat group company, and is occupied by Floreat group companies as the group’s head office. Mr Wardell questioned why, given the lease was granted between parties who were not at arm’s length, there had been no independent valuation or assessment of rent that is paid by FHL under these arrangements. He also referred to the fact that the transaction for the acquisition of 33 Grosvenor Street included three residential apartments (known as 3 King’s Yard) which were occupied or used by the Floreat principals. No details of the apportionment of the purchase price had been provided.
- vi) In relation to the investment by RAGOF in the property at Springs Farm in Berkshire, the applicants say that the property was acquired by RAGOF using funds from the portfolio and was refurbished by Studio 51 North Limited, the thirteenth respondent, a company controlled by Mr Hussam Otaibi, once again with funds derived from the portfolio. The property has been occupied by Mr Hussam Otaibi and members of the Otaibi family. Until recently, that occupation has been rent free.
- vii) Furthermore, the applicants claim that the structure of and terms of the acquisition of Springs Farm by RAGOF were such that they allowed Mr Hussam Otaibi and a Jersey incorporated company owned and controlled by Mr Mutaz Otaibi to strip out any profit from the sale of the property so that RAGOF could not benefit from any uplift in value. They also claim that the offering memorandum misrepresented the circumstances in which certain preference shares which were issued as part of the consideration for the acquisition of Springs Farm were to be redeemed.

- viii) The applicants also raise concerns about the arrangements involving Shanti. Shanti is owned by PIF and was established, the applicants say, to acquire works of art, which could be made available to Mr Wang. Mr Wardell produced evidence which he says supports the submission that the structure was used by Mr Hussam Otaibi to misappropriate funds from Mr Wang to acquire an art collection, which was represented as being owned by Mr Hussam Otaibi and/or which was made available to the Floreat principals, members of the Floreat Group and to “Modern Forms”, a collection and curatorial platform for modern art, established by Mr Hussam Otaibi.
- ix) Mr Wardell also referred to the arrangements concerning Mount Tai, the seventh respondent. Mount Tai has been used as a vehicle to pay expenses on behalf of Mr Wang and members of Mr Wang’s family, which have then been reimbursed from the portfolio. Mr Wardell raised concerns about the level of fees paid to Mount Tai for the handling of these payments (whether they should be charged at rate of 10 per cent. or 17.5 per cent. under the relevant agreements), whether Mount Tai had been used to discharge expenses for the benefit of the Otaibi family, and whether Mount Tai had been used to acquire works of art for Shanti, thereby incurring additional fees under the agreements with Mount Tai.
70. Mr Wardell says that the issues are plain: the evidence suggests that the Floreat principals were engaged in a broadly based conspiracy by unlawful means to deprive Mr Wang and his family of their assets. The “categories of complaint” (which I have described above) represent the means by which that conspiracy was given effect and, the applicants say, provide clear evidence of wrongdoing on the part of the Floreat principals. In the alternative, Mr Wardell says that the “categories of complaint” provide clear evidence of breach of fiduciary duty by the Floreat principals. The various classes of documents listed in the schedule to the draft order enclosed with the amended application are necessary to enable the applicants to plead their case effectively. The removal of the fourth, fifth sixth, and eighth respondents from the application does not constrain the application as the focus of the application is on the Floreat principals. The question of whether the relevant documents are within the control of the remaining respondents is a matter which can be resolved at a later stage and should not prevent the order of disclosure at this stage.
71. Mr Hunter, for the respondents says that the issues are far from clear. The applicants have failed to identify with sufficient clarity the issues on which they intend to rely; they have not provided particulars of claim or any letter before action. The effect, the respondents say, is that it is not possible to apply the test in CPR 31.6 to the documents requested. In addition, in their responsive evidence, the respondents dispute much of the evidence on which the applicants

rely. Mr Hussam Otaibi's witness statements rebut the evidence and assert that Mr Wang was fully aware of many of the matters of which he now complains.

72. The matters on which the applicants rely in terms of the anticipated proceedings as articulated by Mr Wardell in his skeleton argument and at the hearing – namely conspiracy by unlawful means and breach of fiduciary duty – are indeed broadly based claims. However, it would be inappropriate to regard the breadth of a potential claim as being an automatic bar on meeting the jurisdictional thresholds in CPR 31.16(3)(c). The nature of the complaint and the clarity of issues raised by it can appropriately be addressed as relevant factors in the exercise of discretion (see Rix LJ in *Black* [88]).

73. It is, however, incumbent upon the applicants, notwithstanding the breadth of the case, to identify the issues with sufficient clarity that the requirements of standard disclosure can be applied. In his skeleton argument, and his submissions at the hearing, Mr Wardell has set out the main issues on which the applicants intend to rely in support of their anticipated claims and which Mr Wardell describes as clear evidence of wrongdoing on the part of the respondents.

74. In summary, those issues are:

- i) the deliberate breach of the FCA rules relating to Mr Wang's designation as a professional investor;
- ii) misrepresentations made to Mr Wang about the nature of the funds and the identity of other investors in them;
- iii) whether the structures of the Floreat Funds and the other arrangements for the provision of services to the applicants (such as Mount Tai) were designed to extract excessive fees from Mr Wang;
- iv) misrepresentations made in the offering memoranda for some of the funds (in particular, those in relation to the acquisition of Springs Farm by RAGOF); and
- v) the exploitation of assets acquired by the funds for the benefit of the Floreat principals (in particular, Springs Farm, the offices at 33 Grosvenor Street, the residential apartments at 3 King's Yard, and the works of art acquired by Shanti).

(More detail of these issues is set out at [69] above.)

75. I am satisfied that it should be possible, at least in principle, to apply the test for standard disclosure in CPR 31.6 to these issues. It would, of course, have been preferable for these claims to have been specifically identified in the application

itself or in draft particulars of claim filed with the application or a letter before action. I am sure that that would represent best practice. However, once again, these are issues which can be taken into account by the Court as part of the consideration of the exercise of discretion.

76. I now turn to the application of the test for standard disclosure. Even if I were satisfied in respect of some of the underlying matters that the issues were sufficiently clear to enable the test in CPR 31.6 to be applied, I cannot reach the conclusion that it is “more probable than not” that all relevant documents in each class or category in the schedule to the draft order would fall within the scope of standard disclosure as required in order to meet the jurisdictional threshold in CPR 31.16(3)(c).
77. I have set out above the terms of the opening words of category 1 of Class A. Mr Wardell says the documents within this class are central to the applicant’s assertion that the respondents breached the FCA rules when engaging Mr Wang as a client. Even if I accept that that claim is sufficiently well-defined for these purposes, the opening words of that category are such that it is inconceivable that all documents within the category will meet the requirement of supporting or undermining a specific issue which is likely to be pleaded in relation to that claim. The other categories within Class A suffer from similar objections.
78. I reach the same conclusion in relation to the documents in Class B which concern the establishment and management of the Floreat Funds. The opening words of each of separate categories within Class B are in similar broad terms to those of category 1 of Class A. Simply by way of example, the matters referred to in category 5, item 5.3 is “the investment decisions taken by and underlying assets of the Floreat Funds and in particular the degree of control or influence (if any) by the Floreat principals over the same”. This disclosure potentially extends to all correspondence and records with any person in relation to any investment decision taken by any of the funds. Once again, it is inconceivable that this request could meet the requirements of standard disclosure in relation to any issues which might be expected to arise, and the anticipated causes of action outlined by Mr Wardell.
79. The Court does not have jurisdiction to order pre-action disclosure in the form of the order requested by the application in respect of the documents in these broadly expressed categories because the jurisdictional threshold in CPR 31.16(3)(c) is not met. I would reach a similar conclusion in relation to the documents in Class A, Class B, Class C category 9, Class D category 12, Class E categories 15 and 16, and Class F.
80. I accept that some of the individual documents or even the groups of documents listed in specific items within the categories in the schedule may meet the requirements for standard disclosure in relation to the relevant issues as framed

by Mr Wardell. In such circumstances, it may be possible for the Court to order pre-action disclosure in respect of those documents but not others (see, the approach taken in *Total*). However, that possibility cannot oblige the Court, in the context of an extensive application such as this, in which documents are listed in broad categories, to engage in an exercise of seeking to identify within the classes and categories of documents requested, those which may meet the requirements of CPR 31.6 on its own initiative. That issue, it would seem to me, is strictly a matter to be taken into account at the stage of the exercise of discretion. However, for the reasons that I give below, I intend to refuse to exercise discretion to order disclosure in this case in any event. As a result, I do not propose to engage in an exercise of reviewing each and every individual request for disclosure within the draft schedule in order to determine whether or not there are individual documents or categories of documents which may meet this third threshold requirement.

### Desirability

81. The final jurisdictional threshold is whether or not it is desirable for the Court to order pre-action disclosure in order to (i) dispose fairly of the anticipated proceedings; (ii) to assist the dispute be resolved without proceedings; or (iii) same costs.
82. I am prepared to accept that, as a matter of principle, it may be desirable for a court to order pre-action disclosure in order to enable a case to be pleaded more accurately and thereby to assist the fair disposal of the anticipated proceedings and therefore that this threshold requirement can be met.

### **The exercise of discretion**

83. For the reasons that I have given above, the jurisdictional requirements may be met in relation to some but not all of the documents which are listed in the schedule to the draft order. So I should now turn to the question of whether I should exercise my discretion to order pre-action disclosure in this case.
84. For the reasons I have set out below I do not consider that this is an appropriate case for the Court to exercise its discretion in favour of pre-action disclosure.
85. I will begin with the nature of the claim. The claim has been expressed by Mr Wardell in his skeleton argument and in the hearing as primarily based on a conspiracy by unlawful means or, in the alternative, on breaches of personal fiduciary duties by the Floreat principals. Those claims of their nature question the probity and honesty of the individuals concerned. These are serious allegations. The applicants suggest that the Floreat principals engaged in a planned course of action to deprive Mr Wang of his assets or to exploit those assets for their own benefit. In these circumstances, if such claims are to form

the basis of an application for pre-action disclosure, they must be specific and the application for disclosure must be focussed (*Black* [54]-[57]). An application for pre-action disclosure cannot be used as a means of finding out more precisely what claims can be brought. The respondents are entitled to know what case they must answer.

86. As I have mentioned above, the level of specificity in the applicants' claims as described by Mr Wardell may meet the level required for the purpose of the jurisdictional thresholds. However, beyond Mr Wardell's eloquent articulation at the hearing of the manner in which the evidence supports the anticipated causes of action, at no stage have the applicants set out clearly in writing the nature of the proceedings and the issues on which they intend to rely. The application does not set out in detail the nature of the anticipated proceedings in respect of which disclosure is sought; there is no draft particulars of claim; there is no letter before action.
87. I also take into account the manner in which this application has proceeded. As I have mentioned above, the original application filed in March 2021 simply cross-referred to Mr Wang's first witness statement by way of description of the anticipated proceedings. No change was made to the application when Mr Wang's third witness statement (containing the description of his complaints in relation to Shanti) was filed in July 2021. The amendment made to the application on 14 September 2021 simply extends the description of the anticipated proceedings by adding a cross-reference to Mr Wang's third witness statement. The respondents had no clear notice of the claim of unlawful means conspiracy until they received Mr Wardell's skeleton argument in advance of the hearing.
88. The breadth of the claims is reflected in the breadth of the disclosure requested by the application. The respondents estimate that the disclosure request would require the examination of 11 gigabytes of e-documents, 50,000 emails, and 60 files of hard copy documents. That estimate has not been challenged. The breadth of the disclosure exercise would place a significant burden on the respondents.
89. This is not a "highly-focused" exercise confined to what is "strictly necessary" to enable the applicants to plead their case. As I mentioned above, the current request extends far beyond the scope of standard disclosure even for the anticipated proceedings as articulated by Mr Wardell. In cases where there is a clearly identifiable class of documents or a small number of documents which do not meet the jurisdictional threshold requirements within an application which otherwise does meet those requirements, I accept that it may be appropriate for the Court to grant pre-action disclosure in relation to those documents which pass the threshold test. However, the Court is not obliged to embark upon a forensic review of the documents for which disclosure is

requested to identify those which meet the threshold requirement and those which do not. It is for the applicants to ensure that as far as possible the application only requests disclosure of documents which meet the conditions for standard disclosure in relation to the anticipated proceedings.

90. Furthermore, I am not convinced that the applicants could not adequately plead their case without access to the documents that they request in the schedule to the draft order. The applicants have access to a significant amount of documentation in relation to the matters of which they complain. This is apparent from the extensive nature of the FFP report, which is exhibited at Mr Wang's second witness statement, and which contains a significant amount of detail on Mr Wang's investments in the Floreat Funds.
91. It is also not clear to me that the applicants have exhausted the sources of documentation that are available to them, whether that be the banks which hold accounts on behalf of Mr Wang or from public sources. I accept Mr Wardell's submission that the fact that some of the documents are available from other sources does not mean that they do not fall within the scope of standard disclosure. However, I am being asked to make an order for disclosure outside the normal course of proceedings. Even where the applicants are bearing the costs of the disclosure exercise, such an order places an additional burden upon the respondents. It cannot be appropriate to impose that burden in relation to a significant amount of material which the applicants are able to source themselves.
92. Furthermore, when, as I am required to do so, I stand back and take a "big picture" view, I remain of the view that this is not an appropriate case for the exercise of discretion. The applicants have raised some serious issues. They require further investigation. They may well lead to proceedings before this Court. However, as evidenced by the last-minute changes in the articulation of the anticipated proceedings, this application is at best premature. The applicants should complete their investigations and clarify the issues, if any, which are likely to be in dispute and then decide if it is appropriate to issue proceedings.

### **The amended application**

93. Given my conclusions on the other matters before this Court, the amendment application itself is somewhat academic, but I will deal it briefly.
94. Some of the amendments to the original application made by the respondents do not require the permission of the Court. These include: the removal of the fourth, fifth, sixth and eighth respondents from the application; and the removal of some of the documents from the schedule to the draft order. (This is subject to the respondents' arguments about the need for a discontinuance for the

applicants to withdraw their application in relation to the fourth, fifth, sixth and eighth respondents, but that is no longer in issue.)

95. Some of the changes do require the permission of this Court. These include: the expansion of the anticipated proceedings to include the matters identified in Mr Wang's third witness statement (which relate principally to Shanti); and the inclusion of documents in the schedule to the draft order which were not included in the original schedule. I have listed the main additions to the schedule to the draft order at [34] above.
96. The respondents object to the changes. They object in particular to the expansion of the anticipated proceedings to include Shanti and the new disclosure requirements in relation to Shanti and Mount Tai. Mr Hunter says that the first time at which the respondents were aware of these changes was when the applicants' solicitors wrote to the respondents' solicitors on 10 September 2021, six days before the date of the hearing. The application to amend the original application was not filed until 14 September 2021, two days before the date of the hearing. The applicants had the relevant information in relation to these matters at least two months before that date. The timing of the amendment application was such that the respondents have not had any opportunity to respond or to file any responsive evidence.
97. Mr Wardell says that the amendments are required as a result of additional information of which the applicants became aware as a result of events that had occurred following the filing of the original application. He refers to steps taken by the respondents to terminate loans of artwork by Shanti to Mr Wang and members of Mr Wang's family in the period after the original application and before the hearing from directions on 16 June 2021. It was only at that stage, he says, that the applicants became aware of the use of Shanti to acquire artwork which was made available and displayed in the homes of the Floreat principals. It was that information which led to the production of Mr Wang's third witness statement, which included the information relating to Shanti. Mr Wardell says that it must have been obvious to the respondents that the applicants intended to extend the application to include the allegations in relation to the artworks owned by Shanti at that time. However, Mr Hussam Otaibi did not address the allegations in his witness statement in response to the evidence. Instead he relied upon the fact that, at that time, no formal application had been made to extend the scope of the anticipated proceedings to avoid making any substantive response to the new evidence.
98. In relation to the revisions to the schedule to the draft order which referred to Mount Tai, Mr Wardell says that these changes are not new. Class I in the schedule attached to the original application included two much broader categories, category 27 and category 28. The documents requested in the new

Class J category 29 and category 30 are specific examples of documents which were included within the original request for disclosure.

99. I was referred by Mr Hunter to the decision of Mrs Justice Carr in *Quah v. Goldman Sachs International* [2015] EWHC 759 (Comm) in which she set out the factors which a court should take into account when considering whether to grant permission to a party to amend the statement of case. In that case, at [38], Mrs Justice Carr said this:

38. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.

100. I was reminded by Mr Wardell that, in that case, Mrs Justice Carr was dealing with an application for an amendment to a statement of case which, if it was accepted, would have caused the trial date to be vacated. I accept that some of the principles set out in the passage to which I have just referred are directed at cases in which a trial date could be put at risk virtue of a late amendment to a statement of case. However, I accept Mr Hunter's point that the general view must now be that a stricter view should be taken of non-compliance with the CPRs and directions of the Court.
101. With this in mind I turn to the specific amendments that were made in this case.
102. I will turn first to the amendments that are made to make specific reference to the documents relating to Mount Tai (Class J, new categories 29 and 30). I agree with Mr Wardell that these requests are not in reality new. A request for these documents was subsumed within the broader categories within Class I in the draft order enclosed with the original application. There is no prejudice to the respondents by the grant of permission to make these amendments and, to the extent that permission was needed, I would have granted it.
103. I will then deal with the other additions to the schedule which do not relate to Shanti. This includes the addition of the indemnity in relation to the acquisition of Springs Farm in Class D, the inclusion of valuations and correspondence relating to valuations for Springs Farm (within Class D) and the inclusion of valuations and correspondence relating to valuations for the properties at 33 Grosvenor Street and 3 King's Yard (within Class E).
104. I regard these changes as relatively minor. They all relate to matters which were already the subject of evidence. Those matters were already within the scope of the anticipated proceedings as described in the original application. The parties would have had to address the disclosures relating to those matters in any event at this hearing. There would be no material prejudice to the respondents in accepting these amendments. I would have granted permission for them.

105. I include within this group of amendments the change to the application to refer separately to the residential properties at 3 King's Yard. I accept Mr Wardell's submission that this change is merely clarificatory. The original application referred to 33 Grosvenor Street including the residential apartments. Given the incorporation of the residential properties within the transfer of 33 Grosvenor Street, that reference can only be to the properties at 3 King's Yard.
106. That leaves the amendments relating to the purchase and loan of artworks by Shanti: the change to the anticipated proceedings to include matters relating to the Shanti artworks; and the inclusion of the new Class F in the schedule to the draft order.
107. Mr Wardell is correct that the matters relating to Shanti were referred to in Mr Wang's third witness statement, which was filed on 14 July 2021. However, no attempt was made to amend the application to incorporate matters relating to Shanti at the time or to amend the schedule to the draft order to include the documents relating to Shanti. Mr Wardell says that it was obvious that the anticipated proceedings would extend to matters relating to Shanti and there is no prejudice to the respondents arising from the failure to make an amendment to the original application or the draft order at the time.
108. I have decided that I should refuse the application to amend the application in respect of matters relating to Shanti. There is no good explanation of the failure to make an application to amend at the time of the service of Mr Wang's statement. I accept that it would have been reasonably clear to the respondents that the issues underlying the potential causes of action might be extended to matters concerning the Shanti artworks as set out in Mr Wang's third witness statement. However, this is an application for pre-action disclosure. No notice was given that there would be additional documents required in support of that claim until 10 September 2021. There was no good reason for that delay. It is incumbent upon the appellants to produce one. It is not simply a matter of prejudice to the respondents. For these reasons, I would refuse the application.

## **Decision**

109. For the reasons that I have given above:
- i) I refuse the application for pre-action disclosure under CPR 31.16.
  - ii) I will make a direction that the applicants should be given notice of any application by a non-party under CPR 5.4C(2) to obtain copies of Mr Wang's witness statement or any of the exhibits to it.
110. I will ask counsel to draw up an order to reflect this decision.