Neutral Citation Number: [2025] CIGC (FSD) 93

Cause No: FSD 2024-0317 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

BETWEEN:

KRYO GROUP LTD

Plaintiff

-and-

(1) SECURUS CO. LTD
(2) SCOTT EDWARD LAMB

Defendants

Appearances:	**Mr Jeremy Durston of Campbells LLP for the Plaintiff** **Mr Michael Wingrave of Dentons for the Defendants**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**17 February 2025**
Judgment:	**12 September 2025**

Civil procedure—GCR Order 63, rule 3—open justice—application to seal court file to protect allegedly confidential information in pleading—whether pleaded information is confidential—whether to order sealing of court file—

JUDGMENT

A. The issue

1. This application raises a question of open justice in the context of proceedings concerning unpaid amounts in respect of a number of allegedly confidential commercial transactions. The issue arises because it may be necessary within the proceedings for the parties to make reference to the persons involved in those transactions and certain details of those transactions. The Plaintiff wishes to prevent that information becoming public, whilst the Defendants contend that there is no proper basis in law or the Rules and on the facts for the court to assist the Plaintiff to do so.

2. By a summons filed on 12 December 2024, the Plaintiff asks that I make an order pursuant to GCR O.63, r.3(4) and Practice Direction No 1 of 2015 sealing a number of documents on the court file in these proceedings from access by the public. In addition, the Plaintiff seeks an order for anonymisation of any further pleadings and/or evidence filed in these proceedings insofar as they contain confidential personal data about third parties. As a fall-back position, if I refuse the primary relief sought, the Plaintiff seeks a sealing order in respect of the evidence filed in support of its summons.

B. Factual background to the application

3. Shortly after the Defendant filed its Defence, on 25 November 2024 the Plaintiff's attorneys applied by letter for an order that certain documents on the court file be sealed. As the legal justification for the Plaintiff's request was unclear, I made an interim sealing order and required the Plaintiff to apply by summons and supporting affidavit to maintain that relief. When the Plaintiff filed that summons on 12 December 2024, I extended the interim sealing order until the determination of the summons.

4. The Plaintiff's summons came on for hearing before me on 17 February 2025. I am grateful to Mr Jeremy Durston of Campbells LLP and Mr Michael Wingrave of Dentons for their helpful written

and oral submissions. I regret that I have not been able to deliver my judgment in this matter sooner due to the current volume of work in the Financial Services Division. I am grateful to the parties for their patience.

5. The following summary of the material background is based upon the matters pleaded in the Plaintiff's Statement of Claim and the admissions in the Defendants' Defence, supplemented by the evidence in the parties' affidavits filed in relation to the Plaintiff's summons. I do not need to make any final findings on the substance of the matters in dispute between the parties for the purpose of dealing with the Plaintiff's summons.

6. The Plaintiff is a company incorporated in the Cayman Islands. For many years, the individuals behind the Plaintiff, Mr Robert Young and Ms Aida van Wees, had carried on a business providing estate and tax planning for high-net-worth individuals, with a focus on Canadian citizens. The business involved assisting such individuals to obtain loans and insurance products with beneficial consequences from an estate and tax planning perspective, with a view to minimising their tax liabilities. Over the years, Mr Young and Ms van Wees had built up considerable confidential know-how and template documents to enable them to provide these services. In more recent years, they had transferred that confidential intellectual property into a trust and had then carried on the business through various corporate entities, including the Plaintiff, and on the basis of a licence to use the intellectual property granted by the trust.

7. The Second Defendant, Mr Scott Lamb, is a chartered accountant and experienced tax specialist, previously working at accountancy firms in Canada. Mr Lamb emigrated to the Cayman Islands in about the first quarter of 2021. He began to work with Mr Young and Ms van Wees in about March 2021, with a view to transitioning the business from them and their corporate entities to Mr Lamb and his corporate entities, including the First Defendant.

8. During 2021 and 2022, Mr Lamb became more involved in the operation of the business, but in about mid-2023 the commercial relationship between Mr Young and Ms van Wees on one side, and Mr Lamb on the other, broke down and the Defendants' participation in the business ceased.

9. The Plaintiff's claim is for unpaid "royalty" payments in respect of six transactions on behalf of high-net-worth individuals that occurred during 2022 or 2023, which the Plaintiff alleges are due from the Defendants. The Defendants counterclaim for sums that they allege are owed to them by the Plaintiff.

C. The parties' contentions regarding confidentiality

10. The basis for the Plaintiff's current application is that the Defendants' Defence names some of the parties involved in the six transactions, and provides some limited details of the transactions. Ms van Wees, in her evidence in support of the Plaintiff's summons, asserts that the pleading of those details by the Defendants:

    10.1 is a breach of confidentiality requirements agreed by the parties;

    10.2 is a breach of confidentiality agreements between other parties, but about which the Defendants knew or ought to have known;

    10.3 is a breach of relevant privacy laws, namely the Data Protection Act and the Confidential Information Disclosure Act;

    10.4 is unnecessary for the court to decide the issues in the case;

    10.5 will cause damage to the Plaintiff's business if those details become public because other potential clients may be inhibited from engaging the Plaintiff's services in the future if they are not confident that their involvement will remain confidential; and

    10.6 could harm the third parties who have been identified if their details become public, as they may be subject to investigations into their financial and tax affairs, and will have to incur time and cost in responding to any such investigations.

11. However, by the time the summons was argued before me, the Plaintiff had abandoned any reliance upon an alleged breach of the Data Protection Act. The Plaintiff had also accepted that there had not yet been any breach of the Confidential Information Disclosure Act by the Defendants. The Plaintiff therefore advances its arguments based on the alleged breach of the confidentiality agreements and of the common law duty of confidentiality.

12. The Defendants' response is that:

    12.1 the Plaintiff pleads in its Statement of Claim that it intends to rely at trial upon certain documents central to the "royalty" payments allegedly due that contain the very information that the Plaintiff is now trying to keep confidential, so that there is no utility in the Plaintiff's application;

    12.2 the Plaintiff's application is focused on the need to protect confidential information about the ultimate clients, however the details pleaded in the Defence relate to other parties in the transactions, not the ultimate clients, and there is no basis on which information about those parties is properly to be considered confidential;

    12.3 the details pleaded, mainly names of persons or corporate entities, is not information to which the contractual confidentiality provisions that the Plaintiff relies upon apply;

    12.4 any confidentiality agreements between other parties are not relevant to the position between the Plaintiff and the Defendants; and

    12.5 the information pleaded is relevant to the issues in the case and is raised and relied upon by the Plaintiff itself.

D. <u>The relevant law and submissions</u>

D.1 The open justice principle

13. There is no disagreement between Mr Durston and Mr Wingrave regarding the applicable law. I can therefore summarise it relatively briefly.

14. The starting point is Clause 7 of the Cayman Islands Constitution, concerning the right to a fair trial. So far as relevant, clause 7 states:

> *"(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.*
> *…*
> *(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*
> *(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court—*

> *(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings; …"*

15. The general principle is thus that all hearings where substantive rights or duties are determined should take place in public unless: (a) the court considers it necessary or expedient to exclude the public to avoid prejudicing the interests of justice; (b) privacy is necessary in the interests of public morality; (c) to protect the welfare of minors; or (d) to protect commercial confidence or the private lives of persons concerned. The court may also exclude the public from interlocutory hearings in the exercise of its discretion. This latter discretion is independent of and is not limited to the types of situations identified in (a) to (d).

16. The broad principles in the Constitution are supplemented by GCR O.63, r.3 as regards documents filed within court proceedings. This provides:

> *"(3) Subject to paragraphs (4) and (5), the Court file relating to any proceeding shall be open to inspection only by the parties to that proceeding.*
>
> *(4) The Court may order that the Court file relating to any proceeding or any specific document therein be closed and not open to inspection by any party or other person except with the prior leave of the Court.*
>
> *(5) The Court may give leave on application to any person not being a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings."*

17. The originating process in any cause or matter, i.e. a writ, originating summons, petition etc, is open to inspection by the public. If the Statement of Claim is endorsed on the writ, rather than served separately, the Statement of Claim will also be open to inspection. Subject to this, the general position is that the court file is not open to inspection by anyone who is not a party to the action unless the court grants leave. The Rules therefore provide for a significant derogation from the principle of open justice insofar as the contents of the court file are concerned.

18. Turning to the case law, in *Re SphinX Group of Companies* [2017] 1 CILR 176, Smellie CJ (as he then was) noted that a sanction application within liquidation proceedings does not engage clause 7 of the Constitution because such an application is not a partisan dispute and does not require the court to determine the rights and obligations of the parties. However, he considered that there is also a

common law basis for the open justice principle, which applies even in such cases. He explained his approach as follows:

> *"9. Given that the principle of open justice is, however, one of common law, it does not depend exclusively on s.7 of the Constitution being engaged. Rather, the principle requires that, in general, the public should have access to court proceedings and access to information about what occurs in such proceedings.*
>
> *10. This is the right to freedom of information about all aspects of the democratic process … The principle of open justice would ordinarily therefore apply to all court proceedings, including such as the present for the sanction of liquidators' decisions and whether partisan or otherwise.*
>
> *11. It is recognized, however, that the principle of open justice is not unlimited. Rather, open justice forms part of the overriding principle that justice must be done. As such, at common law, the general rule as to publicity must yield to this overriding principle and limitations can be placed upon the access to information by the public.*
>
> *12. But these limitations are not left to the individual discretion of the judge based simply on what is convenient or desirable in the circumstances. Limitations can only be placed on the principle where the interests of justice so require. The court is therefore required to balance the general rule as to publicity against any requirements for confidentiality or privacy in the interests of justice that may arise in a particular case. In* Scott (or Morgan) v. Scott *Viscount Haldane, L.C. stated as follows ([1913] A.C. at 435 and 437–438):*
>
>> *'If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge. …*
>>
>> *[T]he exceptions [to the principle of open justice] are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done … As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.'*
>
> *13. That there can be exceptions or limitations to the principle of open justice to ensure that justice is done, both in the context of conducting hearings in camera or in private (i.e. in chambers) and in the context of keeping documents or information relating to those court hearings confidential, is also expressly recognized by legislation and court procedure in the Cayman Islands. This is the case both in civil proceedings generally and in liquidation proceedings more specifically. In particular, s.11(2)(b) of the Constitution provides, among other things, that the principle of open justice can be limited— 'for the purpose of protecting the rights, reputations and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, [and] maintaining the authority and independence of the courts …' Further, both the Grand Court Rules 1995 and the Companies Winding Up Rules 2008 expressly permit for documents to be sealed on the court file …*
>
> *14. In respect of hearings in chambers, it is relevant to note that such hearings are not automatically to be regarded as in camera. Members of the public can be permitted to attend hearings in chambers with the permission of the judge. As was stated earlier by this court, the fact that the public does not have an automatic right to attend hearings in chambers does not however 'automatically cloak them in secrecy.' Nor is there any automatic restriction on the disclosure of what occurred in chambers.*

> *15. Hearings in chambers, however, often deal with sensitive or commercial matters and it is equally established that it may be appropriate for the court to make orders sealing the court file or limiting publication. …"*

I gratefully adopt what Smellie CJ said in that case.

19. In Sasken Communication Technologies Ltd v Spreadtrum Communications Inc [2016] 1 CILR 1, Rix JA made the following observations about ordering the sealing of documents on the court file where information within the documents is subject to a confidentiality requirement:

> *"17. So the position, in my judgment, is this. First of all, an order for closure may be made at the request of a party or parties to a proceeding without them needing to identify a clear and present danger of a desire to inspect by other parties. It is sufficient if, for good reason, the closure of a file, in whole or in part, is needed in the interests of justice. …*
>
> *19. … The position in this case is that, under the contract between the parties, there was a requirement of confidentiality which disclosure of the two documents in question would have upset. The judge accepted that that was the case. In my judgment, he should have concluded that the interests of justice permitted and required the sealing of the documents in question, so that if any third person wished to inspect the court file, they would not be able to do so without the permission of the court in circumstances where that permission could not be obtained without the court hearing from the parties in question on that application before any order of unclosing or unsealing of the file was made."*

20. Before the hearing, I drew the attorneys' attention to the decision of Nicklin J in the English case of PMC v A Local Health Board [2024] EWHC 2926 (KB), which was a recent and detailed examination of the application of open justice principles, the making of withholding orders (i.e. orders for anonymity) and reporting restriction orders, and invited submissions on it. Shortly before I finalised this judgment, the English Court of Appeal allowed an appeal against Nicklin J's judgment: see PMC v A Local Health Board (also known as PMC v Cwm Taf Morgannwg University Health Board) [2025] EWCA Civ 1126. I therefore invited the parties to make any further written submissions that they wished to address the effect of that judgment, which they did on 5 September 2025, and I have taken those additional submissions into account in reaching my conclusions on the summons.

D.2 The common law duty of confidentiality

21. The Plaintiff relies on Condoco Grand Cayman Resort Ltd v Broadhurst Dacosta [2004-05 CILR 236], where Henderson J at [20] quoted Lord Goff's opinion in AG v Guardian Newspapers Ltd.

(No. 2) [1990] 1 A.C. 109 at 281 with approval, notwithstanding Lord Goff's indication that he was not intending his summary to be definitive:

> *"I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word 'notice' advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious."*

22. Mr Durston cites paragraphs 21, 22 and 25 of Henderson J's judgment as well, in which the learned judge referred to *Coco v A.N. Clark (Engrs.) Ltd* [1969] R.P.C. 41, where Megarry J (as he then was) stated that for a breach of confidence claim: (a) the information must be of a confidential nature; (b) the information must have been communicated in circumstances importing an obligation of confidence; and (c) there must be unauthorized use of the information.

23. Mr Durston does not rely on any more recent authority nor on any textbooks on the question of the common law duty of confidentiality, for example *Toulson & Phipps on Confidentiality*, notwithstanding that this area of the law has undergone significant development in recent years.

24. The Plaintiff's argument, based on *Condoco* is that the Defendants owe a duty of confidentiality to the Plaintiff and/or to the Plaintiff's clients and lenders because their names and details of the transactions are objectively confidential; the Defendants must have been aware that the information was confidential because of the nature of the relationship between the parties and/or because the Defendants agreed and understood the information was confidential; and the Defendants' use of the information has not been authorised by the clients or lenders.

25. The Defendants adopt the Plaintiff's concession in argument that a breach of confidence claim has not been pleaded to argue that the Plaintiff cannot therefore rely upon breach of confidence as a basis to seek sealing of the court file. I disagree. I do not consider that the Plaintiff need to plead a substantive claim for breach of confidence to be able to rely upon that argument in support of its application to seal the court file.

26. Mr Wingrave draws my attention to the recent English decisions of ***Brake v Guy*** [2022] EWCA Civ 235 and ***Jinxin Inc v Aser Media Pte Ltd*** [2022] EWHC 2856 (Comm). In the latter case, Mr Simon Salzedo KC, sitting as a Deputy Judge of the High Court, drew the distinction between privacy and confidentiality, and explained that information may be confidential or private against certain persons or in connection with certain uses, but not against others or for other purposes, and that it will depend on the relationship between the information, the persons and the uses to which the information is intended to be put. Mr Wingrave submits that the mere fact that the borrowers or lenders in this case might consider their names and roles to be private does not mean that the information is necessarily private or is confidential information or is confidential for all purposes or against all persons. It might, for instance, be private and not confidential, it might be confidential for certain uses or against certain people or it may not, in fact, be private or confidential at all.

27. On this foundation, Mr Wingrave argues that the Defendants have never agreed that the names and the fact of the involvement of the clients and lenders in estate planning is confidential; that there is no good reason why the names and involvement of borrowers and lenders in estate planning should objectively be considered private or confidential, and draws an analogy with information regarding mortgage borrowings, which is included in publicly available Land Registers. Lastly, of relevance, the Defendants argue that the information is pleaded in a Defence in legal proceedings, where the Defence is not open to inspection by anyone other than the parties, without the leave of the Court. Mr Wingrave's position is that the information is not confidential vis a vis the Defendants, but in any event will remain confidential as regards the rest of the world under the Rules.

D.3 The impact of the Confidential Information Disclosure Act

28. Despite Ms van Wees raising the issue of the Confidential Information Disclosure Act, Mr Durston concedes that the Defendants have not yet done anything that would be a breach of the Act. However, he argues that the Act will become relevant when the parties give discovery and at later stages in the case.

29. Mr Wingrave responds that "confidential information" for the purposes of the Confidential Information Disclosure Act does not include the identity of an individual, so that the Act does not bite in this situation. Further, the Act requires that the principal is owed a duty of confidence by the recipient before information becomes "confidential information" for the purposes of the Act, which

Mr Wingrave does not accept is factually the case here. Mr Wingrave otherwise reserves the Defendants' position.

30. Given that the Plaintiff accepts that there has not yet been any breach of the Act by the Defendants, I do not need to deal with this aspect in this judgment. However, I agree with Mr Durston that the need to comply with the requirements of the Act may become a live issue as the case progresses towards trial.

E. Discussion and decision

31. I think it is useful to adopt the nomenclature used by Sir Geoffrey Vos MR, in *PMC*, namely that a withholding order means an order to withhold or anonymise the names of a party or a witness, including withholding information that would identify that person; a reporting restrictions order means an order which has the effect of restricting the reporting of material disclosed during proceedings, whether in open court or by the public availability of court documents; and an anonymity order means an order which has the effect of both withholding or anonymising the names of a party or a witness and restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of documents.

32. Mr Wingrave argues that I should first determine whether any of the information in question is confidential. He submits that it is only if the information is confidential that I should go on to consider whether the requirement for confidentiality or privacy is such that the interests of justice demand an exception to the principle of open justice by making a withholding order or an anonymity order. I consider that this is the correct approach to take.

E.1 Are the details pleaded in the Defendants' Defence confidential?

33. Mr Durston argues that an obligation of confidentiality regarding the information in question arises in two ways: first because of express provisions in two contracts between the parties, namely a written royalty agreement and a non-compete agreement, both of which are in the evidence before me; and secondly at common law.

34. Based on the two contracts, Mr Durston submits that the Defendants agreed that they would come into possession of confidential information relating to clients of the Plaintiff's business and that that information was to be kept confidential. He argues that it follows from the very nature of the products that the Plaintiff's clients were purchasing that information about the clients, including that they had engaged the Plaintiff, and their borrowings is confidential.

(a) The contractual obligations as to confidentiality: the royalty agreement

35. The full title of the royalty agreement is *"Use of Intellectual Property and Royalty Payment Agreement"*. It is dated 1 December 2022 and was made between the Plaintiff and the Defendants, with the Plaintiff described as *"licensee"*. The royalty agreement included as the first recital that:

> *"The Licensee has a licensing agreement … that permits the Licensee to develop, exploit, commercialize and enforce the intellectual property … relating to bespoke insurance and loan planning as detailed in a non-compete among [the Second Defendant] and others dated effective from and after January 1, 2021 ("Non-Compete Agreement" and a copy of the Non-Compete Agreement is attached hereto as Exhibit 1"*

In other words, the licensing agreement referred to is the one granted by the trust to the Plaintiff to use the intellectual property that Mr Young and Ms van Wees had originally developed and had assigned to the trust.

36. The Plaintiff relies on the following clauses of the royalty agreement as giving rise to an obligation of confidentiality on the Defendants in respect of the identities of customers and other participants in the transactions.

36.1 The definition of intellectual property, which is as follows:

> *"'Intellectual Property' incorporates the terms of the Non-Compete Agreement and without limitation includes trade secrets, design elements, Copyright, software code, schematics, websites, domain names, legal opinions, actuarial opinions, draft and final documents developed over time and constantly being improved, stored on the Parties' servers or otherwise, that relates to a Transaction, including for what the Parties call:*
>
> *1. Personal Secured Finance;*
>
> *2. Corporate Secured Finance;*
>
> *3. Critical Illness Planning or Loans;*
>
> *4. Departure Planning;*
>
> *5. Immigration Planning;*
>
> *6. Asset sale planning, and*
>
> *7. Other planning developed by the Parties from time to time,*
>
> *including intellectual property pertaining to the same and includes, but without limitation, any discoveries, developments, derivations, adaptations for different markets, evolutions and*

enhancements of any of the same from time to time whether created by or with the involvement of the Parties and/or any of their respective employees, contractors, consultants or otherwise;"

36.2 Clause 7.1 of the royalty agreement, which provides:

"All Intellectual Property provided or made available to [the Second Defendant] and [the First Defendant] jointly and severally, or created by the Parties whether directly or indirectly pursuant to this Agreement or otherwise is vested and shall remain the sole property of the Trust."

36.3 Clause 7.3 of the royalty agreement, which is headed *"confidentiality"* and which states:

"All Intellectual Property, reports, correspondence, and other like information prepared or made available by the Licensee or, as the case maybe, [the Second Defendant] and [the First Defendant] jointly and severally in connection with this Agreement, shall be regarded as being confidential as between the Parties. [The Second Defendant] and [the First Defendant] jointly and severally shall ensure that staff and/or consultants are aware of the confidential nature of such information and will obtain, if required by the Licensee, a confidentiality agreement in favour of the Licensee."

37. The first question is therefore whether the names of the Plaintiff's clients, the names of lenders and the amounts lent, which are the details in question pleaded by the Defendants in the Defence, are *"Intellectual Property"* or *"like information"* for the purposes of clauses 7.1 and 7.3 of the royalty agreement. Looking at the definition of *"Intellectual Property"*, and putting on one side the alleged incorporation of the non-compete agreement, in my judgment that definition is not apt to cover the names of clients, lenders and their borrowings. Intellectual property is usually understood to require some element of inventiveness in the creation of a literary or artistic work, design, symbol, trade name, logo or similar. The definition of *"Intellectual Property"* in the royalty agreement follows this approach. All of the kinds of materials identified within the definition of *"Intellectual Property"* in the royalty agreement involve some element of creativity in their making. By contrast, the names of the Plaintiff's clients, the lenders and the amounts of the clients' borrowings do not involve any element of creativity: they are simple matters of fact. I do not consider that the definition of *"Intellectual Property"* in the royalty agreement can, without more, properly be construed as encompassing the names of the Plaintiff's clients, the lenders and the amounts of the clients' borrowings. Similarly, factual information of that kind is not, in my view, *"like information"* for the purpose of clause 7.3 of the royalty agreement, since it is materially different in nature from the kinds of information that are within the definition of *"Intellectual Property"*. Nor do I consider that it can properly be implied that the Plaintiff and the Defendants intended that the definition of *"Intellectual Property"* in the royalty agreement would cover information of those kinds.

(b) The contractual obligations as to confidentiality: the non-compete agreement

38. Secondly, the Plaintiff relies on the non-compete agreement dated 1 January 2021 annexed to the royalty agreement. This is a tri-partite agreement between: (a) the First and Second Defendants and another company owned or controlled by the Second Defendant referred to as "DS"; (b) Mr Robert Young and Ms Aida van Wees; and (c) the trust. The Plaintiff is not a party to the non-compete agreement. As noted earlier in this judgment, the definition of *"Intellectual Property"* in the royalty agreement states:

> *"'Intellectual Property' incorporates the terms of the Non-Compete Agreement ..."*

39. Mr Durston submits that:

> *"... the definition of 'Intellectual Property' incorporates the Non-Compete Agreement. As such the relevant terms of the Non-Compete Agreement are incorporated and binding on the Defendants to these proceedings."*

40. The Plaintiff then relies on the following provisions in the non-compete agreement:

40.1 Recital G:

> *"G. It was always understood among the parties that the First Party was being given access to confidential information and intellectual property on the understanding that they would not compete with the Second Party and they would maintain strict confidentiality;"*

40.2 Recital P:

> *"P. in connection with working together in the Primary Business, from and after his arrival in the Cayman Islands, the [Second Defendant] has been given access to, generated, or otherwise come into contact with certain proprietary and/or confidential information of [Mr Young and Ms van Wees] or clients of [Mr Young and Ms van Wees] and the parties agree it is in their collective best interest and they desire to prevent the dissemination or misuse of such information;"*

40.3 Clause 2, headed *"Confidentiality"*:

> *"[The Second Defendant] recognizes and acknowledges that all the information which the Trust owns or has developed in order to provide estate planning services in the Primary Business it owns, planned or developed, whether for its own use or for use by its clients, is confidential and is the property of the Trust. [The Second Defendant] further recognizes and acknowledges that in order to enable DS to perform services for the clients and [the First Defendant] to provide loans and take investments from insurance companies, such clients and other third parties may furnish to DS and [the First Defendant] confidential information concerning their business affairs, property, methods of operation or other data; that the goodwill afforded to the Companies depends upon, among other things, the [Second Defendant] keeping such services and information confidential (collectively, including DS systems and all client information, the 'Confidential Information')."*

40.4 Clause 3, headed *"Non-Disclosure"*:

> *"[The Second Defendant] agrees that, except as directed by [Mr Young and Ms van Wees] or compelled by a court of competent jurisdiction or under the laws of the Cayman Islands, the [Second Defendant] will not at any time, whether during or after working with [Mr Young and Ms van Wees], disclose to any person or use any Confidential Information, or permit any person to examine and/or make copies of any documents which contain or are derived from Confidential Information, whether prepared by the [Second Defendant] or otherwise coming into the [Second Defendant's] possession or control without the prior written permission of [Mr Young and Ms van Wees]."*

41. Mr Durston's submission assumes that the non-compete agreement is fully incorporated into the royalty agreement by reference, so that it is to be considered fully effective between the Plaintiff and the Defendants, as if they were parties to the non-compete agreement. However, Mr Durston does not put forward any more detailed explanation or analysis of the extent to which and the purposes for which the non-compete agreement should be considered to have been incorporated into the royalty agreement to justify his submission.

42. I consider that there is a real difficulty with Mr Durston's argument as to the extent to which and the purposes for which the non-compete agreement was incorporated into the royalty agreement. This is because the incorporation of the non-compete agreement was not effected by way of an independent clause within the royalty agreement recording that the non-compete agreement was incorporated. If it had been, then it would have been easy to accept Mr Durston's argument that the intention of the parties must have been a wholesale incorporation of all of the terms of the non-compete agreement into the royalty agreement. However, the incorporation of the non-compete agreement is instead achieved within the definition of *"Intellectual Property"*. That is not a natural place to include a reference to a separate agreement that is intended to be fully incorporated for the purpose of giving contractual effect to all of its provisions. Instead, it suggests that the incorporation of the non-compete agreement was for definitional purposes only, in other words to extend the meaning of *"Intellectual Property"* in the royalty agreement by reference to any relevant definitions within the non-compete agreement.

43. Having regard to the way in which the non-compete agreement is referenced within the royalty agreement, in my judgment, recitals G and P of the non-compete agreement, which recite matters of historical fact, are not apt to extend the meaning of *"Intellectual Property"* within the royalty

agreement. Accordingly, I consider that they are not effectively incorporated into the royalty agreement by the reference within the definition of *"Intellectual Property"*.

44. Clause 3 of the non-compete agreement, which is headed *"non-disclosure"*, contains positive obligations on the Defendants not to disclose confidential information. It too is therefore inapt to extend the meaning of *"Intellectual Property"* within the royalty agreement, and I conclude that it is not effectively incorporated into the royalty agreement.

45. However, clause 2 of the non-compete agreement, headed *"confidentiality"*, contains acknowledgments by the Defendants that certain categories of information is to be treated as confidential, along with a definition of *"Confidential Information"* in the last clause of the paragraph:

> *"... clients and other third parties may furnish to DS and Securus Ltd. Co. confidential information concerning their business affairs, property, methods of operation or other data; ... (collectively, including DS systems and all client information, the 'Confidential Information')."*

46. In my judgment, the way in which the non-compete agreement is referred to within the definition of *"Intellectual Property"* is suitable to incorporate this definition of *"Confidential Information"* from the non-compete agreement into the meaning of *"Intellectual Property"* within the royalty agreement, and I conclude that it has that effect. In other words, the definition of *"Intellectual Property"* for the purpose of the royalty agreement includes *"confidential information concerning [clients' and third parties'] business affairs, property, methods of operation or other data"*

47. Furthermore, I consider that this broader meaning of *"Intellectual Property"* is suitable to cover factual information about clients of Mr Young and Ms van Wees' business and service providers, such as their names, and information about the borrowings in question.

48. I therefore conclude that the names of the clients, the lenders and details about the loans are all *"Intellectual Property"* for the purposes of the royalty agreement, which is therefore to be regarded as being confidential between the Plaintiff and the Defendants in accordance with clause 7.3 of the royalty agreement.

(c) The common law position

49. In light of my findings regarding the extent and effect of incorporation of the non-compete agreement into the royalty agreement, I do not need to consider the common law position in detail. However, I record that I am sceptical that the Defendants owe any duty of confidentiality regarding the information in question to the Plaintiff, as opposed to the clients and lenders, but the clients and lenders have not sought to enforce any confidentiality obligation, so it is unlikely that the common law would have provided the relief sought by the Plaintiff if I had concluded that there was no contractual duty of confidentiality.

E.2 Is the inclusion of the details pleaded in the Defendants' Defence a breach of confidentiality?

50. In my view, Mr Wingrave is right to point out that the question of confidentiality is not binary. The courts regularly apply the concept of a confidentiality club in litigation, where the parties or a subset of the parties are allowed to share information between themselves, whilst that information remains confidential to anyone outside the confidentiality club, including the public. Confidentiality must be considered in the context in which it arises, as indicated by Simon Salzedo KC in *Jinxin Inc v Aser Media Pte Ltd* [2022] EWHC 2856 (Comm). In this case, the position is that:

    50.1 The information in the Defendants' Defence is known to both the Plaintiff and the Defendants, so there is no breach of confidentiality to the extent that the details have been shared between the Plaintiff and the Defendants.

    50.2 The Defendants' Defence is on the court file but the court file is not open to inspection by the public without leave of the court. The information pleaded by the Defendants is therefore not in the public domain at this time. It will be available to the parties and to the court alone, until referred to in open court, which is unlikely to be until trial.

    50.3 Accordingly, there is no breach of confidentiality at this time resulting from the Defendants' pleading of the names of clients and lenders, and the amount of borrowings, and there is unlikely to be any breach before the matter comes on for trial. I anticipate that the parties will canvass with the court before trial what steps may be appropriate to protect any information that remains confidential and which ought not to be referred to in public.

E.3 Should the court make a sealing order in respect of the Defendants' Defence?

51. The question of a potential breach of confidentiality will only arise if an application for leave to inspect the file is made by some third party. If that were to happen, then as indicated by Rix JA in *Sasken Communication Technologies Ltd*, the parties should be given the opportunity to make representations to the court before the question of access to the file by a third party is determined. If any such application is made, the Plaintiff will be able to seek to prevent inspection of the Defendants' Defence or to redact information contained in the Defence, in the context of a specific application for inspection that is before the court, rather than trying to deal with the issue in the abstract.

52. I am conscious that in *Sasken*, Rix JA made a sealing order notwithstanding the automatic effect of GCR O.63, r.3(3) to prevent access to the court file by anyone other than the parties, effectively as a failsafe. In that case, both parties wished to have two confidential documents on the court file sealed, and the judge at first instance had refused to do so. The Court of Appeal allowed the appeal. Because both parties sought a sealing order, the Court of Appeal did not need to consider what order to make where the parties taken differing positions. In this case, the parties are not agreed that the Defendants' Defence should be sealed. Given the effect of GCR O.63, r.3(3), I consider it would be wrong for me to make a sealing order against the Defendants' opposition to that outcome.

E.4 Should the court make a sealing order in respect of the evidence in support of the Plaintiff's summons?

53. The Plaintiff did not put forward any detailed arguments in support of its request that the affidavit evidence filed in support of the summons should be sealed.

54. In my view, the considerations are similar to those that apply in respect of the Defendants' Defence. The affidavit evidence does not adduce any material that is not already known to the Defendants. It is therefore not confidential as regards the Defendants. As regards anyone other than the Defendants and the court, the evidence on the court file is not accessible as a result of GCR O.63, r.3(3) and *Sasken*, unless an application for leave to inspect the file is made. If such an application is made, the Plaintiff (and the Defendants) should be given notice and whether or not to seal the affidavit or to redact any part of its contents or the contents of the exhibit can be considered in context.

F. Disposal

55. For the reasons set out in detail in this judgment, I dismiss the Plaintiff's summons seeking sealing of the Defendant's Defence and also dismiss the Plaintiff's application for alternative relief in the form of sealing of the affidavit of Ms van Wees in support of the summons.

56. Within 7 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 12 September 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT