

SUPREME COURT OF QUEENSLAND

CITATION: *Fang v Yao* [2026] QSC 242

PARTIES: **LINA FANG**
(first plaintiff)
NAXI AGRICULTURE INVESTMENT PTY LTD
ACN 634 072 209 (AS TRUSTEE FOR THE NAXI
AGRICULTURE INVESTMENT TRUST)
(second plaintiff)
NAXI @ TROUGHTON PTY LTD ACN 634 070 698 (AS
TRUSTEE FOR THE NAXI PROPERTY
INVESTMENT TRUST)
(third plaintiff)
NAXI (CHINA) PTY LTD ACN 616 666 749
(fourth plaintiff)
v
WENLIANG YAO (ALSO KNOWN AS WILLIAM
YAO)
(first defendant)
LIANRU ZHAO
(third defendant)
NEW AUS GROUP PTY LTD ACN 165 555 733
(fourth defendant)
W HOLDING GROUP PTY LTD ACN 619 024 341
(fifth defendant)
BRISBANE VALLEY INVESTMENTS PTY LTD ACN
623 094 306 (BOTH IN ITS OWN RIGHT AND IN ITS
CAPACITY AS TRUSTEE FOR THE BRISBANE
VALLEY INVESTMENTS TRUST)
(sixth defendant)
THE COMMISSIONER OF TAXATION
(ninth defendant)

FILE NO: 13370 of 2022

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 2 October 2026

JUDGE: Muir J

ORDER: 1. By 4.00pm, Friday, 16 October 2026, the plaintiffs are:

- (a) to identify in writing to the Yao and Zhao defendants where in the plaintiffs' disclosure, the category 5 documents are listed (including where claims for privilege have been made); and/or
 - (b) to the extent (if any), disclosure of these documents has not been made, to make disclosure (including any claim for privilege).
2. The application for disclosure by the Yao and Zhao defendants is otherwise dismissed.
 3. If necessary I will hear the parties as to costs as set out at paragraph [138]–[139] of my reasons.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – where the defendants apply pursuant to rule 223(1) and (2) of the *Uniform Civil Procedure Rules 1999* (Qld) for the plaintiffs to give further and better disclosure of seven categories of documents – where the Court is asked to make a determination in respect of each category – where the plaintiffs oppose the application on the bases that the documents are not relevant, and either do not exist or have previously been disclosed – where the plaintiffs also claim that the documents are subject to legal professional privilege – where the defendants submit that the iniquity exception applies to the claimed privilege – where the defendants must establish special circumstances in respect of each category – where the Court must determine whether the interests of justice require disclosure of the documents in each category – whether the plaintiffs should be ordered to give further and better disclosure of each category of documents – whether challenge to the privilege claim was adequately made or necessary under rule 213(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the exercise of the Court's discretion to dispense with compliance under rule 371 of the *Uniform Civil Procedure Rules 1999* (Qld) should be exercised

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 211, r 212, r 213, r 223, r 371

AKS Investments Pty Ltd v Queensland Police Service [2018] QSC 4

Attorney General (NT) v Maurice (1986) 161 CLR 475

Attorney-General (NT) v Kearney (1985) 158 CLR 500

Baker v Campbell (1983) 153 CLR 52

Commissioner of Australian Federal Police v Propend

Finance Pty Ltd (1997) 188 CLR 501

DSE (Holdings) Pty Ltd v InterTAN Inc (2003) 127 FCR 499
Integrated Medical Technology Pty Ltd v Gilbert (No 2)
 [2015] QSC 124
Mann v Carnell (1999) 201 CLR 1
*Mastercard Asia/Pacific (Australia) Pty Ltd v Australian
 Competition and Consumer Commission* (2026) 315 FCR 256
*Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water
 Supply Joint Board* [2005] 1 Qd R 373
R v Cox & Railton (1884) 14 QBD 153
R v Dunwoody (2004) 212 ALR 103
Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors [2019]
 QSC 144
*The Queensland Local Government Superannuation Board v
 Allen* [2016] QCA 325
*Village/Nine Network Restaurants & Bars Pty Ltd v
 Mercantile Mutual Custodians Pty Ltd* [2001] 1 Qd R 276
Watson v McLernon [2000] NSWSC 306
Zavodny v Coupler & QBE [2018] QSC 328

COUNSEL: D de Jersey KC, with S Scarlett, for the plaintiffs
 A O'Brien KC, with AM Campbell, for the first, third, fourth,
 fifth and sixth defendants
 VG Brennan with P Hanna for the ninth defendant

SOLICITORS: Clayton Utz for the plaintiffs
 Bartley Cohen for the first, third, fourth, fifth and sixth
 defendants
 McInnes Wilson Lawyers for the ninth defendant

Application for further disclosure

- [1] The first and third to sixth defendants (**Yao and Zhao defendants**) apply for orders under r 223(1) of the *Uniform Civil Procedure Rules 1999* (UCPR) for the plaintiffs to make further and better disclosure of seven categories of documents.
- [2] The plaintiffs oppose the application on three bases:
 - (a) First, legal professional privilege (categories 1, 2 and 7);
 - (b) Second, relevance (categories 1, 2, 3, 5 and 7); and
 - (c) Third, non-existence and/or destruction (categories 1, 2, 3 4, 5 and 6).
- [3] There is some urgency to the determination of the disclosure dispute as a six-week trial is listed to commence before Hindman J on 26 October 2026.
- [4] Before examining each of the categories of requested documents it is necessary to have some understanding about the parties and what the case is about.

A birds-eye view of the proceedings

- [5] The first plaintiff, Ms Fang, is the sole director and shareholder of the second, third and fourth plaintiffs. The first defendant, Mr Yao, is the sole director and shareholder of the fourth and fifth defendants. The third defendant, Ms Zhao, is Mr Yao's mother and the sole director and shareholder of the sixth defendant. The **Commissioner** of Taxation is the ninth defendant.
- [6] The plaintiffs' case is that in 2016, Ms Fang transferred approximately AUD \$78 million of monies gifted to her (by her then husband Mr Wang) from bank accounts in China, to Mr Yao's and Ms Zhao's bank accounts in Australia (**Transfer Funds**). The transfer of funds was done in reliance on statements by Mr Yao to Ms Fang that he was a lawyer, and that the Transfer Funds would be held in the trust account of Mr Yao's law firm. Instead, the Transfer Funds were paid into Mr Yao's personal bank accounts, and into the personal bank accounts of his mother, Ms Zhao.
- [7] While some of Ms Fang's funds were used to acquire real properties in Australia in the names of the second, third and fourth plaintiffs, a significant amount of the money is unaccounted for. Further, in September 2021, the Commissioner garnisheed approximately AUD \$28 million of the Transfer Funds from Mr Yao's and Ms Zhao's bank accounts, in apparent satisfaction of their respective taxation obligations. That amount remains held by the Commissioner (**Garnisheed Funds**).
- [8] The plaintiffs also allege that Mr Yao acted as their agent in assisting them to acquire real property in Australia, and therefore owed them fiduciary duties. In breach of these duties, Mr Yao is alleged to have caused companies he controlled to sell real properties to the plaintiffs, at inflated purchase prices, and without disclosing the apparent conflict.
- [9] The Yao and Zhao defendants deny any liability to the plaintiffs for the Transfer Funds or damages. Their case is that:
- (a) Ms Fang was never the legal or beneficial owner of the Transfer Funds and, accordingly, any representation that she is, made by her, or on her behalf, is false;
 - (b) the "Gift Certificate" or "Gift Declaration", which the plaintiffs rely on as documenting the gift from Mr Wang to Ms Fang is not genuine and does not record a transaction which in fact occurred;
 - (c) the Transfer Funds were made for the sole or substantial purpose of:
 - (i) Mr Wang, or Mr Wang and Ms Fang, expatriating the Transfer Funds otherwise than in accordance with Chinese law; and
 - (ii) Ms Fang obtaining a subclass 188 or 132 visa for which she was not eligible.

(Transfer Purpose); and
 - (d) Ms Fang made false declarations in support of her visa applications.
- [10] By their reply, the plaintiffs deny these allegations and that the funds were transferred for any improper purpose.

Events leading up to the current application

- [11] The proceedings have been on foot since 31 October 2022, having twice previously been set down for trial; neither of which proceeded. It is now listed for trial for a third time.
- [12] This is also not the first disclosure or interlocutory stoush. It is another in the long line of many. Nor, it seems, will it be the last, with the Yao and Zhao defendants foreshadowing an application for leave to further amend their defence and the plaintiffs foreshadowing a request for guillotine orders following the Yao and Zhao defendants' non-compliance with some of the trial directions made by Hindman J on 25 September 2026.
- [13] On 6 and 7 August 2026, the Yao and Zhao defendants wrote to the plaintiffs raising concerns with the plaintiffs' disclosure. The plaintiffs addressed those concerns through responsive letters dated 3 and 4 September 2026.
- [14] The concerns raised in the 6 and 7 August 2026 letters from the Yao and Zhao defendants correspond with Categories 1, 2 and 3 of the application. Categories 4 to 7 of the application were not the subject of any pre-application correspondence and were first raised by the Yao and Zhao defendants when their application was served late on 21 September 2026. The bases on which the Yao and Zhao defendants sought disclosure of the documents in Categories 4 to 7 were first articulated in their outline of submissions served on the plaintiffs late in the evening on 25 September 2026.

Disclosure under the UCPR

- [15] There is an ongoing duty under the UCPR for one party to disclose to another party in the proceeding each document in the possession or control of that party directly relevant to an issue in the pleadings: r 211 of the UCPR. Relevantly, this duty does not apply to a document of which there is a valid claim to privilege from disclosure: r 212(a) of the UCPR. Although a document that is directly relevant but subject to a claim of privilege must be listed as part of the disclosure regime.
- [16] A party may challenge a claim to privilege from disclosure. Within 7 days of a party making such a challenge, the party maintaining the claim must file and serve an affidavit from an individual who knows the facts giving rise to the claim: r 213 of the UCPR.
- [17] This proceeding is a complex, document-heavy one. Unsurprisingly, the parties adopted a documents disclosure management plan which (at least from the plaintiffs' perspective) disclosed documents in family categories. I was not taken to that plan, nor did the parties make detailed submissions about what had been agreed between them. Although the parties did make alternative submissions about the relevance of documents listed as part of disclosure within the plan.
- [18] On the one hand, the Yao and Zhao defendants submitted that the inclusion of documents in the plaintiffs' list of privileged documents was a concession as to their direct relevance. But on the other hand, the plaintiffs submitted that disclosure was completed at a document group (family) level which meant that if a document in a group was relevant, the whole group was disclosed but this did not mean all the documents within that family group were relevant. In other words, where there were documents attached to the principal document, they were disclosed as a group.

- [19] I accept that document management plans play a crucial role in facilitating and managing disclosure in cases involving a high volume of documents. But the use of such a plan does not eliminate the need for some intellectual engagement with the disclosure process under the UCPR. On the evidence (and arguments) as they were maintained before me, I accept that the disclosure of a parent document as part of a family document management plan in itself does not necessarily waive privilege or relevance in all of the attachments. But the notion that no real attempt is made to confine the documents in a list of documents to those directly relevant is a surprising one that is contrary to r 211 and r 5 of the UCPR.
- [20] It is unnecessary to resolve this impasse because the real issue is whether privilege was waived or the iniquity exception applies.
- [21] Under r 223(1) of the UCPR, the Court may order a party to disclose a document or class of documents by delivering copies or producing them for inspection. Under r 223(2) of the UCPR, the Court may order a party to file an affidavit stating that a specified document or class of documents does not exist or has never existed, or the circumstances in which it ceased to exist or passed out of the party's possession or control.
- [22] Rule 223(4) of the UCPR confines the power of the Court to make orders of the kind sought in the application if there are "special circumstances and the interests of justice require it", or it appears there is an objective likelihood that the duty to disclose has not been complied with, or a specified document or class of documents exists or existed and has passed out of the possession or control of a party. The threshold requires "something more than mere suspicion": *Village/Nine Network Restaurants & Bars Pty Ltd v Mercantile Mutual Custodians Pty Ltd* [2001] 1 Qd R 276 at [10].
- [23] Where, on the application, objection is taken to disclosure on the ground of privilege, the Court may inspect the document to decide the objection: r 223(5) of the UCPR.
- [24] Issues of waiver of legal professional privilege and the iniquity exception to privilege permeate the application. It is therefore instructive to set out the relevant legal principles that apply to these concepts.

How is the issue of waiver of legal professional privilege to be determined?

- [25] Waiver of legal professional privilege may be express or implied. Determination of whether legal professional privilege has been waived requires an assessment of the circumstances in which the communication was made, and whether there is conduct inconsistent with maintenance of the confidentiality which the privilege protects: *Mann v Carnell* (1999) 201 CLR 1 at 13 at [29]. The inconsistency may arise not only from an express or implied assertion about the content of the communication but from conduct which "necessarily lays open the confidential communication to scrutiny": *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 127 FCR 499 at [58].
- [26] The assessment of whether waiver has occurred involves considerations of fairness between the conduct of the client and the maintenance of the confidentiality but "not some overriding principle of fairness operating at large": *Mann* at [29].
- [27] In determining whether privilege has been waived, the following principles emerge from the authorities:

- (a) a mere or passing reference to legal advice having been taken or obtained does not constitute a waiver of privilege in respect of that advice: *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 481;
- (b) disclosure of the gist, conclusion or position taken in the advice may suffice to establish waiver: *Mastercard Asia/Pacific (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2026) 315 FCR 256 at [60].
- (c) whether disclosure of the substance or effect of a legal advice constitutes waiver depends on a consideration of the purpose of the disclosure and the extent to which the substance or effect of the advice is proposed to be relied on by the privilege holder in the litigation: *The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [73]; *Maurice* at 481–3;
- (d) a reference to a document in a pleading or affidavit which is not put into evidence does not waive privilege. But if the document is set out in full the privilege is waived: *Maurice* at 481; and
- (e) a party to litigation cannot construct a case for waiver through its own pleadings: *Allen* at [73].

Not all documents are protected by legal professional privilege

- [28] Communications made for the purpose of facilitating or furthering a crime or fraud will not be protected by legal professional privilege: *R v Cox & Railton* (1884) 14 QBD 153; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 514–6. This principle is commonly known as the “iniquity exception”: *R v Cox & Railton* (1884) 14 QBD 153 at 171; *Baker v Campbell* (1983) 153 CLR 52 at 107–8; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 514 and 546–7.
- [29] The onus is on the party alleging that the iniquity exception applies to establish a *prima facie* case that the communications came into existence in furtherance of an improper purpose: *Baker* at 107–8. A mere assertion or allegation of illegal purpose is not sufficient. It is the communications themselves that must be considered to determine whether they were made in pursuit of that plan: *R v Dunwoody* (2004) 212 ALR 103 at [50]; *AKS Investments Pty Ltd v Queensland Police Service* [2018] QSC 4 at [122].
- [30] The party resisting the claim of privilege need not prove the iniquity, but there must be “something to give colour to the charge”: a charge made in clear and definite terms and “some prima facie evidence that it has some foundation in fact”, so that there are reasonable grounds for believing the communication was made for the improper purpose: *Kearney* at 516; *Propend* at 514.
- [31] Implicit in the rule of law is an entitlement to obtain legal advice so that individuals may know their rights. Obtaining such advice, even for the purpose of concealing previous dishonest conduct or avoiding adverse consequences, such as penalties or claims for damages, does not amount to furtherance of the improper purpose. But if the person seeking advice proposes to continue the dishonest conduct and use the legal advice obtained to assist in this purpose, then that would be sufficient to amount to a furtherance of the improper purpose. For example, an employee who seeks advice about past dishonest conduct towards their employer retains privilege, but waives it

if the advice sought is in continuing to use information dishonestly acquired: *Watson v McLernon* [2000] NSWSC 306 at [116].

- [32] Even if a *prima facie* case of furtherance of an improper purpose is established on the evidence, an inspection of the questioned communications by the court may assist in resolving this aspect of the case: *AKS Investments* at [122].
- [33] Turning then to each of the categories of documents sought.

Category 1: anti-money laundering, counter-terrorism advices

- [34] The first category of documents sought by the Yao and Zhao defendants are communications between Clayton Utz, Fisher Dore Lawyers and Ms Fang concerning advice about anti-money laundering and counter-terrorism financing and related advice (AML/CTF). The documents sought include those:
 - (a) identified in exhibit PJB-30 to the affidavit of Mr Bisset affirmed on 14 March 2023 (**Bisset Affidavit**); and
 - (b) the documents in items 99-121 of the Schedule to the application.
- [35] The Yao and Zhao defendants seek all “documents recording or evidencing communications with Clayton Utz concerning AML & CFT”, “including but not limited to” communications with Fisher Dore Lawyers and Porter Davies Lawyers. This is a broad request that seeks an unlimited range of documents (including, for example, internal communications between the plaintiffs’ solicitors associated with the draft voluntary disclosure letter). I am not satisfied that direct relevance is simply established by these documents being included in the family of documents contained in the plaintiffs’ list of privileged documents.
- [36] The Bisset Affidavit was affirmed in support of an application by the plaintiffs’ for interim freezing orders against the Yao and Zhao defendants. Exhibit PJB-30 summarised the 532 professional hours Clayton Utz spent on tax matters for the plaintiffs up until 16 December 2022. The plaintiffs relied on the number of hours of work undertaken by their solicitors to support a submission that they were investigating and prosecuting their claims with due expedition.
- [37] Exhibit PJB-30 listed the work undertaken to relevantly include that the firm:
 - (a) requested advice from Mr Hine of its Sydney office “re AML/CTF issues pertaining to L Fang”;
 - (b) prepared for him a “note on possible consequences of disclosure to ATO of ownership of Garnisheed Moneys” under the anti-money laundering, proceeds of crime and criminal code legislation;
 - (c) drafted “updates to voluntary disclosure letter incorporating feedback from C Hine”;
 - (d) reviewed “advice from Fisher Dore”; and
 - (e) considered “anti-money laundering & counter-terrorism financing and criminal liability for newest draft disclosure letter to ATO”.

- [38] The Yao and Zhao defendants point to items 99–121 of the Schedule to their application and contend that the plaintiffs have conceded relevance in relation to these documents by including them in the plaintiffs’ privilege list. Items 99-121 of the Schedule most relevantly include:
- (a) emails with Fisher Dore in September 2021;
 - (b) Porter Davies’ draft letters of instructions to Fisher Dore in December 2021 and January 2022;
 - (c) emails sent on 22 and 23 June 2022 with the subject “advice from Fisher & Dore”; and
 - (d) a file note of 2 August 2022 for a “meeting re immigration and ATO issues”.
- [39] Senior Counsel for the Yao and Zhao defendants, Mr O’Brien KC, submitted that the plaintiffs had an obligation to disclose the above category 1 documents because they are relevant, and to the extent they are subject to a claim of privilege (and as I understood the submission they all were), the plaintiffs are obliged to disclose these documents because of the iniquity exception (and not waiver) with waiver “attached more” to the second category.
- [40] The Yao and Zhao defendants submitted that the “colour to the charge” that Ms Fang has engaged in an improper purpose emerges from the disclosed documents and what is relevant on the face of the pleadings including that:
- (a) the ninth defendant does not admit that Ms Fang owns the Garnisheed Funds, and Ms Fang has engaged with the Commissioner about them since December 2021 (the plaintiffs deny those dealings were attempts to persuade the Commissioner that Ms Fang is the legal or beneficial owner of the Garnisheed Funds);
 - (b) the visa applications lodged in Ms Fang’s name declared personal and business assets that were a small fraction of the RMB ¥580 million she says Mr Wang gave her in August 2015 (the plaintiffs allege that Mr Yao lodged the applications without her reviewing them);
 - (c) the divorce certificate that Ms Fang previously relied upon to allege that she and Mr Wang were divorced on 2 August 2019 is not a genuine document (with the plaintiffs now alleging that Mr Yao “procured” the certificate).
 - (d) by amended replies filed on 20 July 2026, the plaintiffs deny that Clayton Utz gave advice in June 2022 about the consequences under anti-money laundering, proceeds of crime, and criminal code legislation of disclosure to the ATO of Ms Fang’s asserted title to the Garnisheed Funds;
 - (e) in November 2025, it was said that Clayton Utz’s engagement “involved the provision of the advice of the kind referred to” in (a) above, and that Ms Fang had “sought certain advice from Fisher Dore solicitors as to any liability that might arise under money laundering or counter-terrorism legislation in Australia” after funds held in the accounts of Mr Yao and Ms Zhao had been garnisheed by the Commissioner.
- [41] It is convenient to deal with category 1 documents in two parts:

- (a) **Category 1(a):** communications with Clayton Utz “concerning AML & CTF and related advice”; and
- (b) **Category 1(b):** communications with Fisher Dore.

Category 1(a): communications with Clayton Utz concerning AML & CTF and related advice

- [42] The plaintiffs submitted that the iniquity exception does not apply to documents in category 1(a) because the advice given was in relation to the consequences of making a voluntary disclosure to the ATO.
- [43] I am not satisfied that the Yao and Zhao defendants established that any such advice exists or, if it does, was obtained for the furtherance of any alleged improper purpose.
- [44] First, as the Yao and Zhao defendants were told by letter on 3 September 2026, the plaintiffs’ solicitors were instructed to prepare a voluntary disclosure to the ATO and advise on potential consequences of drawing those matters to the Commissioner’s attention voluntarily. That voluntary disclosure letter dated 7 July 2022 has been disclosed.
- [45] Second, the draft voluntary disclosure letter was reviewed by Clayton Utz, the plaintiffs’ solicitors with expertise in financial services matters, including AML and CTF issues. Mr Jones, the solicitor with carriage of the proceeding for the plaintiffs, in his fifth affidavit affirmed on 24 September 2026 gave evidence that no separate standalone advice or communication was provided by Clayton Utz to Ms Fang in respect of those issues.
- [46] Third, and regardless, Mr Jones’ evidence is that the only documents falling within the description in category 1(a) documents that the plaintiffs can identify in the Schedule to the application are items 112-114 and 116 (of which, duplicates of items 113 and 114 have been disclosed). His evidence is that there are otherwise no documents in the plaintiffs’ privilege list of the kind sought by the Yao and Zhao defendants’ submissions.
- [47] Fourth, (and although waiver of privilege of category 1 documents was not seriously pressed before me), I am satisfied that the Bisset Affidavit does not waive privilege over items 111, 112, 115 and 116 because the substance of the advice was not disclosed in that affidavit. The purpose of that affidavit was to show the extent of the work undertaken in prosecution of the plaintiffs’ freezing order application against the Yao and Zhao defendants. A description of the nature of that work undertaken by Clayton Utz does not therefore constitute a waiver of the documents. Further, the Yao and Zhao defendants have not challenged privilege pursuant to r 213(1)(a) of the UCPR.
- [48] Fifth, the Yao and Zhao defendants submitted that the subject matter of the communications have been deployed in inconsistent ways by the description of the work in PJB-30 and, by Clayton Utz, assertions that the purpose and gist of the Fisher Dore advice (“as to any liability which might arise”) and of Clayton Utz’s advice (“the likely consequence of drawing these matters to the Commissioner’s attention”) as supporting a finding of a *prima facie* case of improper purpose by Ms Fang. This inconsistency is said to support an inference that such advice exists. But

the evidence is that they don't. And even if they did, such advice is privileged and the evidence at its highest (including the alleged inconsistency) does not establish a *prima facie* case that any such advice(s) were given for the furtherance of an unlawful purpose. It is unsubstantiated speculation made by the Yao and Zhao defendants late in the day (with the delay being explained).

- [49] It follows that there is no special circumstance nor do the interests of justice warrant an order for the disclosure of the category 1(a) documents.
- [50] It follows that I am not satisfied that it is necessary for me to inspect the documents to determine the objection. The application for disclosure of documents in category 1(a) is dismissed.

Category 1(b): communications with Fisher Dore Lawyers

- [51] By category 1(b) the Yao and Zhao defendants seek a broad category of documents "recording or evidencing" communications with Fisher Dore "including but not limited to" the categories specified in paragraph 1(b) of the application. I am not satisfied that an order for the disclosure of category (b) documents should be made.
- [52] First, (and again), the request is for a broad range of documents for which direct relevance is not shown.
- [53] Second, after Ms Fang's discovery that the statements of Mr Yao, (as pleaded by the Yao and Zhao defendants), were untrue, Ms Fang (by her previous solicitors Porter Davies) sought advice from Fisher Dore as to any liability which might arise under money laundering or counter-terrorism financing legislation in Australia. There is no evidence to support a submission that the advice was obtained for the furtherance of any alleged improper purpose.
- [54] Third, the Yao and Zhao defendants point to items 99–121 of the Schedule to their application and contend that the plaintiffs have conceded relevance in relation to these documents by including them in the plaintiffs' privilege list. As stated earlier, I do not accept this in itself established relevance. But regardless, and relevantly, the only items that refer to Fisher Dore are items 99, 100, 103–108, 110, 120 and 121. Privilege claims in relation to these documents were previously challenged and proved in the First Porter Affidavit in relation to items 105–108 and 110. Privilege has not been challenged pursuant to r 213(1)(a) of the UCPR for the remaining items, nor has privilege been waived by the Bisset Affidavit for the reasons stated earlier at paragraph [47].
- [55] Fourth, I do not accept the Yao and Zhao defendants' submissions that the plaintiffs have waived privilege over the Fisher Dore documents by responding to their solicitor's disclosure and privilege complaints in relation to these documents. Plainly, this correspondence was made in a manner consistent with maintaining confidentiality over the documents.
- [56] Fifth, a *prima facie* case has not been established that the Fisher Dore advice was obtained in furtherance of any improper purpose and therefore the iniquity exception does not apply to these documents because:
 - (a) of the reasons stated at paragraph [48] above; and

- (b) the advice was allegedly sought in relation to potential penalties or adverse consequences that might arise from Ms Fang's funds having been transferred to Australia in accordance with Mr Yao's advice (who Ms Fang believed to be an Australian lawyer). Advice as to the avoiding of adverse consequences, including penalties and claims for damages, does not amount to a furtherance of the improper purpose.

[57] It follows that I am not satisfied that it is necessary for me to inspect the documents to determine the objection. The application for disclosure of documents in category 1(b) is dismissed.

Category 2: independent immigration advice

[58] By the category 2 request, the Yao and Zhao defendants seek disclosure of "documents recording or evidencing" communications with Mr Drakopoulos of Milner Lawyers "including but not limited to" those which relate to Ms Fang's visa applications. This request includes items 1 to 98 of the Schedule.

[59] Items 1 to 98 of the Schedule include:

- (a) emails between Ms Fang and Mr Porter dated 13 to 19 July 2022 with the subject "188c visa Supplementary Material Requirements", some copied to four Clayton Utz lawyers;
- (b) Mr Porter's email to Mr Drakopoulos dated 15 July 2022;
- (c) Ms Fang's emails to Mr Drakopoulos dated 15 and 16 July 2022 with the subject "Visa" and "Re: Lina Fung Application for Business and Innovation Investment (Subclass 188) Visa (22-1058)", attaching the Department's request and certified translations of her supporting documents;
- (d) an email dated 5 August 2022 with the subject "Visa application withdrawal successful"; and
- (e) emails dated 11 and 12 August 2022 with the "visa applications" and "132A" by which the same material passed between Ms Fang, Mr Porter and Clayton Utz.

[60] Exhibit PJB-30 listed the work undertaken to relevantly include that:

- (a) in July 2022, Clayton Utz sent an "[e]mail re advice from T Drakopoulos re visa applications and tax implications"; and
- (b) in August 2022, Clayton Utz met with Ms Fang, sent an email "re scheduling meeting with T Drakopoulos (immigration lawyer)", prepared a "[d]raft letter to ATO re L Fang's visa withdrawal" and perused "a bundle of information provided by J Porter in relation to L Fang's 132 visa application".

[61] These documents are sought on the basis that they are relevant. To the extent they are privileged, it is submitted there has been a waiver of privilege. It is also submitted that, independently of waiver, no privilege attaches to this category of documents, because the Yao and Zhao defendants' pleaded case (as supported by *prima facie* evidence) is that Ms Fang made false declarations in support of her visa application, which she later withdrew (following immigration advice) rather than provide

information in response to, or address the concerns raised by, the Department of Immigration.

[62] The Yao and Zhao defendants point to the documents being relevant for two reasons:

- (a) First, because some of the category 2 documents are included in the plaintiffs lists of documents, so the plaintiffs must be taken to have conceded their direct relevance;
- (b) Second, they are made relevant by paragraph 41A of the 3FAD which contends that the declarations Ms Fang made in support of her visa applications were false and that she withdrew her visa applications because she was unable to provide a response to questions asked by the Department of Home Affairs about the veracity of those declarations.

[63] For the reasons discussed earlier, I do not accept the first proposition above establishes relevance in this case. The request under this category is a very broad one. Mr Drakopoulos was engaged to advise on the work conditions of Ms Fang's Australian visa. The broader direct relevance of the documents sought has not been established by the Yao and Zhao defendants.

[64] But regardless, only items 24-26 and 28-45 of the Schedule apparently relate to communications with Mr Drakopoulos. Where privilege has been challenged over those documents, that challenge was proved by the First Porter Affidavit. Duplicates of nine of those documents have been disclosed. The very recent challenge to the balance of the claim for privilege on grounds of waiver and in reliance on the iniquity exception are dealt with below.

[65] As to the second pleading point, the plaintiffs refer to their replies to the Yao and Zhao defences. By their replies, the plaintiffs relevantly:

- (a) admit that in July and August 2022, Ms Fang sought and obtained advice from Mr Drakopoulos, but they do not waive privilege over that advice other than to say that, to the extent that the advice was in writing, it was via WeChat messages and the plaintiffs have disclosed that advice;
- (b) otherwise deny any other communication between Mr Drakopoulos are relevant to the proceeding and, in any event, claim they are privileged;
- (c) admit that by letter of 29 May 2026, Clayton Utz asserted that the independent immigration advice upon, or following, which Ms Fang withdrew the visa application was given by Ms Zhang, a registered migration agent;
- (d) deny that it is to be inferred that Ms Fang could not provide any further information to satisfy the Department of Home Affairs of certain income, shareholdings and interests in businesses on the basis that these allegations are irrelevant, that no such inference arises, and that the visa applications were withdrawn because, following receipt of immigration advice, Ms Fang became aware that incorrect information had been provided to the Department of Home Affairs in connection with her 188 visa application, which gave rise to a concern that incorrect information may have also been provided in connection with the 132 visa application, and that any nominated non-cash assets in the 188 visa application would need to be liquidated to support the investment requirement for the grant of the application.

Waiver

- [66] The Yao and Zhao defendants submitted that the plaintiffs have put the category 2 documents in issue because they allege that Ms Fang withdrew her visa applications:
- (a) first, “following receipt of independent immigration advice”; and
 - (b) more recently following amendment, “upon receipt of independent immigration advice.”
- [67] This submission is not strictly correct. A review of the plaintiffs’ replies reveals that that the plaintiffs initially pleaded “upon” and then later changed this aspect of the pleading to “following”. But nothing turns on this. The Yao and Zhao defendants submitted that whichever pleaded version the plaintiffs advance makes no difference because a party who pleads that it acted on advice, or puts in issue a state of mind to which legal advice contributed, cannot maintain confidentiality over the communications relevant to the formation of that state of mind: *DSE* at [58], [121] and [127]; *Mastercard* at [62] and [65] to [66]. I accept these general propositions as correct. But they are not applicable to the present case. The plaintiffs do not plead that they acted on advice, nor is Mr Fang’s state of mind in issue. The basis of her withdrawal of the visa application is as set out in [65](d) above.
- [68] The Yao and Zhao defendants also submitted that the Court would be reluctant to accept what was said initially and what is said now about this subject because:
- (a) the plaintiffs admit that Ms Fang “sought and obtained advice” from Mr Drakopoulos, an immigration lawyer, in July and August 2022; and
 - (b) they have also disclosed documents which record that, in the three weeks before Ms Fang’s withdrew her visa applications, Clayton Utz and/or Porter Davies met with Ms Fang “re immigration and ATO issues” and drafted a letter to the ATO about the withdrawals.
- [69] The starting point is that a party to litigation cannot construct a case for waiver through its own pleadings. In many ways this is what the Yao and Zhao defendants are attempting to do.
- [70] I am not satisfied that privilege has been waived in the plaintiffs’ replies to the Yao Defence and the Zhao Defence because the substance of the “independent immigration advice” referred to was not particularised. Regardless, and in any event, the advice referred to has been disclosed (to the extent such advice was in writing), and is not advice given by Mr Drakopoulos.
- [71] I am also not satisfied that any waiver of privilege arises from the Bisset Affidavit for the reasons discussed under category 1 above.

Iniquity exception

- [72] The Yao and Zhao defendants submitted that, independently of waiver, no privilege attaches to the category 2 documents because the pleaded case, supported by *prima facie* evidence, is that Ms Fang made false declarations in support of her visa applications and withdrew them when the Department of Home Affairs raised concerns about the veracity of what she had said.

- [73] The Yao and Zhao defendants rely on the evidence that there were communications with an immigration lawyer around this time about how to deal with the request, or how to withdraw the request, as *prima facie* evidence of furtherance of applications founded on false declarations or of the concealment of their falsity from the Department of Home Affairs.
- [74] The Yao and Zhao defendants allege that communications regarding Ms Fang's visa applications therefore cannot be privileged as they would be communications made in the furtherance of an unlawful purpose, namely the Transfer Purpose.
- [75] I do not accept this as anything other than belated speculation by the Yao and Zhao defendants.
- [76] First, the plaintiffs, through their solicitor, have asserted that no further relevant communications exist. There is nothing inconsistent with this and the plaintiffs pleaded case.
- [77] Second, there is no evidence to establish a *prima facie* case that the alleged Transfer Purpose was "furthered" by the advice obtained from Mr Drakopoulos. The false declarations in support of Ms Fang's visa applications were allegedly made by Mr Yao as Ms Fang's migration agent, without Ms Fang's knowledge or consent.
- [78] Third, Ms Fang's visa applications were allegedly withdrawn upon Ms Fang becoming aware of the misstatements made in her applications by Mr Yao. Any advice as to the consequences of the misstatements being made in her visa applications is not advice given in the furtherance of an improper purpose: *AKS Investments* at [122]; *Carbotech* at [25]-[26]; *Watson* at [116].
- [79] The application for disclosure of documents within category 2 is dismissed.

Category 3: various communications

- [80] The documents sought by the Yao and Zhao defendants under category 3 are various communications between the plaintiffs and the ATO, most particularly:
- (a) Clayton Utz's letters to the ATO dated 12 April 2024, 26 April 2024 and 8 November 2024;
 - (b) the covering email to each letter to the ATO that the plaintiffs have disclosed, including the emails produced informally on 1 October 2026;
 - (c) every document attached to or enclosed with those letters or emails, or uploaded to the ATO with them (including to the ATO's Dropbox portal or "Sigbox"); and
 - (d) the documents identified in Annexure A to Bartley Cohen's letter of 16 April 2026.¹
- [81] The Yao and Zhao defendants submitted that these documents are relevant to the following issues crystallised on the pleadings:

¹ The application also sought the documents identified in Annexure A to Clayton Utz's letter to Bartley Cohen dated 4 September 2026, however, this was not pressed in the revised submissions of the defendants' solicitors.

- (a) whether Ms Fang owns the money (the **Non-ownership Reason**);
- (b) whether Mr Wang gave her RMB ¥580 million by stamping the Gift Declaration (the **No Gift Reason**);
- (c) what Ms Fang told the Commissioner about who owns the Garnisheed Funds;
- (d) where the AUD\$30,900,013 came from, and why it was moved out of China; and
- (e) whether Ms Fang suffered any loss.

[82] Before turning to the documents sought, it is necessary to deal with the allegation that the where and why of the AUD\$30,900,013 referred to in (d) above is relevant. The plaintiffs' replies plead that such an allegation is irrelevant. During the course of argument, the Yao and Zhao defendants did not persuade me to the contrary. Regardless, there is no evidence upon which I am persuaded that there are documents that are directly relevant to this sum of money, sent to the ATO by the plaintiffs, which have not been disclosed.

[83] The first of the documents sought are the three letters from Clayton Utz to the ATO. These letters are not included in the plaintiffs' list of documents. These letters are said to be relevant as they are referred to in other documents that have been disclosed by the plaintiffs. But I am not satisfied that the Yao and Zhao defendants have established such direct relevance.

[84] First, the fact a document is referred to in a directly relevant document does not of itself make that other document relevant.

[85] Second, in this case a solicitor on behalf of the plaintiffs has identified these letters as not being directly relevant to any allegation in issue in the proceeding.

[86] Third, the Yao and Zhao defendants have also sought disclosure of these documents from the Commissioner of Taxation and the Commissioner has said there is nothing further to disclose.

[87] The balance of the documents sought are the enclosures to and covering emails of letters that have already been disclosed. The Yao and Zhao defendants submitted that the relevance of the enclosures and covering emails is conceded because the letters have been disclosed. To the extent this category seeks disclosure of covering emails to letters that have already been disclosed, the plaintiffs have agreed to make that disclosure. It is therefore unnecessary to make any orders about that disclosure.

[88] I am otherwise not satisfied that the Yao and Zhao defendants have established that any of the other documents sought in category 3 are directly relevant and ought to be disclosed.

[89] First, to the extent the Yao and Zhao defendants seek disclosure of documents merely referred to in those covering emails or other disclosed documents, I am not satisfied that the relevance of those documents to the issues on the pleadings has been shown. Again, I am not satisfied (based on the document management plan being used in this case) that just because a document is referred to in a disclosed document, means that the referenced document is directly relevant to the issues in the proceeding. If this was the case the duty of disclosure, particularly in a case such as this, would be

burdensome leading to disclosure of potentially a large volume of irrelevant documents and causing unnecessary expense and delay to the just and expeditious resolution of the real issues in dispute.

[90] Second, the Yao and Zhao defendants submissions focussed on reference to the partial bank statements identified by the plaintiffs as not being directly relevant and submitted that it is reasonable to infer that this, and other attachments, were directly relevant because they were sent in response to Ms Fang being asked to substantiate the purported custodian arrangement, and the source of the purported gift funds – being the real issue in the case. But I am not satisfied that such an inference is open because:

- (a) the plaintiffs’ solicitors have affirmed that they have identified the documents that were attached that are directly relevant to the issues in dispute on the pleadings and that there are other documents that aren’t directly relevant;
- (b) there was nothing on the face of documents disclosed that the Yao and Zhao defendants could point to as supporting a finding that a relevant attachment was not disclosed;
- (c) there was no evidence before me of exactly what the request made by the ATO to Ms Fang was and it would be wrong to speculate further; and
- (d) a solicitor on behalf of the plaintiffs has identified the disclosure sought as not being directly relevant to any allegation in issue in the proceeding. There has been no basis submitted or established by which I am satisfied that this assessment is wrong.

[91] Fourth, and again, the Yao and Zhao defendants have also sought disclosure of these documents from the Commissioner of Taxation, and the Commissioner has said there is nothing further to disclose.

[92] The application for disclosure of documents within category 3 is dismissed.

Category 4: Communications with Mr Yao, Mr Wang, Mr Li and others

[93] The documents sought by the Yao and Zhao defendants under category 4 are:

- (a) documents recording or evidencing WeChat communications dated on or before 5 July 2020 between Ms Fang and Mr Yao;
- (b) documents recording or evidencing all directly relevant communications between the first plaintiff and one or more of the following persons:
 - (i) Mr Zhenjie Wang;
 - (ii) Mr Dongfeng Li;
 - (iii) the persons referred to in subparagraphs 47(a)(i) to (v) of the fifth further amended statement of claim (**5FASOC**);
 - (iv) the “Ximei Staff” referred to in Schedule 1 of the 5FASOC; and
 - (v) all directly relevant emails (and their attachments, if any) sent from or received by the email account 2603620594@gq.com.

[94] As part of their application, the Yao and Zhao defendants also seek an order that Ms Fang file and serve an affidavit under r 223(2) of the UCPR for any of those documents she says do not exist or are not in the plaintiffs' possession or control, stating:

- (a) what became of the telephone she used before July 2020 and any backup of it, and whether the WeChat messages can be recovered;
- (b) when, and why, she deleted her messages with Mr Wang and Mr Li, and whether copies exist on any other device or account;
- (c) whether she communicated with Mr Wang or Mr Li by any means other than WeChat;
- (d) whether any document within paragraph 1(f)(iii)-(iv) exists; and
- (e) who searched the account 2603620594@qq.com, how and when.

[95] The fifth affidavit evidence of Mr Jones is that he is instructed by Ms Fang that:

- (a) in relation to paragraph 1(e) of the application, Ms Fang does not possess or otherwise have access to any WeChat communications between herself and Mr Yao dated on or before 5 July 2020 as at or about that time, she purchased and began using a new mobile phone and was unable to transfer the WeChat messages from her old phone. WeChat messages between Ms Fang and Mr Yao after 5 July 2020 have been disclosed;
- (b) in relation to paragraph 1(f)(i) of the application, Ms Fang does not possess or otherwise have access to any communications with Mr Zhenjie Wang, as on a date she cannot presently recall, but following her separation from Mr Wang, Ms Fang deleted her WeChat messages with Mr Wang;
- (c) in relation to paragraph 1(f)(ii) of the application, Ms Fang does not possess or otherwise have access to any communications with Mr Dongfeng Li prior to late 2019, at which time she deleted those communications at the request of the Mr Yao. Ms Fang has otherwise periodically engaged in the deletion of non-essential messages and documents in order to manage storage space on her device. As a consequence, Ms Fang does not possess or otherwise have access to any communications between herself and Mr Li which might be relevant to the issues in dispute in these proceedings
- (d) in relation to paragraphs 1(f)(iii)-(iv) of the application, Ms Fang does not possess or otherwise have access to any communications with the Custodians (as defined at paragraphs 47(a)(i) to (v) of the 5FASOC nor the Ximei Staff (as defined at Schedule 1 of the 5FASOC) as Ms Fang only ever communicated with Mr Dongfeng Li regarding the transfer of Ms Fang's funds.
- (e) in relation to paragraph 1(g) of the application, Ms Fang has conducted searches in respect of the mailbox "2603620594@qq.com" and there are no additional emails or attachments sent from or received by the email account described relevant to the issues in dispute in these proceedings other than those that have already been disclosed.

[96] It follows that the plaintiffs do not possess or otherwise have access to the documents sought in category 4.

- [97] An order for an affidavit under r 223(2) of the UCPR may only be made under r 223(4) if:
- (a) there are special circumstances and the interests of justice require it; or
 - (b) it appears there is an objective likelihood:
 - (i) the duty of disclosure has not been complied with; or
 - (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.
- [98] I am not satisfied that there are any special circumstances and the interests of justice require an affidavit to be filed by Ms Fang in the form requested by the Yao and Zhao defendants (or at all).
- [99] First, where, as in this case, a detailed affidavit has been sworn by the plaintiffs' solicitor with carriage of the proceeding, there is little practical benefit to be gained by requiring a similar affidavit from Ms Fang: *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373 at [30].
- [100] Second, I am not satisfied that there is an objective likelihood that the duty to disclose has not been complied with merely because an affidavit from Ms Fang under r 223(2) has not been sworn. The issues relevant to discovery under this category are adequately dealt with in Mr Jones affidavit: *Mitchell Contractors* at [30].
- [101] Third, some aspects of the requests sought in the affidavit arguably fall outside the ambit of r 223(2); for example, "why" Ms Fang deleted her messages.
- [102] Fourth, despite the long history of the proceedings and the impending trial, the application for disclosure seeking such an affidavit was only received by the plaintiffs' solicitors on 21 September 2026. Ms Fang does not arrive in Australia for the trial until 10 October 2026 and ordering an unnecessary affidavit is an unnecessary cost and a distraction from trial preparation for the plaintiffs.
- [103] Fifth, the power to order a party to file and serve such an affidavit is not a general panacea in favour of a party who cannot discharge the onus of showing that it appears there is an objective likelihood that the duty to disclose has not been complied with by the other party: *Integrated Medical Technology Pty Ltd v Gilbert (No 2)* [2015] QSC 124 at [11].
- [104] The application for disclosure of documents within category 4 is dismissed.

Category 5 financial documents

- [105] The financial documents sought by the Yao and Zhao defendants under category 5 relate to the rental income the plaintiffs have earned from various properties owned by them (purchased by the Yao defendants variously on their behalf from the Transfer Funds), the continued ownership of the properties and the benefit of any increase in the value of the properties.
- [106] There was an unfortunate disconnect in the parties written and oral submission under this category which was confusing. Initially the plaintiffs' written submission contended that:

- (a) the documents sought were not directly relevant to issues in dispute on the pleadings and the defendants had not identified the relevance; and
- (b) this category of documents was not subject to any pre-application correspondence.

[107] But at the hearing, Senior Counsel for the plaintiffs, Mr de Jersey KC, conceded relevance (after receiving the Yao and Zhao defendants revised written submission that day) and accepted that some aspects of the complaint were touched upon in a letter from Bartley Cohen to Clayton Utz on 27 August 2026. This letter appeared to suggest there had been a claim for privilege made over some of the documents.

[108] Senior Counsel for the Yao and Zhao defendants, Mr O'Brien KC, submitted (consistent with the 27 August 2026 letter) that, instead of disclosing documents in their possession or control, the plaintiffs had only disclosed those in the possession or control of Clayton Utz. Some of the documents had been provided to Clayton Utz by way of privileged communication, which meant that some or all of these documents have been redacted, rather than disclosure from the actual source, namely, the plaintiffs. There was, however, no challenge to such a claim under r 213(b) of the UCPR by the Yao and Zhao defendants.

[109] Senior counsel for the plaintiffs submitted at the hearing:

- (a) there has been disclosure by the corporate plaintiffs that own the relevant properties – although he did not point to where in the plaintiffs' list such disclosure was made. Rather, Senior Counsel suggested that nobody (from the Yao and Zhao defendants' side) had gone back to the plaintiffs' disclosure and checked and identified what they want; and
- (b) until the morning of the hearing, the plaintiffs did not know how the documents sought in the application were relevant and what was missing.

[110] The submission that the plaintiffs did not know the relevance of the documents sought is hard to reconcile with the submission that disclosure of those documents has been made. As is the submission that the Yao and Zhao defendants had not identified what they wanted with the submission that the plaintiffs had only just become aware of what was missing.

[111] Much of the confusion about this category of documents can be attributed to the Yao and Zhao defendants delay in bringing the disclosure application and in not having identified the relevant issues about disclosure earlier. That is not the plaintiffs' fault.

[112] I am, however, satisfied that there are special circumstances and that the interests of justice warrant the court directing and ordering that by 4.00pm, Friday, 16 October 2026, the plaintiffs are:

- (a) to identify in writing to the Yao and Zhao defendants where in the plaintiffs' disclosure the category 5 documents are listed (including where claims for privilege have been made); and/or
- (b) to the extent (if any), disclosure of these documents has not been made, to make disclosure (including any claim for privilege).

[113] The reasons underpinning the making of such an order are:

- (a) the plaintiffs' concession as to relevance;
- (b) the plaintiffs' submission that the category 5 documents have already been disclosed; and
- (c) that such an order will assist with the just and expeditious resolution of the real issues in dispute between the parties, particularly given the looming trial date.

Category 6: marriage documents

- [114] By category 6, the Yao and Zhao defendants seek documents directly relevant to the alleged marriage of the first plaintiff to Mr Aihua Hong and the dissolution thereof.
- [115] These documents are said to be directly relevant to issues in dispute on the pleadings because:
 - (a) Ms Fang pleads that she was Mr Wang's wife "from 10 May 2002 until 23 October 2024";
 - (b) The Yao defendants plead that Ms Fang was married to Mr Hong from 19 March 2003 to 10 July 2006; and
 - (c) The plaintiffs deny this marriage on the basis that the records are "not genuine documents".
- [116] The Yao and Zhao defendants seek an order that Ms Fang file and serve an affidavit under r 223(2) of the UCPR about the marriage documents sought in paragraph 1(i) of the application.
- [117] The fifth affidavit evidence of Mr Jones is that he is instructed by Ms Fang that:
 - (a) Ms Fang has never married, met, nor heard of Mr Aihua Hong; and
 - (b) she does not possess or otherwise have access to documents which relate to an alleged marriage to Mr Hong (or dissolution thereof).
- [118] Given this evidence, I am satisfied that the plaintiffs do not possess or otherwise have access to the documents sought in category 6.
- [119] I am not satisfied that there are any special circumstances and the interests of justice require an affidavit to be filed by Ms Fang in the form requested by the Yao and Zhao defendants (or at all).
- [120] First, similar to my reason refusing to order such an affidavit under category 4, where an affidavit has been affirmed by the plaintiffs' solicitor addressing and dealing with the very issue raised, there is little practical benefit to be gained by requiring a similar affidavit from Ms Fang.
- [121] Second, ordering an unnecessary affidavit is another unnecessary cost and an unwelcome distraction from the plaintiffs' preparation for the impending trial.
- [122] Third, I am not satisfied that there is an objective likelihood that the duty to disclose has not been complied with merely because an affidavit from Ms Fang has not been sworn. The issues relevant to discovery under this category are adequately dealt with in Mr Jones' affidavit.

- [123] The application concerning category 6 documents is dismissed.

Category 7: documents withheld from production

- [124] By category 7, the Yao and Zhao defendants seek the documents disclosed by the plaintiffs in this proceeding but withheld from production and identified as items 122-218 in the Schedule. All of these documents are privileged. Although the privilege claims in relation to items 122–125 were previously challenged and proved in the First Porter Affidavit.
- [125] By their written submissions, the Yao and Zhao defendants acknowledged from the outset that they have not challenged each of the category 7 documents under r 213 of the UCPR and submitted:
- (a) First, they will seek whatever dispensation is necessary. No particular rule was referred to, but I note the power to dispense with a failure to comply with the rules is found under r 371(2) of the UCPR. The application of this provision is discussed further below; and
 - (b) Second, the absence of a formal challenge under r 213 of the UCPR is no bar to the Court determining a disputed claim of privilege under r 223 of the UCPR. No authority was referred to in the submissions, but I note that in correspondence between dated 30 September 2026 from the solicitors for the Yao and Zhao defendants to the plaintiffs’ solicitors, the cases of *Zavodny v Coupler & QBE* [2018] QSC 328 and *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* [2019] QSC 144 were referred to. I accept that both these cases dealt with disputed claims of privilege under r 223 of the UCPR although in different circumstances to the present and where both sides were given the opportunity to peg the boundaries of the dispute for determination. However, as discussed below, the Yao and Zhao defendants do not seek for this Court to determine a disputed claim for privilege under r 223 of the UCPR.
- [126] In their revised submissions provided on the day of the disclosure hearing, the Yao and Zhao defendants sought orders under r 223(5) of the UCPR that items 137, 156, 158, 183, 188, 192, 201 to 205, 207 and 210-214 of the Schedule be produced to the Court for inspection, and that the plaintiff file and serve an affidavit complying with r 213(3) of the UCPR or deliver a copy of the document for each other Schedule item from 122-218. No corresponding application for leave to amend relief sought in the application was made.
- [127] The revised submissions also identified some of the documents as being relevant to the following issues “crystallised” on the pleadings:
- (a) whether the gift happened, and whether the Gift Certificate is genuine;
 - (b) how the money was held in China and transferred;
 - (c) Ms Fang’s tax position and her dealings with the Commissioner.
- [128] In their oral submissions at the hearing, Senior Counsel for the Yao and Zhao defendants:
- (a) did not press for an order for production for the court to inspect under r 223(5) of the UCPR;

- (b) submitted that the filing of the application on 21 September 2026 was a challenge to the claim under r 213(b) of the UCPR;
 - (c) pressed for an order that the plaintiffs provide an affidavit under r 213(2) of the UCPR stating the claim for privilege by 16 October 2026. This date being premised on the affidavit evidence from Mr Jones for the plaintiffs that the appropriate person to swear any such affidavit was Mr Porter, who was not employed by Clayton Utz, and that the preparation of the affidavit would take about two and a half weeks, allowing for the quantity of documents, the plaintiffs preparation for the six week impending the trial and compliance with the trial directions of Hindman J; and
 - (d) did not advance any oral submission that there was anything potentially significant in these documents that was likely to impact on the Yao and Zhao defendants' preparation for trial or the trial itself.
- [129] In the short period leading up to the hearing, and at the hearing, the plaintiffs objected to the orders for production (and subsequently for the filing of the affidavit under r 213(2) of the UCPR) on the basis that the Yao and Zhao defendants had not complied with r 213 of the UCPR.
- [130] The Yao and Zhao defendants categorised this as a technical objection – and argued again at the hearing that compliance with the requirement to challenge the claim could be dispensed with and that the plaintiffs should now be ordered to provide an affidavit under r 213(2) of the UCPR.
- [131] I am not satisfied that the orders now sought by the Yao and Zhao defendants should be made.
- [132] First, I do not accept that the filing of the application on 21 September 2026 is properly categorised as a challenge under r 213 (1)(b) of the UCPR. The reason being that the application and the first set of written submissions did not seek an affidavit under r 213(2) of the UCPR but rather sought production of the documents without affording the plaintiffs the opportunity to prove their claims for privilege.
- [133] Second, under r 213(1)(a) and (b) of the UCPR, a party may challenge another party's claim for privilege. Upon a challenge being made, the claiming party must file and serve an affidavit, from an individual with knowledge of the facts giving rise to the claim, on the party challenging the claim: r 213(2) and (3) of the UCPR. The court has broad powers under r 371 of the UCPR to make various for orders non-compliance with other provisions the UCPR, including making an order dealing with the proceeding as the court considers appropriate: r 371(2)(e) of the UCPR. Rule 213(1)(a) of the UCPR is silent on how or within what timeframe a challenge is to be made. But the rule expressly states that the affidavit under r 213(2) of the UCPR is premised on a challenge having been made in the first place. So there would need to be at least some basis for such a dispensation to be given. One such reason of course would be to facilitate the just and expeditious resolution of the real issues at a minimum of expense: r 5 of the UCPR.
- [134] Third, I am not satisfied a dispensation with the requirement to make a challenge under r 213(1)(b) of the UCPR is in keeping with r 5 of the UCPR because:

- (a) the concern sought to be addressed by the Yao and Zhao defendants in pursuing documents in category 7 is a substantive one in relation to 97 documents listed in the plaintiffs' seventh, tenth and eleventh privilege lists. These lists were provided to the Yao and Zhao defendants well over a year ago;
- (b) there was no explanation (or even an attempt at one) from the Yao and Zhao defendants about the delay in pursuing the category 7 documents for over a year. This is most surprising given the asserted relevance of these documents to longstanding issues on the pleadings.

[135] Fourth, even if it is accepted that a challenge can now be said to have been made under r 213(1) of the UCPR through the revised submissions of the Yao and Zhao defendants and even orally at the hearing (which I do), I am satisfied that in the present circumstances, it is appropriate to dispense with the requirement under r 213(2) and (3) of the UCPR that the plaintiffs must swear an affidavit stating the claim:

- (i) for the reasons stated in [135](b) above;
- (ii) because the preparation of such an affidavit will take another two and a half weeks of critical trial preparation time leading up to and during the trial – in circumstances where it has not been shown that any of the documents are critical or important; and
- (iii) the requirement to swear such an affidavit at this late point in time is unnecessarily onerous and would not be in keeping with the purpose of r 5 of the UCPR.

[136] I therefore dismiss the application as it concerns category 7 and I otherwise refuse to make the order that the plaintiffs' swear an affidavit under r 213(2) and (3) of the UCPR.

[137] Of course, and as the plaintiffs' counsel conceded, the dismissal of the application, as concerns the category 7 documents, does not mean that a disputed claim for privilege cannot be later ventilated on a further claim under r 213(b) of the UCPR or if a privilege document in this category assumes some critical importance during the course of the trial. As was the case in *Sanrus*.

Costs

[138] The plaintiffs were successful in opposing six of the 7 categories of documents sought. The orders I have made in relation to category 5 did not occupy much of the hearing or the submissions and this category was one of the categories where little if any notice was given of the orders sought. In all the circumstances, I can see no reason why costs should not follow the event. My preliminary view is that the appropriate order as to costs is that Yao and Zhao defendants pay the plaintiffs' costs of the application (on the standard and not on the indemnity basis).

[139] But I will allow the parties until 1.00pm Monday 12 October 2016 to either bring in another (agreed) cost order or to otherwise email my associate that they wish to be heard on the issue of costs. If the latter occurs, a hearing for a short oral cost argument will be listed at a convenient time to the Court and the parties on Tuesday 13 October 2026.

[140] Otherwise, the order foreshadowed will be made.