Neutral Citation Number: [2022] EWCA Civ 1103

Case No: CA-2022-000280

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
Ms Clare Ambrose (sitting as a High Court judge)
[2021] EWHC 3409 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2022

Before :

LORD JUSTICE COULSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between :

Candey Limited	**Appellant**
- and -	
(1) Basem Bosheh	**Respondents**
(2) Amjad Salfiti	

- -
- -

George Bompas QC and **Mathew Rogers** (instructed by **CANDEY LIMITED**) for the **Appellant**
Hannah Ilett (instructed by **B A International Sols Ltd**) for the **Respondents**

Hearing Date : 12 July 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 2pm on 1 August 2022

LORD JUSTICE COULSON:

1. INTRODUCTION

1. Can a firm of solicitors bring proceedings against their former client on the basis that the client was in breach of a duty of good faith, by settling the underlying litigation on terms which meant that the solicitors had no express entitlement to their costs? To what extent, if at all, when bringing such a claim, can the solicitors rely on privileged documents? To what extent, if at all, can the solicitors rely on confidential documents, provided to them after the underlying proceedings have settled? These are just some of the questions raised by the claim and the appeal in these proceedings. When granting permission to appeal, Lord Justice Males referred to them as "novel issues": in my view, that was something of an understatement.

2. The appellant ("Candey") commenced proceedings against the respondents ("Mr Bosheh and Mr Salfiti") for £3 million. That claim arose out of the contract, agreed between Candey on the one hand, and Mr Bosheh and his son Sulaiman ("the Boshehs") on the other, by which Candey acted for the Boshehs in connection with civil proceedings in London brought against them by Sheikh Mohamed ("the Retainer"). Candey's claim is put by way of fraudulent misrepresentation, deceit and breach of an implied obligation of good faith. Candey allege that, by settling Sheikh Mohamed's claim on a 'drop hands' basis, the Boshehs were acting in breach of that duty and in repudiatory breach of the Retainer. Candey's claim against Mr Salfiti was that he procured the Boshehs' breach of the Retainer and/or was liable in unlawful conspiracy. The claims relied heavily on both privileged and confidential material.

3. At a two-day hearing in November 2021, Ms Clare Ambrose, sitting as a deputy High Court judge ("the judge") dealt with a number of applications by both sides. Those included Candey's applications for a freezing injunction, and for permission to amend its particulars of claim to rely on privileged and confidential documents. Mr Bosheh and Mr Salfiti applied for an order striking out the claim in whole or in part; relief in respect of both privileged and confidential information; and an order that the hearing be heard in private. That latter application was refused at the start of the proceedings. The judge said that, in order to preserve the status quo, she would direct that any reference to a document is not to be treated as the document having been deployed or used in open court. We were content to adopt the same formula in respect of this appeal.

4. In a detailed judgment ([2021] EWHC 3409 (Comm)), the judge ruled, amongst other things, that Candey could not rely on either the privileged nor some of the confidential material that they sought to deploy. She held that the claim based on the alleged implied terms, including that of good faith, had no prospect of success. She made similar findings in respect of the claims in deceit and fraudulent misrepresentation, conspiracy and inducing breach of contract. She found that the only claim made by Candey which had a real prospect of success was the alleged breach of an express term of the Retainer (known as "the Costs Term"). I make clear at the outset that nothing that I say in this judgment is intended to impact in any way on that ongoing claim. Candey's applications for permission to amend their pleadings and for a freezing order were both refused.

5. Candey originally sought and obtained permission to appeal against the judge's judgment on nine grounds. However, they have since abandoned four of those grounds:

Grounds 4, 6, 8 and 9. That left Ground 1, which is concerned with the judge's refusal to allow Candey to rely on privileged material. It was agreed that, if this court refused the appeal on Ground 1, then it would inevitably mean that the appeal on Ground 5 (express representations) and Ground 7 (unlawful means conspiracy and procuring breach of contract) would also fall away. The other remaining Grounds are Ground 2 (an appeal against the judge's order that Candey could not use confidential material), and Ground 3, which went to the judge's rejection of the implied term of good faith, a central plank of the claim against Mr Bosheh and Mr Salfiti.

6. Mr Bosheh and Mr Salfiti served a Respondent's Notice. This raised a number of issues not directly covered by the Grounds of Appeal. The most important is at paragraph 4 of the Respondents' Notice, which alleges that the entire basis of the claim is flawed, and has no reasonable prospect of success, on the ground that, even allowing for the good faith term, the Boshehs were not and could not have been in breach of contract in instructing Candey to agree a settlement on a 'drop hands' basis. This reflects their original application before the judge to strike out the claim altogether, or for reverse summary judgment.

7. The appeal was heard on 12 July 2022. Despite the fact that there were four lever arch files of authorities (the vast majority of which were never referred to) the issues on appeal were relatively straightforward. I am grateful to Mr Bompas and Ms Ilett for the crispness of their submissions.

2. THE FACTUAL BACKGROUND

8. In 2018, Sheikh Mohamed commenced proceedings against Mr Bosheh and Mr Salfiti. The proceedings alleged fraud, knowing receipt and conspiracy. An important aspect of those proceedings was that certain Yahoo and RBS accounts in Mr Bosheh's name were secretly controlled by Mr Salfiti, who had used them to induce Sheikh Mohamed into entering into certain high interest loans.

9. By an email dated 20 September 2018, Candey agreed to act on a conditional fee basis for both men in connection with the proceedings brought by the Sheikh. However, owing to a potential conflict of interest, they stopped acting for Mr Salfiti, who found alternative representation. In January 2019, Sheikh Mohamed discontinued those proceedings and immediately commenced new proceedings, adding additional defendants, including Mr Bosheh's son, Sulaiman. The basic allegations remained the same. They were denied and Mr Bosheh also brought a substantial counterclaim.

10. For the new proceedings, the terms of Candey's Retainer were subsequently varied, first to a damages-based agreement and then, on 11 January 2021, to a different conditional fee agreement, having retrospective effect ("the CFA").

11. Relevant parts of the CFA included the following:

> "In the event you win or are successful i.e. you recover any damages, profits, money, and/or you derive any other benefits ("the Proceeds") or an award of assessed, contractually indemnified or agreed costs from contemplated or actual proceedings against your Opponent through formal legal proceedings (whether by court order, tribunal award, settlement, agreement or otherwise) you agree that you will pay CANDEY double our standard hourly rate costs

> ("the Double Fee Payment") incurred and to be incurred in respect of the Proceedings. If you lose, you will not be liable to pay CANDEY anything.
> The Double Fee Payment is made up of the above hourly rates ("Standard Hourly Rates") as well as a 100% success fee (the "Success Fee"). If you are successful in Court proceedings, the Court will normally order your Opponent to make a substantial contribution to your costs incurred at standard hourly rates. The Success Fee element may be recoverable from your Opponent in Court proceedings pursuant to the contractual indemnity.
>
> If (at any time) we obtain an order or agreement that our hourly rate costs (with or without the uplift) be paid by your Opponent then we shall be entitled to recover those costs from your Opponent, and you are always liable to pay these costs to us to the extent that we recover them from your Opponent. **You will always seek to recover costs by order or agreement.**" (Emphasis added)

The last sentence was referred to by the judge as "the Costs Term". It was Candey's alternative claim, made pursuant to that provision, which was the only claim that the judge allowed to go on to trial.

12. It was common ground before the judge, and also before this court, that the terms of the CFA meant that, if the Boshehs recovered nothing out of the litigation, Candey would not be entitled to anything by way of their costs. It was also agreed that, for these purposes, a settlement on a 'drop hands' basis - with neither side recovering money from the other, and each side being responsible for its own costs – was a nil recovery and therefore meant that Candey would recover nothing from the Boshehs as a contribution towards the costs that they had incurred in acting pursuant to the CFA.

13. During the Sheikh Mohamed litigation, in around June 2021, Mr Candey obtained a proposal from Sheikh Mohamed: that his claim against the Boshehs would be discontinued; 50% of any recovery that Sheikh Mohamed made against Mr Salfiti, up to a cap of £1 million, would be paid to the Boshehs; and the Boshehs would agree not to give evidence. Mr Candey explained to the Boshehs that any money paid out pursuant to this arrangement would go to pay Candey's costs, which were said to be more than £1.2 million. This was and is not accepted by the Boshehs as a correct interpretation of the CFA.

14. The Boshehs did not accept that proposal and asked Candey to negotiate further, seeking a financial settlement from Sheikh Mohamed or, if that was not possible, a 'drop hands' agreement. Eventually, that was how the Sheikh's claim was settled. Under the terms of the CFA, therefore, the settlement meant that Candey were not entitled to recover any fees from the Boshehs.

15. The precise sequence of events summarised above has to be traced through various email exchanges between Mr Candey and Mr Sulaiman Bosheh. Surprisingly, given the central importance of these exchanges to Candey's claim, the relevant emails have never been put in any sort of chronological sequence in the bundle. Accordingly, I have undertaken that task myself, and the relevant sequence of events, together with quotations from the relevant emails, is set out in the attached Appendix 1.

16. On 25 June 2021, Candey delivered the settlement agreement to Mr Bosheh for signature and, on the very same day, terminated their Retainer *and* issued the claim

form in these proceedings. They did not send a traditional letter before action, let alone engage in the relevant pre-action protocol process. That highlights the fact that it was the terms of the settlement with Sheikh Mohamed, and its financial effect on Candey, which was the source of Candey's unhappiness. It means that at no time before the commencement of these proceedings did Candey ever suggest to the Boshehs that the Boshehs had lied to them.

17. About a week after Candey had terminated their Retainer and commenced these proceedings, they received from RBS certain bank statements belonging to Mr Bosheh. Those statements had been sent as part of Mr Bosheh's disclosure obligations in the Sheikh Mohamed proceedings. RBS had provided the statements not knowing – presumably because they had not been told - that those proceedings had settled. Rather than returning those bank statements to Mr Bosheh, the judge found that Candey went through them "carefully" [58]. The judge was very critical of Candey's conduct in this regard, saying at [62]:

> "62. The Claimant failed to provide a good excuse for its decision to inspect and retain the RBS bank statements that it received after it terminated its retainer with the Defendants. There was no lawful basis for it retaining and reviewing such documents and they should have been returned immediately."

There is no appeal against those findings.

3. THE JUDGMENT

18. The core part of the judgment is divided into three sections. The first section, dealing with the relief sought by Mr Bosheh and Mr Salfiti relating to the use of privileged and certain confidential information, is at [21]-[77]. The judge refused to allow Candey to rely on privileged information. Her reasoning is at [21]-[55]. The judge also refused to allow Candey to rely on confidential information. Her reasoning is at [56]-[65].

19. The second section of the judgment, dealing with the merits and the application to strike out the claim, is at [78]-[127]. The judge rejected the claims based on the implied terms alleged by Candey (including the implied term of good faith) at [81] – [88]. She also rejected the other claims put by way of deceit, fraudulent misrepresentation, and (as against Mr Salfiti) unlawful conspiracy and inducement at [99] – [111]. The only claim that survived her analysis was the claim for breach of the Costs Term, for the reasons she explained at [89] – [94]. There is a useful summary of the relevant findings between [125]-[127]. The third, much shorter section of the judgment, is concerned with the judge's refusal to make a freezing order at [128]-[132].

4. THE ISSUES ON APPEAL

20. Ground 1 of the appeal is concerned with Candey's reliance on privileged material. It is said that:

> "The judge was wrong in law to find that appellant was not entitled to rely on the *prima facie* privileged material and that the respondents were entitled to have all such material struck out from the appellant's particulars of claim, witness statements and exhibits"

21. I deal with that Ground in section 7 below. As I have noted, it is common ground that, if the appeal on Ground 1 is dismissed, neither Ground 5 (the express representation claim) nor Ground 7 (the allegations of unlawful means conspiracy and procurement of breach of contract against Mr Salfiti) can separately survive, because they depend entirely on Candey being able to rely on the privileged material.

22. Ground 2 of the appeal is concerned with Candey's attempt to rely on confidential information. It is said:

> "The Judge was wrong in law (alternatively as a matter of discretion):
>
> a. To find that the Appellant was not permitted to rely upon bank statements which it had requested pursuant to its clients' ongoing duties of disclosure but which arrived following the termination of its retainer with the First Respondent in circumstances where those documents were material to the Appellant's fraud case, constituted prima facie evidence of a false disclosure statement, criminality and intentionally suppressed disclosure, and to the Appellant's concerns that the Respondents were seeking to dissipate their assets.
>
> b. To find that the Appellant required permission from the Chancery Division in order to use the witness statements of Ms Dalia El Masri ("Ms El Masri") in Proceedings BL 2019-000160 (the "Second Chancery Claim") in these proceedings in circumstances where she had consented in writing to their use. In so doing, the Judge incorrectly applied CPR 32.12(2)."

23. Mr Bompas did not pursue most of these arguments. In the light of his realistic submissions on the topic of confidential information, I deal with Ground 2 quite briefly in section 8 below.

24. It will be seen that both Grounds 1 and 2 address the material that Candey may or may not be able to deploy if their underlying claims are allowed to proceed. But their primary difficulty is the judge's rejection of their central claims as a matter of law. The only Ground that goes directly to that part of the judge's order is at Ground 3 of the appeal, in these terms:

> "The Judge was wrong in law to find that the Appellant had no real prospect of successfully establishing that the Retainer contained an implied term that the First Respondent would act in good faith in its dealings with the Appellant."

25. Ground 3 is therefore the most important ground of appeal. If the judge was right about there being no duty of good faith then (since there is no appeal in respect of the other alleged implied terms) the whole claim falls away (save for the limited claim by reference to the Costs Term, and possibly those which are wholly dependent on privileged and confidential material). I therefore address Ground 3 first, in section 5 below. That also brings with it the point raised at paragraph 4 of the Respondent's Notice: even assuming such a duty, Ms Ilett submits that Candey has no reasonable prospect of establishing any breach of that duty as a result of the 'drop hands' settlement. Accordingly, I address that issue in section 6 below.

5. THE IMPLIED TERM AS TO GOOD FAITH

5.1 The Judgment

26. As the judge noted at [81], the principal claims against Mr Bosheh and Mr Salfiti were, in one way or another, based on three implied terms, to the effect that:

    i) "the Boshehs would act or their instructions would be motivated by their best interests alone as opposed to those of a third party"; and/or

    ii) "they would at all times act in good faith towards the claimant [Candey]"; and

    iii) "that Mr Bosheh would cooperate with, give a full and accurate account of the case to, and not deliberately mislead the Claimant".

27. The judge found that there was no reasonable prospect of showing that the three terms were implied into the Retainer. She found at [85] – [86] that the term at i) above (as to motivation by their best interests) was unworkable, too uncertain and incapable of clear expression; if she was wrong about that, she found that it was not reasonable, equitable or necessary for the retainer to work. She found at [83] that the term at iii) above (as to cooperation) was not necessary for the Retainer to work, or so obvious that it went without saying. As Ms Ilett correctly noted, there is no appeal against the judge's rejection of the implied terms noted at paragraph 26(i) and (iii) above. The appeal is solely concerned with the judge's rejection of the term at noted at paragraph 26(ii) above, the implication of an obligation of good faith.

28. As to that, the judge held that a Retainer between a solicitor and client would not be the subject of a duty of good faith. She said:

> "84. The Defendants correctly maintained that a retainer between a solicitor and client is not subject to a duty of good faith and this is not necessary for the relationship to work. A solicitor owes a fiduciary duty. The Claimant argued that its relationship with Mr Bosheh was a relational contract giving rise to a duty of good faith as outlined in *Bates v Post Office* [2019] EWHC 606 (QB). However, there is no authority to support the argument that a client owes his solicitor a duty of good faith. Indeed the solicitor's fiduciary duty to the client would displace such a finding under *Bates v Post Office*. The presence of a contingency fee arrangement does not change that and the Claimant's case had no real prospect of success on these implied terms."

5.2 The Law

29. The test for implied terms has been stated in slightly different ways in different cases over the years. Perhaps the most comprehensive summaries in recent times can be found in *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co. (Jersey) Limited* [2015] UKSC 72; [2015] 3 WLR 1843 and *Europa Plus SCA SIF & Ors v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm) at paragraph 33. The test can therefore be formulated in this way:

    (a) The term must be reasonable and equitable; and

(b) The term must be necessary to give business efficacy to the contract (in other words, does the contract lack commercial or practical coherence without the term?); or

(c) The term must be so obvious that it 'went without saying'; in other words, if pointed out to the parties that it was missing, they would say "of course, so and so will happen; we did not trouble to say that; it is too clear": see *Reigate v Union Manufacturing Co. (Ramsbottom) Limited* [1918] 1 KB 592 at 605; and

(d) The term must be capable of clear expression and be formulated with sufficient precision: see *Shell UK Limited v Lostock Garage Limited* [1976] 1 WLR 1187 at 1204; and

(e) The term must not be inconsistent with, much less contradict, an express term: see *Marks and Spencer PLC v BNP Paribas* at [28].

30. As a consequence of the decision of Leggatt J (as he then was) in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111(QB), contractual claims can now be put by reference to an implied duty of good faith. Leggatt J was clear that such an obligation would only arise in a category of 'relational' contracts like a joint venture, in which the parties were committed to collaborating with each other, typically on a long-term basis, in ways which respected the spirit and objectives of their venture which they had not tried to specify, and which it might be impossible to specify exhaustively, in a written contract. That explains why relational contracts feature heavily in chapter 11 of *Hewitt on Joint Ventures, 7th edition.* In *Sheikh Tahnoon Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167] Leggatt LJ (as he then was) refined what he was looking for:

> "…such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party in its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith."

This led him to conclude that, where a contract was truly relational, a term of good faith will be implied on the basis of the test in *Marks & Spencer PLC v BNP Paribas*, or alternatively as a matter of law: see [174] and *Liverpool City Council v Irwin* [1976] AC 239 at 254.

31. In reliance on these authorities, there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded. One such were the Sub-Post Masters and Sub-Post Mistresses in *Bates v Post Office* [2019] EWHC 606. There, Fraser J set out a useful checklist of the possible indicators of a relational contract. He said:

> "725. What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:

> 1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
> 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
> 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
> 4. The parties will be committed to collaborating with one another in the performance of the contract.
> 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
> 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
> 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
> 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
> 9. Exclusivity of the relationship may also be present.
>
> 726. I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases."

32. Of course, the mere fact that some relationships are long-term does not make the underlying contract a relational contract: see Fancourt J in *UTB LLC V Sheffield United Limited* [2019] EWHC 2322 (Ch)[1]. Moreover, as a general rule, it is important not to veer from the test as to implied terms noted above. As Beatson LJ observed in *Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd* [2016] EWCA Civ 396 at [68]:

> "…An implication of a duty of good faith will only be possible where the language of the contract viewed against its context permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

Putting that another way, it might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law.

5.3 Submissions

33. Mr Bompas argued that the Retainer was a relational contract and that therefore there was an implied term of good faith. He argued that it satisfied the main characteristics of a relational contract as set out be Fraser J in *Bates v Post Office*, and the fact of Candey's fiduciary duty to Mr Bosheh was not sufficient to displace such a conclusion. He relied in particular upon the suggestion that, because this was a CFA, there was a

[1] I note that Fancourt J was not, in any event, enthusiastic about the use of the word 'relational'.

closeness between the interests of the solicitor and the client, such that it was akin to a joint venture agreement.

34. Ms Ilett submitted that the Retainer was not a relational contract because the relevant characteristics were simply not present. She argued that no good reason had been put forward as to why the obligation of good faith should be applied into a CFA but not a traditional retainer between a client and his or her solicitor.

5.4 Analysis

35. I consider this issue, first by reference to the usual test for implied terms, and then by asking whether this was a relational contract. Either way, my answer is the same: the judge was right to conclude that there was no implied duty of good faith in the Retainer.

36. First, the term is not so obvious that it went without saying. It was not necessary for the Retainer to work. The Retainer and CFA worked quite coherently without such a term. There was no real argument to the contrary.

37. Secondly, Candey have not put forward any cogent basis for the implication of such a term. There is no authority that supports the proposition that, when retaining a solicitor to act for him or for her, the client owed that solicitor a duty of good faith. The absence of authority is perhaps unsurprising: it is a startling concept. Many would say that, if a duty of good faith was applicable at all, it would arise the other way round, and be owed by the solicitor to the client.

38. Thirdly, I reject the suggestion that, because this was a CFA, as opposed to a traditional retainer, a duty of good faith arose in consequence. A CFA is merely a vehicle by which a party obtains legal services for minimal initial financial outlay. It governs the solicitor's remuneration; it does not change the services or duties that the solicitor owes the client, or vice versa. Beyond the question of remuneration, therefore, there is no relevant distinction between a CFA and an ordinary retainer; certainly not one which justifies the inclusion of a duty of good faith in the former and not the latter.

39. Furthermore, the CFA was itself contrary to the implied duty. As Candey well knew, the allegations made by Sheikh Mohamed against the Boshehs involved fraud and dishonesty. The CFA assumed that it was quite possible that Sheikh Mohamed would win his claim - that he would prove that the Boshehs had acted fraudulently - because the CFA provided that, if that happened, Candey would recover nothing. Thus, the possible truth of the fraud allegations was inherent in the CFA itself. It would therefore be contrary to the CFA to suggest that the Boshehs somehow owed a duty of good faith to Candey, particularly when addressing the allegations of fraud made against them by Sheikh Mohamed.

40. Inevitably, the communications between the Boshehs and Candey were going to involve the detail of those allegations of fraud, with the Boshehs explaining why they were incorrect, and what the explanations were for the conduct alleged against them. Mr Candey was well aware of the risks that those allegations might be proved to be true, as evidenced by the exchanges that led up to the settlement with Sheikh Mohamed, summarised in Appendix 1. Mr Bosheh asked Mr Candey for "a proper advise (sic) about our chances of success". Mr Candey replied "50/50: it depends on your performance in Court as witnesses". So he knew that the odds on the allegations of

fraud being proved against the Boshehs was 50/50. There can be no room for a good faith obligation in such circumstances; otherwise, rather than this being a conditional fee agreement, it would become a guaranteed fee agreement: Candey would 'win' (i.e. recover its costs) if their clients were telling the truth (because Sheikh Mohamed would lose and the CFA would allow Candey to recover); but they would also 'win' if their clients were found not to be telling the truth (because of the breach of the good faith obligation). That is why the implied term is at odds with the CFA itself.

41. Fourthly, a run-through of the checklist at [725] of *Bates v Post Office*, using that merely as a sense check rather than a series of statutory requirements, leads to the conclusion that the Retainer was not a relational contract, so the good faith obligation would not be implied as a matter of law:

a) As to (1), I have already noted that the implied duty ran counter to the CFA itself. It might also be said that the good faith duty was contrary to the Costs Term. At the very least, the Cost Term provided a mechanism for dealing with difficulties arising out of Candey's failure to recover their fees.

b) As to (2), there was no guarantee that the CFA would be a long-term contract. It might have been over in a few weeks, depending on Sheikh Mohamed's progress of the litigation. It was completely different to a long-term joint venture between two separate commercial entities concerned with mining, say, or infrastructure, where the implication of such a term is more common.

c) As to (3), as Ms Ilet noted, there is no reason to think that the Boshehs would not have paid Candey if they had been so obliged. But under the express terms of the CFA, in the circumstances that occurred, they were not. So no question of integrity arose. Candey's lack of remuneration was the effect of the CFA, which Candey themselves had drafted. Reasonableness of an alleged implied term is not the sole test for its implication.

d) As to (4), there was no commitment to collaboration. The judge rejected the implied term as to collaboration, and there is no appeal against that finding.

e) As to (5), the agreement between the parties was quite capable of being expressed in a written contract. Candey, as the solicitors, were required to carry out their services exercising reasonable skill and care, and they would be paid for those services in accordance with the terms of the CFA. That was the start and end of it.

f) As to (6), this was a fiduciary relationship, with Candey owing a fiduciary duty, or an obligation of "loyal subordination" of its own interests to those of the Boshehs: see Leggatt LJ in *Al-Nehayan* at [167]. Such a duty was different to the trust and confidence in a relational contract.

g) As to (7), there was no high degree of communication and no expectation of loyalty from the Boshehs. This was an ordinary retainer of a solicitor under a CFA.

h) As to (8), there was no degree of investment by the Boshehs. As for Candey, they chose to tie their prospects of recovering their investment in the case to what they described as the 50/50 chances of the Boshehs' ultimate success.

i) As to (9), there was no exclusivity: Candey could terminate the Retainer at any time and, in the event, they did just that.

42. In short, this was an ordinary solicitors' retainer which happened to be on a CFA basis. There are thousands of those in operation at any one time in the UK. Nobody has ever suggested before that they are relational contracts, or that in every CFA, the client owed the solicitor a duty of good faith. As my Lord, Lord Justice Phillips, pointed out during argument, that is not how they are sold to the public.

5.5 Summary

43. For all these reasons, I agree with the judge that Candey has no real prospect of successfully establishing any implied term of a duty of good faith in the CFA. I would therefore dismiss Ground 3 of the appeal.

6. RESPONDENT'S NOTICE: DOES THE CLAIM FOR SETTLING ON A 'DROP HANDS' BASIS (BASED ON A BREACH OF THE DUTY OF GOOD FAITH) HAVE A REAL PROSPECT OF SUCCESS?

6.1 The Issue

44. This is the issue at paragraph 4 of the Respondent's Notice. For these purposes, we must assume that the judge was wrong, and that there was an implied obligation of good faith, at least in respect of the settlement of Sheikh Mohamed's underlying claim. For the reasons noted below, I am in no doubt that Candey has no prospect of establishing a breach of duty arising out of that settlement.

45. The claim form alleges at paragraph 3:

> "3. In June 2021, the Claim was compromised on terms that were substantially less advantageous to the Boshehs than had been proposed by Sheikh Mohamed and without the Boshehs seeking to recover their costs. In agreeing such settlement, the Boshehs acted in repudiatory breach of the Retainer. The Second Defendant was at all times aware of the terms of the Retainer and the Representations, and procured the Boshehs breach of the Retainer. Further or alternatively the Second Defendant acted in concert with the Boshehs in an unlawful (alternatively lawful) means conspiracy."

46. In the original particulars of claim, the breach is alleged in the following terms:

> "9. Pursuant to the Retainer, the Claimant sought and obtained an offer from Sheikh Mohamed, whereby (a) the Boshehs would receive 50% of any monies recovered by Sheikh Mohamed from the Second Defendant in the Claim (the "Recovered Monies"), capped at £1 million ("Sheikh Mohamed's Offer"), and (b) the Boshehs would not attend the trial of the Claim to give evidence. Sheikh Mohamed subsequently indicated (through his legal representatives, Hugh Lyons and Zahy Deen) that, he would be willing to agree to provide the Boshehs with 50% of the Recovered Monies without any cap.
>
> 10. On 21 June 2021, the Boshehs instructed the Claimant to reject Sheikh Mohamed's Offer and make a counter-offer rejecting any payment to the

> Boshehs (the "Defendants' Counter-Offer"). It is averred that the Defendant's Counter-Offer was substantially less advantageous to the Boshehs than Sheikh Mohamed's Offer, but more advantageous to the Second Defendant. Moreover, the Defendant's Counter-Offer did not seek to recover any costs.
>
> 11. It is to be inferred from the Boshehs conduct that:
> a. they were acting (and always intended to act) in the best interests of the Second Defendant and/or the other defendants to the Claim in addition to, or instead of, their best interests;
>
> b. further or alternatively, they were acting (and had always intended to act) in bad faith, seeking to agree a settlement with Sheikh Mohamed that resulted in them not achieving a "success" under the terms of the Retainer, and thereby seeking to deprive the Claimant of payment under the Retainer; and
>
> c. the Boshehs therefore made the Representations fraudulently, in that they knew they were false or were reckless, not caring whether they were true or false. Alternatively, the Representations were made negligently. "

47. During the course of argument, my Lord, Lord Justice Arnold, asked Mr Bompas whether it was his case that, if the Boshehs had accepted the earlier proposal from Sheikh Mohamed, Candey would have no claim against them. He subsequently confirmed that that was indeed his case. This demonstrated further that the claim in these proceedings is all about the 'drop hands' settlement, and that the points made orally about the accuracy of the information provided about the Sheikh's claim during the litigation were immaterial to that claim. All that matters to Candey are the terms of the settlement.

48. Moreover, both the claim form and the particulars of claim assume this basic proposition: that the earlier proposal (that the Boshehs did not give evidence at trial, and would receive to £1 million of any sums the Sheikh recovered from Mr Salfiti, as a contribution towards their costs) was a substantially more advantageous deal *for the Boshehs* than the 'drop hands' agreement actually agreed. But for the reasons noted below, I do not accept that. On the contrary, I consider that the 'drop hands' proposal was better from the Boshehs' perspective.

49. First, neither of these proposals involved the Boshehs making any contribution to Sheikh Mohamed's costs. For comparison purposes, that was therefore a neutral factor.

50. In relation to their own costs, the 'drop hands' proposal meant that, under the terms of their CFA with Candey, the Boshehs would not be liable to Candey for their own costs either. The pleadings appear to suggest, on this point, that the proposal whereby Sheikh Mohamed agreed to pay to the Boshehs up to £1m of any sums recovered from Mr Salfiti, was therefore a better offer from the Boshehs' perspective. But, on the face of it, it was not because, as Mr Candey had made quite clear in his email of 18 June 2021 (see paragraph 9 of Appendix 1), the £1 million would *not* be paid to the Boshehs, but would instead be paid to Candey, as a contribution towards their costs. Mr Candey said in his email that that was "only right and fair". So it may be. But it meant that, even if the Boshehs recovered the maximum amount from Sheikh Mohamed pursuant to his

proposal, they would not be one penny better off themselves. So, from the Boshehs' perspective, that point of comparison was again neutral[2].

51. During the course of his submissions, questions from all three members of the court obliged Mr Bompas to address this difficult issue head-on, which he did with courtesy and clarity. But he had to acknowledge that, if the £1m went to Candey by way of costs, as they said it would, then there was indeed no difference between the earlier proposal and the eventual settlement. He sought to argue, however, that the Boshehs "would have to have the firm's interest in mind" (i.e. that the Boshehs were obliged to prefer a settlement that saw Candey recover their costs rather than one that did not). Mr Bompas was asked if it was his case that the Boshehs were not entitled to put their perception of their own economic interests ahead of the economic interests of Candey. He agreed that it was.

52. I suspected that this point might be reached during the course of the debate. It seemed to me that it was inherent in Candey's pleaded case that the Boshehs were in breach of the duty of good faith because they chose a settlement which was better for them rather than better for Candey. I do not accept that such a case is arguable in principle.

53. First, Mr Bompas' answers demonstrate the potential conflict of interest that can arise under a CFA between the client and the solicitor where the terms are drafted in such a way that the solicitor's costs recovery is itself dependant on the client recovering something – anything – from the proceedings. That potential conflict is not uncommon: see *Goknur v Aytacli* [2021] EWCA Civ 1037 at paragraph 19 and footnote 1, where the solicitors claimed almost £500,000 by way of costs against their client, because his counterclaim (which they had urged him to pursue) had been allowed in the nominal sum of £2. Such conflicts cannot be resolved by an implied duty owed by the client to consider the solicitor's financial interests rather than his own; it is for the solicitor to ensure that such conflicts do not arise in the first place.

54. Secondly, it is self-evident that, irrespective of any duty of good faith, the client cannot be in breach because he or she chooses a settlement which they perceive to be as good as or better for them than the one that obviously suits the solicitor. Any other conclusion would fundamentally alter the solicitor/client relationship. In the present case, the Boshehs were quite entitled to conclude that a 'drop hands' settlement was certainly not a substantially less advantageous (and arguably a better) deal than the earlier proposal made by the Sheikh.

55. As explained above, both the earlier proposal and the eventual settlement were apparently costs neutral from their perspective. But there were two specific ways in which the Sheikh's earlier proposal represented more of a risk to the Boshehs then the eventual 'drop hands' agreement. First, there was the risk that, if the trial had gone ahead, the judge might have made adverse findings about the Boshehs. They had agreed not to give evidence but that would not have stopped the judge, if appropriate, from making significant criticisms of them: indeed, it is not difficult to imagine those criticisms being sharpened by their absence from the trial. Since they were centrally

[2] I note that there are all sorts of arguments between the parties as to how the CFA was intended to operate, which may be relevant to the arguments at the trial of the Costs Term claim. This and the other paragraphs of this judgment dealing with the events of June 2021 are not intended to have any effect on those disputes, which were not argued on appeal. They are simply designed to demonstrate, on the face of the emails, what happened, and why the earlier proposal was not "substantially more advantageous" than the 'drop hands' settlement.

involved in the allegations made by Sheikh Mohamed, their absence would have been the subject of considerable comment. Who knows what ramifications that might have had?

56. Secondly, the earlier proposal would have had the effect of at least potentially driving a wedge between Mr Bosheh and Mr Salfiti. In those circumstances, there was nothing about the proposed deal which would have prevented Mr Salfiti from issuing a contribution notice under the *Civil Liability (Contribution) Act 1978* against the Boshehs. They would then have been back in the proceedings, whether they liked it or not.

57. In any civil litigation where there is more than one defendant, it is much safer for all defendants to settle together. There is always a risk that, if one defendant acts independently of the other(s) and settles with the claimant, they can find that they are no further forward because they are then the subject of a simple contribution claim. Plenty of defendants down the years have thought they had avoided a trial by settling with the claimant, only to find themselves participating fully after all, as a result of a one-sentence letter from another defendant claiming contribution. Yet, despite that obvious risk, it does not appear that the contribution issue was something that Mr Candey gave the Boshehs any advice about.

58. This analysis comparing the earlier proposal and the eventual settlement has so far focused on the economic impact of each. Mr Bompas said that that was all that mattered, going so far as to say that it would have been wrong for the Boshehs to rely on what he called "any emotional factors" when making comparisons between the two possibilities.

59. I disagree with that. We are, let us not forget, considering this issue on the assumption that the Boshehs owed Candey a duty of good faith. Is it really said that the boundaries of such a duty are to be limited to economic considerations only? Litigation, and therefore the proposed settlement of litigation, is a human experience, and the consideration of any proposal to settle will inevitably be informed by a range of emotions and feelings, as well as pure economic interests. For example, in this case, the email exchanges noted in Appendix 1 indicate repeatedly that Sulaiman was extremely concerned about the effect of the ongoing litigation on his father's health. A 'drop hands' settlement would have brought the litigation to a swift and sure end. The earlier proposal, although exempting the Boshehs from giving evidence, would not. That too must be a relevant factor in any comparison exercise, and another factor in favour of the 'drop hands' settlement.

60. Finally, there would appear to be a significant factual error in both the claim form and the particulars of claim. Paragraph 3 of the claim form suggests that the Boshehs rejected Sheikh Mohamed's offer and sought instead the 'drop hands' settlement "without the Boshehs seeking to recover costs". The same point is made at paragraph 10 of the particulars of claim. But that does not reflect the emails and the narrative set out in Appendix 1. That shows that, on a number of occasions, the Boshehs expressly instructed Mr Candey to seek money from Sheikh Mohamed. On the face of it, that would have gone to Candey on account of costs (as Mr Candey had advised). There is no specific evidence as to whether Mr Candey complied with those instructions or what the response was from the Sheikh's lawyers. But it is misleading to ignore the

instructions which the Boshehs actually gave, and to suggest that they did not "seek to recover costs".

61. In my view, therefore, irrespective of the issues of privileged and confidential material, and allowing for the implied term of good faith, neither the claim form nor the particulars of claim disclose an arguable claim for breach. The central allegation in this case is based on the proposition that the 'drop hands' proposal was "substantially less advantageous to the Boshehs than Sheikh Mohamed's offer" (paragraph 10 of the PoC). For the reasons that I have set out, that proposition is unwarranted. It has no prospect of success. In those circumstances, the premise on which this whole claim is based – the particular 'breach' relied on - falls away.

62. In those circumstances, I would allow paragraph 4 of the Respondent's Notice, with the result that the judge's order is confirmed: the entirety of the claim in these proceedings is struck out with the exception of the claim based on breach of the Costs Term, and any claim dependant on the privileged and confidential material.

7. GROUND 1: THE USE OF PRIVILEGED MATERIAL

7.1 The Judgment

63. The privileged material in issue here comprises the statements, answers to questions and other material provided by the Boshehs to Candey in order to allow Candey to prepare the defence, witness statements and the like, in defence of the claims made by Sheikh Mohamed. The material therefore arises out of and in connection with the allegations made by Sheikh Mohamed about, in particular, the Yahoo account and the RBS bank account. There was no allegations of some later or supervening fraud on the part of the Boshehs: what is relied on, in essence, are the Boshehs' responses to the original allegations which, it is now said, were false (and by implication, that the Sheikh's original allegations were correct).

64. The judge relied on the decision of Popplewell J (as he then was) in *JSC BTA Bank v Ablyazov* ("*Ablyazov*") [2014] EWHC 2788 as the leading authority on the interplay between legal professional privilege and fraud (the so-called "Iniquity Exception"). She summarised the test at [38] in this way:

> "38. Both parties relied on this approach. Popplewell J explored the authorities which acknowledge that the mere fact that a client may deceive his lawyer and thereby continue a strategy of lies and perjury will not invoke the "iniquity exception". The test is whether the disputed communications are made in the ordinary course of the professional engagement of a solicitor and whether the alleged deceptions mean that there has been an abuse of the solicitor/ client relationship such that privilege over those communications is negated. Is the deception of the solicitor in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court? I consider that it is implicit that the test would extend to deception used to perpetrate a substantial fraud on the solicitor."

65. Thereafter, from [39] onwards, the judge went carefully through the pleaded deceptions and misrepresentations which, for the purposes of the hearing, she was prepared to accept as *prima facie* grounds for a claim in fraud ([44]). From [45] onwards, the judge

demonstrated that none of the alleged false statements meant that there had been an abuse of the solicitor-client relationship, finding instead that they had been made in the ordinary course of the professional engagement of Candey. Her detailed analysis was this:

> "45. The alleged false statements relating to the Yahoo email and RBS Account were in essence past fraud that was said substantially to give rise to Sheikh Mohamed's action. The Claimant acknowledged that this was the same fraud upon which the Defendants had initially sought legal advice and that had continued into the Retainer. Dishonesty in this respect on the part of the client does not take the matter outside the ordinary professional business of advising a client and taking instructions. In denying the fraud alleged the Boshehs were, even if untruthful, not perpetrating a fraud that would negate privilege.
>
> 46. The alleged false statements regarding whether they would act in good faith, or be motivated by their best interests or maintain that their case would succeed similarly cannot take the situation out of the normal relationship and does not amount to an abuse of the relationship such that *"privilege takes flight*" (referring to Cardozo J's dicta cited in *Ablyazov* at paragraph 91). Fraud actions are, by their nature, likely to be situations where there are prima facie grounds for alleging fraud, and the cases show that in the ordinary run of cases clients may be deliberately untruthful to their lawyers or the court. However, even in those cases where the fraud allegation is well founded the defendant is entitled to a fair trial in order to defend such actions, and also privilege over legal advice. While different inferences may be drawn in different circumstances, the case law does not justify different legal tests being applied for clients seeking advice in civil or criminal litigation, especially where a client is accused of fraud. A client falsely denying fraud, overstating the merits of his position in the litigation and misrepresenting his loyalty to his lawyers or his motives on settlement is within the normal run of case. False statements on these matters do not deprive the client of the right to legal professional privilege.
>
> 47. Even taking the Claimant's case at its highest the alleged deceptions (and other wrongs) do not take this matter outside the ordinary course of the professional engagement of a solicitor or mean that there has been an abuse of the solicitor/ client relationship such that privilege over those communications are negated. The matter can be tested by asking whether a third party would be entitled to require disclosure of these communications (in the manner that an application was made in *Ablyazov*). In that situation the answer would have to be that the Boshehs' conduct was within the ordinary run of case where a client is accused of fraud.
>
> 48. I have considered whether Mr Salfiti's alleged deception, conspiracy in acting in concert with the Boshehs in relation to their fraud and in seeking to take advantage of the Claimant's services, and the other wrongs alleged, take the matter within the iniquity exception so as to preclude the Boshehs' reliance on privilege. However, the alleged conspiracy with a third party does not diminish the client's right to the protection of privilege over his communications with his lawyers. Again, the matters alleged are within the ordinary course of engagement of a solicitor (and the Claimant knew that Mr

> Salfiti was alleged to be the ringleader using Mr Bosheh as a front as this was the case upon which they were instructed to represent Mr Bosheh). The Claimant also knew that Mr Salfiti and the Boshehs were sharing information. The conspiracy was based on the Boshehs' alleged wrongs (including fraud and breach of contract). Those wrongs (even including deception by Mr Salfiti) do not meet the test of iniquity but fall within the ordinary run of cases."

7.2 The Law

66. The leading cases on litigation privilege is *R v Derby Magistrates Court* [1996] AC 487, 507. There, Lord Taylor of Gosforth CJ said:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests."

67. There was debate as to whether the rule was absolute. Lord Taylor said that it was, noting at 508:

> "…the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined"

68. Notwithstanding this, the courts have acknowledged that there is at least an implied waiver of the privilege if a client sues his solicitor, to the extent that it is necessary to enable the court to adjudicate the dispute fully and fairly in accordance with the law: see *Lillicrap v Nalder & Son* [1993] 1 WLR 84. In that case Dillon LJ observed that the waiver could only extend to matters which were relevant to an issue in the proceedings and that there was no waiver "for a roving search into anything else in which the solicitor or any other solicitor may have happened to have acted for the client".

69. An implied waiver in those circumstances was confirmed by the Court of Appeal in *Paragon Finance PLC & Ors v Freshfields* [1999] 1 WLR 1183, 1188 where Lord Bingham of Cornhill CJ said:

> "When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just

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

70. The only other relevant exception[3] to the absolute rule in respect of privilege is the Iniquity Exception, although it is not a true exception since its application means that the information is not protected by privilege in the first place. It goes to the limited circumstances in which fraud may prevent reliance on privilege. As noted above, the leading case is *Ablyazov*. There, Popplewell J summarised the relevant principles in this way:

> (a) If a legal professional privilege exists it is inviolate, and there is no balancing exercise to be undertaken [69];
>
> (b) Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue and which therefore involves a deliberate strategy to mislead the other party and the court and to commit perjury [71], citing (amongst others) *R v Central Criminal Court ex parte Francis & Francis* [1989] AC 346;
>
> c) Privilege would not, however, attach in a situation "far from the ordinary run of cases", where there was "a widespread conspiracy to deceive the English court which was acted upon and has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale": see Longmore LJ in *Kuwat Airways Corp v Iraqi Airways Co (no.6)* [2005] EWHC 367 (Comm); [2005] 1WLR 26734;

71. Popplewell J went on to address how this distinction was to be applied in these terms:

> "76. Where is the line to be drawn between "the ordinary run of cases" in which privilege attaches to communications with a solicitor by a client with a view to advancing a knowingly false case, and the conduct in *Kuwait Airways (No 6)*? The answer lies, in my view, in a focus on three aspects of legal professional privilege and the iniquity exception. The first is that legal professional privilege attaches to communications between solicitor and client which are confidential. The quality of confidence is a prerequisite to the privilege, because it is the protection of such confidence which forms the bedrock of the rationale for the privilege as essential to the administration of justice. Secondly, communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality. It is this which prevents legal

[3] Privilege may be expressly or impliedly abrogated by statute, but that exception does not arise here.

> professional privilege attaching to communications for such purpose. Thirdly, the reason that communications in furtherance of iniquity lack the necessary quality of confidentiality is that communications can only attract the confidence if they are made in the ordinary course of professional engagement of a solicitor. It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service falling within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The "ordinary run of cases" involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case…
>
> 93. I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the "ordinary run" of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege."

72. We were referred to a number of other cases, although it is only necessary to pick out two. *Hakendorf v Countess of Rosenburg* [2004] EWHC 2821 (QB) was a case in which the solicitor sought her costs from the wife in divorce proceedings, and the wife cross-claimed on grounds of misconduct and because of the use by the solicitor of privileged material. The judge noted that there was no authority on the privilege point. He concluded that the wife had not specified what precise information she said was both privileged and disclosed to a third party [75] and that it had not been established that the solicitor, in disclosing what she had to the court, had acted in breach of duty [77].

73. In *Finers v Miro* [1991] 1 WLR 35, solicitors were engaged to set up a series of companies and trusts to hold substantial client assets which were ultimately in the solicitor's control. They suspected that the assets were the proceeds of the defendant's frauds. They applied to the court for direction. The Court of Appeal held that the solicitors could disclose details of the suspected fraud to the victim to enable him to decide whether to claim the assets. Dillon LJ said:

> "The privilege does not require the court to compel the solicitor to continue, at his own personal risk, to aid and abet the apparently fraudulent ends of the defendant in covering up the original fraud of which there is such a *prima facie* case."

7.3 The Submissions

74. On behalf of Candey, Mr Bompas began with an entirely new point. He said that, in circumstances where the solicitors had possession of the relevant documents, this was a case where there was no privilege, because there was no confidentiality as between the client and solicitor in relation to those documents. In support of that proposition he relied on a passage at chapter 26-02 of *Phipson on Evidence (20th Edition)*. There, when discussing the decision in *Paragon Finance*, the learned editors say:

> "They [the Court of Appeal] could have, but did not, put the decision on the basis that, in respect of the documents passing between client and solicitor, there was no basis for a claim of privilege because there was never any confidentiality between them in relation to those documents, even though the documents were confidential (and thus privileged) against the rest of the world, and that in consequence as the documents are never confidential between those parties, a claim for privilege would not lie for those documents in litigation between those parties."

75. If he was wrong about that, Mr Bompas said he was entitled to rely on the Iniquity Exception. He said that this was particularly apposite in cases where a lawyer had entered into a CFA, which he said altered the balance of risk between the client and the lawyer and made it appropriate for a lawyer to unravel fraud by relying on privileged material. In support of these submissions, he relied on *Hakendorf* and *Finers*. He also sought to say, with rather less conviction, that the judge had misapplied *Ablyazov*.

76. In response, Ms Ilett noted that the point about Ground 1 being a debate limited to confidentiality (not privilege) was so new that it was not foreshadowed in their Grounds of Appeal, or even in Candey's appeal skeleton argument. She said that the proposition was contrary to authority, including *Lillicrap* and *Paragon Finance*. She also argued that the end result of Mr Bompas' submission was that, in any case where the underlying allegations concerned fraud, a solicitor on a CFA "could have his cake and eat it". If his client won, he would get paid (including here the 100% uplift to what were already generous renumeration terms) whilst, if the client was disbelieved at trial and lost, or the claims settled but the solicitor suspected dishonesty, there would be no privilege, and the solicitor was entitled to claim damages on the basis of the privileged material.

77. She argued that, on the basis of *Derby Magistrates Court*, there was no scope for balancing different policy considerations and what mattered was whether the Iniquity Exception applied or not. On that point, she said that the judge had correctly applied *Ablyazov* and neither *Hakendorf* nor *Finers* made any difference to the outcome.

7.4 Analysis

78. I would dismiss Candey's appeal on Ground 1 for the reasons set out below.

79. I would be reluctant to express a concluded view about what I will call Mr Bompas' new argument to the effect that - contrary to how the point was argued below - this was a case where there could be no privilege, because there was never any confidentiality between Candey and the Boshehs in relation to the documents in question. Whilst I acknowledge that there is some support for that proposition in the passage in *Phipson*, that is on the rather unpromising basis of what Lord Bingham did not say in *Paragon Finance*, rather then what he did. Furthermore, the authority cited in the footnote, namely *Singla v Stockler & Anr* [2012] EWHC 1176 (Ch) was concerned with common interest privilege. Although Mr Bompas made a couple of references to that concept in his submissions, this was not (and has never been presented as being) a case of common interest privilege.

80. More generally, I consider that this new argument is potentially at odds with the views expressed in the principal cases concerned with privilege, such as *Lillicrap* and *Paragon Finance*. Moreover, it might also be a distinction without a difference because, whatever the position as between client and solicitor, there would be an obligation not to disclose the material to a third party which would, for these purposes, include the court. Even if it was accepted that there was no confidentiality as between solicitor and client, that does not mean that there was no confidentiality at all. In this way, it is not clear where, or how far, this new argument really goes. The issue still remains: can Candey rely on the ostensibly privileged material in pursuit of this claim?

81. I consider that the correct approach on the authorities is to focus on the potential exceptions to the otherwise inviolate rule as to privilege. It has never been unequivocally said in the present case that there was an implied waiver (as per *Lillicrap* and *Paragon Finance*). On the material before this court, it cannot sensibly be said the Boshehs impliedly waived privilege. Candey's argument on that point appeared to suggest that, if a client behaves in such a way that he gives his lawyer a cause of action against him, that may amount to an implied waiver of privilege. I reject that submission. There is no authority for it. Moreover, implied waiver on such a basis would not be a narrow exception; it might apply in numerous situations. It would inevitably impact on the solicitor-client relationship.

82. In those circumstances, what matters is the exception that the judge was asked to consider, namely the Iniquity Exception and the test identified by Popplewell J in *Ablyazov*. Were the disputed communications part of the ordinary course of the professional engagement of the solicitor, or has there been an abuse of the solicitors/client relationship, such that privilege over those communications is negated? The judge went carefully though the pleaded deception/misrepresentations and, between [45] and [48] she concluded that they arose in the ordinary course of Candey's professional engagement.

83. That careful analysis (set out in full in paragraph 65 above), shows which side of the line these alleged deceptions/misrepresentations fell. It has not been seriously challenged on this appeal. Nor in my view could it be: it is an unexceptionable analysis. It demonstrated that, even taking Candey's case at its highest, the alleged false statements related back to the original fraud alleged by Sheikh Mohamed. It was not a new or different fraud relating to the proceedings which took the case out of the ordinary run. In this way, the Iniquity Exception does not apply in this case.

84. The reality was that the Boshehs were communicating with their solicitors whilst embroiled in ongoing litigation alleging fraud. They were explaining why those allegations were untrue in order that pleadings and other statements could be prepared. They also involved certain admissions of matters of fact. It is impossible to characterise those communications as an abuse of the solicitor-client relationship in this case, and equally impossible to characterise those communications as the Boshehs deceiving Candey in order to perpetrate a substantial fraud against Candey.

85. I should pause here to deal with one subsidiary argument relating to the Iniquity Exception. Ms Ilett submitted that, for the Iniquity Exception to be even considered by the court, substantial fraud had to be established. She said lesser wrong-doing, or the mere repetition of earlier allegations, without more, did not trigger the exception at all. She said that this case, in which Candey are simply seeking to re-run the points made by Sheikh Mohamed in the original proceedings, did not achieve the required threshold. In response, Mr Bompas relied on *Barclays Bank PLC v Eustice* [1995] 1 WLR 1238 and *Nationwide Building Society v Various Solicitors* [1999] P.N.L.R. 52 to say that a lower threshold to establish fraud was sufficient and that Candey had made that out in this case.

86. It is unnecessary to decide this debate for the purposes of this appeal. I have dealt with - and rejected - Candey's reliance upon the Iniquity Exception on the basis of the assumption made at [44] by the judge: that the pleaded case allows them to argue in principle that the Iniquity Exception applies. But I would add that a court will usually look very carefully to see whether the necessary threshold for the Iniquity Exception has been met at all, particularly in circumstances where the allegations of fraud are just that – mere allegations - and, as in this case, are no more than repetitions of the allegations of past fraud which gave rise to the original proceedings. As Viscount Findlay said in *O'Rourke v Darbishire and Others* [1920] AC 581 at 604, where one party was seeking to displace privilege on the basis of fraud: "it is not enough to allege fraud…there must be something to give colour to the charge…and there must further be some *prima facie* evidence that it has some foundation in fact".

87. I am not persuaded that *Hakendorf* is of any relevance to the Iniquity Exception. It was decided some time ago, without apparent reference to all the authorities, and no reference is made in the judgment to the Iniquity Exception and how it works. That may well be because the case was decided on its facts, namely the wife's failure to identify the privileged material that she said had been wrongly disclosed. Furthermore, if it is authority for anything, it is authority for the narrow proposition that, if a client disputes and fails to pay her solicitor's fees, that client should not be entitled to defeat the claim for fees by the solicitor by asserting privilege in relation to the action's subject matter.

88. *Hakendorf* is, in reality, an implied waiver case. Privilege belongs to the client. It is a pragmatic solution to the difficulties that can arise when the client sues his or her solicitor to conclude that the decision to sue encompasses an implied waiver of privilege. Both *Hakendorf* and *Paragon Finance* are best explained in that light. By challenging the fees and alleging misconduct on the part of the solicitor, the client cannot in good conscience rely upon privilege to gain an advantage by hampering the solicitor's case/defence.

89. Similarly, I did not consider that *Finers* added anything to the debate. That was a particular case in which the solicitors were not seeking to advance their own claim, or

defend a claim from their clients, but seeking the guidance of the court. It is a long way from Candey's claim in deceit against their former clients.

90. I consider that there is force in Ms Ilett's underlying submission that, if Mr Bompas was right on Ground 1, in any case where the underlying allegations involved fraud, a solicitor in the position of Candey would be able to bring a subsequent claim against its client (whether for costs or damages) relying on the privileged material in which the client had explained why those underlying allegations were unfounded. Unsurprisingly perhaps, there is no authority for such a proposition.

91. I also reject Candey's criticism of the judge's treatment of the CFA. The judge was right to say that the solicitor acting on a CFA was in no different position as to privilege to a solicitor acting on an ordinary retainer. To work under a CFA was a choice the solicitor made. As the judge said at [51]:

> "51. Solicitors have a choice in taking work on a contingency fee basis with the inherent extra risks and rewards involved. There are safeguards to protect against an unexpected outcome and the market is sophisticated. Protection by way of contractual terms or insurance can be agreed. The most obvious safeguard is the uplift in fees for success, which reflects the risk that some cases will not result in success for the lawyer, including where the client is not believed or settles the case unfavourably. Under the Retainer the Claimant obtained agreement to a 100% uplift on fees that were already at a high rate (e.g., £1000 per hour for Queen's Counsel). The Defendants correctly questioned the basis of such an uplift in a fraud case if the solicitor can still use his client's most sensitive communications to sue him on the basis of the same fraud if he does not achieve success."

92. I consider that Mr Bompas' argument as to policy and the allegedly special treatment required for CFAs not only ignores the starting point of *Derby Magistrates Court* – that privilege is absolute - but it also lacks substance. Claims in fraud can be made by a client's lawyer based on deceitful statements made in open court or in other ways. But that does not mean that the solicitor can rely on privileged documents in order to make those claims.

7.5 Summary and Consequences

93. For the reason set out above, I would dismiss Ground 1. That means I must inevitably dismiss Ground 5 because it is accepted that the "express representations fraud claim" relies solely upon privileged material.

94. Grounds 7 too must fail. Ground 7 concerns the unlawful means conspiracy and the allegations that Mr Salfiti procured the breach of contract. In the absence of the privileged material no basis has been set out on which Candey can advance either of those claims. I also note (and agree with) the judge's criticisms of Candey's pleaded case in respect of this claim at [107]-[111].

95. Accordingly, that just leaves Ground 2 of the appeal.

8.1 GROUND 2: THE USE OF CONFIDENTIAL MATERIAL

8.1 The Law

96. The leading case is *Imerman v Tchenquiz* [2010] EWCA Civ 908; [2011] Fam 116, in which it was held that it was a breach of confidence for a person intentionally to obtain another person's information secretly, and without authorisation, and that in principle the person who established a right of confidence in information was entitled to an injunction to restrain the other party from looking at, copying or distributing such information. The ordinary position in civil proceedings is that evidence which was improperly and unjustifiably obtained may still be admissible but that it is a matter for the court: see CPR 32.1(2) ("the court may…exclude evidence that would otherwise be admissible"), and *Jones v University of Warwick* [2003] EWCA Civ 151.

97. The test referred to by the judge, and one that is commonly applied in these circumstances, is that set out by Master Davison in *Mustard v Flowers* [2019] EWHC 2623 (QB) at [19]:

> "19. It is important to note that Mr Audland QC did not contend that the manner of obtaining the recordings should, of itself, lead to their exclusion. He accepted the proposition that evidence that had been unlawfully or improperly obtained might still be admissible. What was required was that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial. The task of the court was to balance these factors together and, having regard to the Overriding Objective, arrive at a judgment whether to admit or exclude. To put it slightly differently**, the issue was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case.** This approach, from which Mr Grant did not dissent, seems to me to be fully in line with the authorities to which I was referred and which I need not set out. I do, however, note that in the majority of such cases the balance has been struck in favour of admitting the evidence." (Emphasis supplied)

98. Candey sought in their skeleton argument to rely on *ISTIL Group v Zahoor* [2003] EWHC 165 (Ch) in support of a submission that jurisdiction to restrain reliance on confidential material lies in equity and that therefore what matters is the "clean hands" approach. The subject matter of the case was concerned with the granting of injunctions rather than the ambit of r.32.1(2).

8.2 The Submissions

99. There are two sets of documents involved in this part of Candey's appeal. The principal set concerns the RBS bank statements received by Candey after the they terminated their Retainer. The second relates to a witness statement of Ms El Masri, sworn in the Sheikh Mohamed proceedings, on which Candey relied before the judge.

100. In relation to the bank statements, the skeleton prepared on behalf of Candey argued that the jurisdiction to restrain the use of confidential information was equitable and that, since it cannot be said that Mr Bosheh and Mr Salfiti have 'clean hands' (because

of the original allegations of fraud), they are not in a position to seek to restrain the use of that information. The skeleton also suggested that the judge was wrong to say that the bank statements were improperly obtained, which appeared to be an attempt to open up a finding of fact which was not in the Grounds of Appeal.

101. At the appeal hearing, Mr Bompas did not seek to defend Candey's conduct in respect of the bank statements. He acknowledged that [62] of the judgment (paragraph 17 above), and the judge's withering findings of fact about Candey's conduct, were not the subject of any appeal. He also said that he did not now challenge the judge's conclusion (that Candey could not rely on the confidential information) on the basis of the information currently available. His argument orally was limited to the proposition that there would be nothing to stop Candey seeking to make an application in the future to rely on the bank statements if some new event occurred or new information came to light.

102. In response to the points in the skeleton, Ms Ilett had said that the equitable jurisdiction was irrelevant: what mattered was the power under r.32.1(2) and the application of the test in *Mustard v Flowers*. She said that it was plain and obvious that Candey should not have opened the bank statements, let alone go through them carefully so as to rely on them against Mr Bosheh and Mr Salfiti. As to the very limited case advanced at the appeal hearing, Ms Ilett conceded that she could not argue that there could not be some future event which might allow Candey to make a renewed application. But beyond that, she said, the judge had been wholly right in her rejection of Candey's attempt to rely on the bank statements, and said that her order should be confirmed.

103. As to the statement of Ms El Masri, Mr Bompas pointed out that Ms El Masri had expressly consented to the use of her witness statement (albeit after the event). Ms Ilett acknowledged that but said that that missed the points which the judge had made at [67] – [69]: namely that Candey should have sought permission from the court anyway, and that despite Ms El Masri's subsequent agreement, Candey did not have retrospective permission for the use they had made of that statement before consent was given. That related to the extensive references to the statement in the evidence of Mr Candey, and in the skeleton argument and oral submissions before the judge on 24 November 2021.

8.3 Analysis

104. In respect of the bank statements, the point that remained between the parties at the hearing of the appeal on the use of confidential material had become so small that it almost vanished altogether. Mr Bompas accepted that he could not sensibly challenge the judge's conclusions as to the use of confidential material. His only point was that, in the future, if circumstances changed, there would be nothing to stop Candey making a further application to seek to rely on those statements. Ms Ilett accepted that she could not say that there would never be any circumstances in which Candey could make such an application. There was therefore no dispute between the parties on that issue.

105. However, for the avoidance of doubt, I should say that, for the reasons that I outline briefly below, the judge was entirely right to reach the conclusions that she did on the material currently available.

106. Whilst the bank statements were provided by a third party (RBS) to Candey, on the mistaken assumption that the proceedings were still ongoing, Candey knew that those

proceedings had come to an end and that they had terminated their Retainer. In those circumstances, Candey had no right to open the bank statements, let alone go through them in detail. The judge was right to find that that action was unlawful and unjustified.

107. What then is the result of the balancing exercise identified by Master Davison in *Mustard v Flowers*? Is the public policy interest in excluding evidence improperly obtained trumped by the important (but narrower) objective of achieving justice in the particular case? I am in no doubt that the answer to that question is No. For all the reasons noted in this judgment so far, it is unarguable that Candey's attempt to recover their costs against Mr Bosheh and Mr Salfiti, regardless of the terms of the CFA, does not trump the public interest in excluding improperly obtained evidence.

108. There is another factor to be weighed in the balance, which further supports the proposition that the public interest in respect of confidential material outweighs the narrow interest arising out of these proceedings. That is the nature of Candey's claim. It cannot be disputed that Candey's claim is an attempt to avoid the terms of their own CFA. The CFA made plain that Candey would not be able to recover fees if there was a 'drop-hands' settlement. It is for that reason that Candey has to try and allege breaches on the part of Mr Bosheh and Mr Salfiti, in order to avoid the terms of their own CFA. As I have already noted, there is no precedent for a claim in which a firm of solicitors successfully sued their own clients for settling on basis A, rather than basis B. That again does not persuade me that this is a situation in which Candey's interest in making such a claim by reference to confidential material somehow outweighs the public interest in that confidentiality.

109. The second, discrete part of Ground 2 relates to the statement of Ms El Masri. In my view, this is a very short point. The original use of the statement was a breach of the CPR. Subsequently, Ms El Masri gave permission for her witness statement to be used prospectively: that is to say, from the moment she gave permission onwards (see CPR 32.12(2)(a)). That permission was given on the night of 24 November 2021. However, the statement had been used prior to that, in particular in the skeleton argument prepared before the hearing on 24 November, and during the hearing itself on 24 November. It had also been referred to in the evidence of Mr Candey. In those circumstances, the retrospective permission of the court was needed under CPR 32.12(2)(b) for that otherwise unauthorised use. Accordingly, to that extent, paragraph 7 of the judge's order was correct. To the extent that the judge may have indicated that Candey also needed prospective permission from the court, I think that, in the light of Ms El Masri's consent, that was unnecessary. In any event, I would grant it.

8.4 Summary and Consequences

110. For the reasons set out above, save for acknowledging that Candey do not need permission going forward to rely on the statement of Ms El Masri, Ground 2 of the appeal is dismissed.

9. CONCLUSIONS

111. For the reasons set out above, if my Lords agree, this appeal will be dismissed.

LORD JUSTICE ARNOLD

112. I agree that this appeal should be dismissed for the reasons given by Coulson LJ. I would add the following observations concerning the new argument advanced in support of Ground 1 by counsel for Candey in oral submissions.

113. The starting point in considering this argument is the principle identified by Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court ex p B* [1996] AC 487 at 507 as underlying legal professional privilege:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

This statement of principle is equally applicable to both legal advice privilege and litigation privilege, and for the purposes of this appeal it is unnecessary to distinguish between the two species of privilege.

114. Subsequently legal professional privilege was described by Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] as "a fundamental human right long established in the common law"; see also Lord Carswell in *Three Rivers District Council v Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at [87].

115. Counsel for Candey submitted that legal professional privilege is founded upon confidentiality, but is not the same as confidentiality. I would agree that confidentiality is a necessary, but not a sufficient, condition for privilege to apply. Thus the information must have the necessary quality of confidence, that is to say, it must not be in the public domain: see *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215 (Lord Greene MR). Where the information satisfies this requirement, the solicitor owes the client an obligation (implied into the contract between them or in equity if there is no contract) to keep the information confidential. The client owes the solicitor no such duty. Where the information is communicated between client and solicitor on a privileged occasion, privilege will attach. The right to privilege will vest in the client, and the client may expressly or impliedly waive privilege. The solicitor has a duty to assert the client's privilege and may only waive it on behalf of the client if acting with the client's authority. Where two or more clients instruct the solicitor jointly, they have a joint privilege. Where clients have a common interest, in particular in bringing or defending a claim, they and their respective solicitors may share information subject to common interest privilege.

116. Counsel for Candey also submitted that the nature of legal professional privilege is that it is "a right to resist compulsory disclosure of information", relying upon Lord Millett's statement to that effect in *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736 at [67]. That is undoubtedly correct so far as it goes, but I do not accept that it is complete statement of the nature of the right. The effect of privilege is to confer an

enhanced degree of protection for a particular genus of confidential information. Thus privilege enables the party (or one of the parties) entitled to the privilege to obtain an injunction to restrain use of the information, including use of the information by a person who has knowledge of it (in particular, where that person either already has copies of privileged documents or has come into possession of them) in legal proceedings (at least provided that the injunction is obtained before the information has been adduced in evidence at trial): see in particular *Goddard v Nationwide Building Society* [1987] QB 670, *English & American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232, *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780 and *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017] EWCA Civ 1029 [2018] 4 WLR 6. (As the law presently stands, there is a limitation on the ability of the party entitled to privilege to obtain an injunction where privileged documents are inadvertently disclosed and the mistake is neither obvious to the receiving party nor would be obvious to a reasonable person in the position of the receiving party, but this has been criticised: see Hollander, *Documentary Evidence* (14th ed) at 25-08 and 25-09.) By contrast, information which is confidential but not privileged may still be admitted in evidence even if it was unlawfully obtained by the person seeking to rely upon it: see in particular *Imerman v Tchenguiz* [2019] EWCA Civ 908, [2011] Fam 116.

117. Building upon the two submissions discussed above, counsel for Candey argued that documents recording communications between solicitor and client which were in the possession of the solicitor were not privileged in subsequent proceedings between solicitor and client. The solicitor did not need to obtain disclosure of such documents from the client, and the information contained in the documents was not confidential as between the solicitor and the client.

118. In my judgment this argument is contrary to both principle and authority. It is contrary to principle for the reasons discussed above. First, the fact that the information is known to the solicitor does not mean that it does not have the necessary quality of confidence if it is not in the public domain. If the information is not in the public domain, then the solicitor owes the client a duty to keep the information confidential. Secondly, the fact that the solicitor does not need to obtain disclosure of the documents does not mean that privilege has no role to play. On the contrary, the client can rely upon privilege to prevent the solicitor using the information in the documents without the client's consent.

119. The argument is also contrary to authority binding on this Court. In *Lillicrap v Nalder & Son* [1993] 1 WLR 94 property developers sued their solicitors for negligence in failing to advise of a problem relating to title in a conveyancing transaction. The solicitors admitted negligence, but contended that, even if they had given the advice which they should have given, the plaintiffs would still have gone ahead with the transaction. They accordingly denied that their admitted negligence was causative of loss to the plaintiffs. In support of this contention, they sought to rely on other cases in which they had acted for the plaintiffs and given adverse advice, which had not deterred the plaintiffs from proceeding. The issue before the Court of Appeal was whether documents relating to these earlier transactions were protected by legal professional privilege or whether the plaintiffs by proceeding had impliedly waived that privilege even though the solicitors had acted in relation to the earlier transactions under separate

and particular retainers. The Court held that the plaintiffs' implied waiver extended to those earlier transactions. It did not hold that the documents were not privileged at all.

120. In *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183 the defendants had acted for the plaintiffs in a series of mortgage securitisation transactions and in the obtaining of related policies of insurance. Subsequently the plaintiffs sought to make claims under the policies which the insurers declined to meet. Initially the defendants continued to advise the plaintiffs, but later they were replaced by new solicitors who pursued and settled the claims. The plaintiffs began proceedings for negligence against the defendants claiming the costs of the proceedings and the negotiations relating to the claims, the shortfall suffered in recovery under the policies, and the fees charged by the new solicitors in effecting recovery and in restructuring and refinancing the securitisation arrangements. The defendants denied the allegations, contested causation and the quantum of the plaintiffs' alleged loss, and alleged contributory negligence by the plaintiffs and failure to mitigate any loss. The judge ordered disclosure of communications between the plaintiffs and their new solicitors relating to the pursuit and settlement of the insurance claims. The Court of Appeal allowed the plaintiffs' appeal, holding that the plaintiffs' implied waiver of privilege did not extend to the communications with their new solicitors. Again the Court did not hold that the documents were not privileged at all.

121. Lord Bingham of Cornhill CJ delivering the judgment of the Court of Appeal said at 1188:

> "When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware."

122. In my view this statement of the law confirms the points I have made in paragraphs 115 to 118 above. I would add that there is no inconsistency between this reasoning and the fact that it is possible to have a limited waiver of privilege where privileged documents are only disclosed for a specific purpose, such as the assessment of costs, and cannot thereafter be used for another purpose, such as different proceedings: see in particular *Goldman v Hesper* [1988] 1 WLR 1238 and *Bourns Inc v Raychem Corp (No 3)* [1999] 3 All ER 154. In such cases the information contained in the documents will be known

to the receiving party once the documents have been inspected by the latter, but the limitation on the use that can be made of the documents means that the information remains confidential because it is not in the public domain (confidentiality being a relative, not an absolute, concept: see *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 130, [2021] Ch 233 at [48]).

123. If one turns to consider the position where the subsequent claim is not brought by the client against the solicitor, but by the solicitor against the client, it is difficult to see how there can be an implied waiver of privilege by the client except in two situations. The first is where the solicitor is suing the client for unpaid fees. In those circumstances the solicitor is entitled to rely upon the fee notes rendered to the client to prove the debt even though such fee notes would generally attract privilege. The second is where the solicitor applies to the court to come off the record in circumstances where the solicitor cannot or will not continue to represent the client, but the client has failed to serve notice of change. In those circumstances the solicitor is obliged to put before the court evidence as to the solicitor's inability or unwillingness to continue to act (although even then the application may need to be made in private). In both of these situations it is possible to posit implied consent on the part of the client because the use of privileged information is both limited and necessary: if solicitors could not sue clients for unpaid bills and could not come off the record even if they were bereft of instructions, few solicitors would act for clients.

124. The nearest authority to this issue is *Hakendorf v Countess of Rosenberg* [2004] EWHC 2821 (QB). In that case, however, Tugendhat J's primary ground for rejecting the wife's complaint that her solicitor had misused privileged information when obtaining a freezing order was that (i) the wife had not specified what privileged information has been misused, (ii) the solicitor's evidence was that she had respected her client's privilege concerning the client's secrets and (iii) thus it had been not established that the solicitor had acted in breach of her duty.

125. Tugendhat J went on to give two further grounds. His second ground was that, as he put it at [78], "a communication by a solicitor to the court, for the purpose of proceedings properly brought by the solicitor, will not of itself constitute a breach of legal professional privilege". His third ground was that, even if the second ground was wrong, a solicitor was entitled, in suing for her fees, to put before the court privileged information which established her entitlement to those fees.

126. I have no difficulty with Tugendhat J's third ground for the reasons explained above. I am unable to agree with his second ground, however. Tugendhat J thought that the proposition I have quoted could be derived from *Finers v Miro* [1991] 1 WLR 35, but in my judgment he was mistaken about that. In that case the solicitors had established a network of offshore companies and trusts acting on Mr Miro's instructions with a view to maintaining secrecy. At the time that the network was established the solicitors believed that Mr Miro had obtained his wealth as a result of inheritance and success in business, but subsequently they became aware of evidence that Mr Miro had committed a fraud on an insurance company and had invested the proceeds in the network. The solicitors applied to the court for directions in respect of the property, investments, money and companies under their control, and in particular as to whether they should disclose information to the liquidator of the insurance company. Mr Miro applied to strike out the proceedings. The Court of Appeal refused to strike out the proceedings, and upheld the judge's direction that the liquidator be given notice of the proceedings.

The Court of Appeal made it clear that the solicitors could answer a request for information from the liquidator "on the basis that it is accepted by the court that the defendant's right to secrecy, and legal professional privilege, are overridden by the prima facie case of fraud" (Dillon LJ at 42). Thus the decision in *Finers v Miro* was squarely based on the iniquity exception to privilege, and not upon implied waiver.

127. I note that Hollander suggests at 24-20 that *Hakendorf* may well be wrongly decided. Hollander goes on to observe there is an argument to be made that there is no privilege because the communications are not confidential between solicitor and client, but recognises that such an argument would require reassessment of the principle set out in *Paragon Finance*. As will appear, I agree that such an argument is currently precluded below the Supreme Court by *Paragon Finance*; but I would go further and endorse the soundness of *Paragon Finance* for the reasons explained above.

128. Finally, I would add that there was some discussion during argument about the situation which sometimes arises where there is a dispute during the course of proceedings as to whether a particular document or class of documents is privileged, and the court resolves the dispute by inspecting the document(s). Such situations normally involve a dispute between opposing parties, rather than between a solicitor and their client. Furthermore, the process of inspecting by the court is carried out in private in order to preserve the confidentiality of the document(s) if the court rules that the document(s) is or are privileged. I do not consider that this practice calls into question any of the principles discussed above.

LORD JUSTICE PHILLIPS

129. I agree with both judgments.

Appendix 1

1. This Appendix sets out excerpts from the email exchanges between Mr Ashkhan Candey and Mr Sulaiman Bosheh between 14-21 June 2021, which provide context for the settlement that was reached in the proceedings brought by Sheikh Mohamed. Mr Sulaiman Bosheh is the son of Mr Basem Bosheh (the First Respondent to this appeal). Both Mr Sulaiman Bosheh and Mr Basem Bosheh were defendants in the Sheikh Mohamed proceedings; in the documented exchange below, Mr Sulaiman Bosheh was speaking on behalf of himself and his father. The passages in bold are for emphasis.

2. On 14 June 2021, an email exchange took place between Mr Candey and Mr Bosheh. In this exchange, Mr Bosheh informed Mr Candey that, owing to the risk of adverse cost implications and his father's deteriorating health, they would like a 'drop hands' agreement to be negotiated if another, more lucrative settlement was not forthcoming. Mr Bosheh also confirmed that to achieve a 'drops hands' agreement that they were prepared to walk away with nothing. Mr Bosheh's 15:08 email on 14 Jun said:

> *We fear costs if we lose they maybe heavy we are depending on Amjad [Mr Salfiti]'s evidence and* ***if you can get any costs or damages that will be good****. If not and what we are offered is a drop hands then it may be more important as my father's health is becoming a real issue. (sic)*

3. Mr Candey sought to double check that this was what Mr Bosheh wanted, and at 18:02 wrote:

> ***OK I will try and obtain a significant contribution*** *but am otherwise authorised by you both to agree a drop hands. You are giving up a large counterclaim because you do not wish to risk costs. I don't follow why that approach has changed as this would have been the position for you from the outset of the case. Nothing has really changed since then.*

4. On 16 June 2021, Mr Bosheh emailed Mr Candey to ask how negotiations were going. Mr Candey informed Mr Bosheh that there had been no movement and offered to call Sheikh Mohamed's solicitors.

5. On 17 June, Mr Bosheh instructed Mr Candey not to call and to approach with a 'drop hands' offer if there was no progress by the end of 18 June 2021. Mr Bosheh also asked for confirmation as to what the negotiation tactics were likely to be.

6. Mr Candey first responded by outlining that he would pursue as favourable a financial settlement as possible and sought authority to agree a settlement for anything above £50,000. Then, later on 17 June, Mr Candey again emailed Mr Bosheh, this time to inform him that there had been a suggestion from Sheikh Mohamed's solicitors that he would make "a payment" (unspecified) in full and final settlement of the claim; the proceedings against Mr Salfiti would continue; and neither Mr Bosheh nor his father would be required to give evidence in the claim against Mr Salfiti. Mr Candey requested further instructions, stating: '*In the light of this proposal please can you confirm that this is in principle acceptable and I should attempt to get as much as possible. I assume that it must be acceptable*.'

7. Mr Bosheh's responded to these emails on 17 June at 20:51 as follows:

> *I don't really understand where this 50k comes from I have not even mentioned this figure. If we drop hand we do this for the benefit of myself my dad and all the others and we do it in coordination. If they want to drop our case only then I would expect a proper settlement as they will gain not us.* ***My***

> ***preferred option is a reasonable payment and a drop hands on all fronts***. *I understand that settlement will the subject of 28% for your fees from any sum recovered on both myself and dad. Our clear instructions is to drop hands in coordination with all Defendant* ***however if you think you can get us money then go for it*** *and but if you can't we close negotiations before weekend. (sic)*

8. On 18 June at 07:33, Mr Candey responded:

> *This is not our deal. We would never have agreed that any agreement requires us to also secure a drop hands for Amjad [Mr Salfiti]. I am very concerned by your email.*

9. At 10:54 on 18 June, Mr Candey again emailed Mr Bosheh outlining the terms of the CFA and stating:

> *Under the terms of the agreement on a settlement we are paid double our hourly rate with the uplift capped at 28% of the Proceeds. Thus if we receive £50,000 you obviously do not become liable for £1 million in costs.* ***But if we receive £1 million it will be paid to us in costs. That's only right and fair.*** *There is nothing in the agreement about a drop hands for Amjad [Mr Salfiti] although I did confirm that a drop hands for you would mean that you would not have to pay us. (Emphasis added)*

10. At 13:33 Mr Bosheh responded by saying that he thought there had been a misunderstanding. He did not expressly accept that this was the position on costs, there being an argument about the proper interpretation of the Costs Term. He went on to say:

> ***I was not instructing you to also settle Amjad*** *[Mr Salfiti] as he is running an independent case. What I said is if we are going for drop hands that we do together with other defendants and I did not specify Amjad [Mr Salfiti].* ***This will apply more pressure making it also favourable to me and dad****. The agreement of fees speaks for itself and you are aware of our interpretation we can discuss later but let us focus on favourable settlement by close of business today. (sic)*

11. At 15:45 Mr Candey responded:

> *Thanks, I think you are missing the point. Do you agree that it would be better to obtain a payment from the Sheikh with the case continuing against Amjad [Mr Salfiti] instead of no payment and a global drop hands for all parties? I believe that we can get the former. Neither you nor your Dad would give evidence. Please confirm so that I can continue my [settlement] discussion with Hugh [Sheikh Mohamed's solicitor]. Even if you get £50,000 that is a far better solution than getting nothing. You must see the logic in that?*

12. An email exchange between Mr Candey and Mr Bosheh then ensued, which culminated with Mr Bosheh providing Mr Candey with instructions; the contents of which are materially captured in Mr Bosheh's 19:07 email:

> *I do apologise if I disappointed you. May I instruct you that* ***you try to reach a financial settlement*** *if not there is no offer on the table that you try a drop hand on behalf of all parties as we don't want to create enemies out of friends. (sic)*

13. On 20 June 2021, Sheikh Mohamed made a new offer. Mr Candey conveyed this offer to Mr Bosheh and wrote:

> *I have an offer from the Sheikh as follows:*
>
> *Drop hands against you both, without any requirement to attend trial. In fact you would both agree not to give evidence. They will continue against Amjad [Mr Salfiti] and will split any recovery they obtain from Amjad 50/50 with you. They want to cap the contribution to you at £1 million but I think they could agree to it being uncapped. This is plainly a much better deal for you than a drop hands with no money. It avoids you being compelled to sue Amjad in professional negligence but you would not have to compromise any such claims. Please let me know your thoughts. I think it's a great offer given your sudden desire to retreat.*

14. On 21 June at 13:39 Mr Bosheh responded, stating:

> *Our instructions are as follows:*
>
> *1- An unconditional drop hands.*
>
> *2- we have given our evidence and we stand by it*
>
> *3-* ***An uncapped share of damages***
>
> *Alternatively a drop hands by all parties. (sic)*

15. After another email exchange between Mr Bosheh and Mr Candey, Mr Bosheh ultimately instructed Mr Candey to reject Sheikh Mohamed's offer and to instead seek a global 'drop hands' settlement. At 18:33 Mr Candey emailed Mr Bosheh. He was not happy:

> *So basically as opposed to honouring your contract with us to ensure we get paid you prefer to instead look after Amjad[Mr Salfiti]'s interests notwithstanding he was always going to lose. That's not cricket. Your metaphor below is correct about "taking the piss". I would never have agreed to this Basem and Sulaiman. Never. That was not our deal. We can settle this in terms that you stand to be paid £1 million which you could then use to settle our fees but instead you wish us to look after Amjad notwithstanding that his negligence has lost you millions of pounds. So ultimately you prefer to honour friendship with Amjad over your lawful obligations to us. We are not writing off our position. I think on this question you need to take independent legal advice which I can arrange for you. In essence you are very likely to settle and then still have to pay us. It's important that you are fully aware of this as our costs are circa £1.2 million. I will do whatever you instruct me to do and will carry on given that we are on the eve of trial but you and your Dad must understand that we reserve all of our rights and we shall invoice you in full even if you now lose. I will write and reject their offer and request a global drop hands as you've requested.*

16. Mr Candey made the offer to Sheikh Mohammed's solicitors. Sheikh Mohamed ultimately accepted this global 'drop hands' settlement offer, with an agreement in principle being reached on 24 June. On 25 June 2021, a settlement agreement was signed, Mr Candey terminated the Retainer and started these proceedings.