(b) Third parties

3–053 It is not just the interests of the defendant that must be considered in determining whether an order should be made. The undertaking in damages will also now normally apply to third parties affected by the order.[91] If the claimant is reasonably aware that the injunction may cause loss to a third party, this is a material factor to draw to the attention of the court. So if the vessel is on time charter and the charterers owe the claimant money, is it fair to the owners to enjoin it from leaving the jurisdiction?[92] Sometimes the potential interference with third party rights will warrant refusal of the order altogether.[93]

3–054 An injunction served on a third party does not prevent them moving the asset on their own behalf where they have an independent right to do so, but it prevents them accepting instructions to move the asset from the defendant (or from anyone who may reasonably be regarded as the defendant's agent) as that would be aiding and abetting a breach of the injunction. And there will be many cases where it is alleged that the third party is acting on behalf of the defendant, so great care is necessary.[94] If X owns a boat chartered to the defendant Y, and is served with an injunction on Y, X can move the boat on his own account (for example, when the charter ends) but cannot do so on Y's instructions. Potential damage to X as a result of lost business if Y could not move the boat might be a reason for the court to refuse to make the order at all.[95]

(c) Disclosure in aid of asset freezing injunctions

3–055 Most asset freezing injunctions contain ancillary disclosure orders.[96] The making of a disclosure order is an important part of the freezing order jurisdiction.[97] The purpose is to make the relief effective;[98] if the claimant knows where the assets are, he can

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91 Standard form at Practice Direction 11.2 Sch.2 para.(1).

92 See *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* [2001] 2 Lloyd's Rep 715 (Colman J) (bank is free to exercise rights in respect of security interest provided it does nothing inconsistent with underlying purpose of the injunction).

93 *Galaxia Maritima v Mineralimportexport* [1982] 1 WLR 539; *Clipper Maritime v Mineralimportexport* [1981] 1 WLR 1262; *Oceanica Castelana Armadora SA v Mineralimportexport* [1983] 1 WLR 1294. See *Tucker v New Brunswick Trading Co* (1890) 44 Ch D 249. No court can compel the claimant to give a cross-undertaking, but the court can discharge or refuse to make the injunction if he does not.

94 In *Bank of China v NBM LLC* [2002] 1 WLR 844, the Court of Appeal said that a worldwide freezing order should contain a proviso that in respect of assets outside the jurisdiction nothing in the order prevented a third party from complying with what it reasonably believed to be its obligations, contractual or otherwise, under the laws and obligations of the country in which those assets were situated or under the proper law of any bank account in question. If this was inadequate to protect the claimant, he should apply to the local court.

95 The Court of Appeal held in *Federal Bank of the Middle East v Hadkinson* [2000] 2 All ER 395 that an order which referred to "his assets" in respect of the defendant was not apt to cover assets beneficially owned by someone other than the defendant.

96 *CTO (HK) Ltd v Li Man Chiu* [2002] 2 HKLRD 875. For a recent summary of the principles relevant to family cases see *UL v BK* [2014] 2 WLR 914 (Mostyn J).

97 *Motorola Credit Corp v Uzan* [2002] 2 All ER (Comm) 945.

98 See *Parker v CS Structured Credit Fund Ltd* [2003] 1 WLR 1680 (Ch) (Gabriel Moss QC).

serve the order on the banks and more effectively police it. It has been suggested that it may be more appropriate to make a disclosure order at the *inter partes* stage[99] but this *dictum* fails to appreciate that in many cases *Mareva* relief will be worthless without the discovery that enables it to be policed from the outset.[100]

3–056 The straightforward disclosure order requires the defendant to identify his assets in the jurisdiction.[101] It will not usually be just and convenient to make an order in aid of asset freezing which goes beyond the identification of assets within Hong Kong,[102] but if there is a worldwide injunction, no such limitation need arise. The Hong Kong Court of Appeal recently confirmed in *Pacific King Shipping Holdings Pte Ltd v Huang Ziqiang*[103] that an ancillary disclosure order may not normally go beyond the scope of the freezing injunction.

3–057 If disclosure proves unsatisfactory, the court may order a further and better affidavit and, ultimately, cross-examination on affidavit before a judge or examiner.[104] Issues of privilege against self-incrimination will arise in respect of disclosure orders. The problems here are less acute than in respect of search orders: in the case of search orders, once the search has been affected it is difficult to turn back the clock at the time of an application to discharge and, by that time, the damage may have been done. Because on disclosure pursuant to a freezing order the defendant has an opportunity to take the point in his affidavit, the position is less of a problem.

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3–058 Normally the timescale for an application to set aside will mean that orders for disclosure of assets must be complied with before the injunction can be set aside. In *Motorola Credit Corp v Uzan*[105] it was argued that it could not be right to require a defendant to comply with an asset disclosure order made against him without notice until he had an opportunity to set it aside, and he sought a stay of execution of the order. The Court of Appeal rejected the argument. There was a balance between

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99 *Nicholas Pappadis v Chan Cong Sheung Barry* [1989] 2 HKLR 511, 517.

100 Discovery can be ordered in aid of post-judgment enforcement wherever it is just and convenient: see *Paloma Co Ltd v Capxon Electronic Industrial Co Ltd* [2020] HKCFI 755, where Keith Yeung J rejected a more restrictive test for such discovery.

101 See *Bird v Hadkinson* [2000] CP Rep 21 (Neuberger J) (in preparing response to disclosure order the defendant was under an obligation not merely to swear a truthful affidavit but also to take reasonable steps to investigate its truth).

102 *Ashtiani v Kashi* [1987] QB 888. The position is different for post-judgment freezing orders where the relief can be justified on a basis of assisting the claimant in effecting execution: *Gidrxslme Shipping Co v Tantomas-Transportes Maritimos* [1994] 4 All ER 507.

103 [2015] 1 HKLRD 830.

104 The cross-examination can only be for the purpose of policing the injunction and not for the purpose of ascertaining whether a contempt has been committed: *Bekhor v Bilton* [1981] QB 923; *House of Spring Garden v Waite* [1985] FSR 173. The defendant may claim privilege against self-incrimination on the basis that answers given in cross-examination may give rise to contempt proceedings: *Memory Corp Plc v Sidhu* [2000] Ch 645 (Arden J). Cross-examination is an exceptional order and possible problems as a result of privilege against self-incrimination must be considered before making an order: *Great Future International v Sealand Housing Corp* [2001] 6 CPLR 293.

105 [2002] 2 All ER (Comm) 945.

the prejudice to the defendant and the prejudice to the claimant if in the meantime the order could not be policed. The making of a disclosure order was an important part of the freezing jurisdiction and the issue was a matter for the judge's discretion.[106]

(d) Section 21B of the High Court Ordinance

3–059 Section 21B of the HCO enables an order to be sought preventing a person from leaving Hong Kong to facilitate the enforcement, securing or pursuance of a judgment or a civil claim other than a judgment. The court seizes the defendant's passport until he has complied with the disclosure order where it was feared that he might leave the country before complying.[107] The order may be made where the person against whom the order is sought either incurred the alleged liability in Hong Kong and whilst present in Hong Kong, carries on business in Hong Kong or is ordinarily resident in Hong Kong and is about to leave Hong Kong, and by reason of the person's departure any judgment that may be given against that person is likely to be obstructed or delayed. Once it is shown that the person is about to leave Hong Kong, this last condition will usually be satisfied.[108] The court may make such an order as ancillary orders in exceptional cases to police the effectiveness of the disclosure provisions.[109] The courts will be concerned to avoid orders that are oppressive.[110]

3–060 It is for consideration whether s.21B replaces rather than supplements common law powers.[111] Certainly the former seems to have been assumed. But the English courts, using common law powers have recently extended the jurisdiction so there may be an argument that the same could be done in Hong Kong. In *Kuwait Airways Corp v Iraqi Airways Co*,[112] a worldwide freezing order was obtained with disclosure obligations. The Court of Appeal ordered that steps be taken to prevent a non-party from leaving the jurisdiction until he had sworn an affidavit of assets on behalf of the company. The Court of Appeal recognised that the case was highly exceptional, and sought to minimise the inconvenience on the individual.

(e) Implied undertaking

3–061 The disclosure of documents is subject to the implied undertaking.[113] The standard form contains express undertakings in the following terms:

> "The plaintiff will not without the leave of the court begin proceedings against the defendant in any other jurisdiction or use information obtained as a result

106 See also *Federal Republic of Nigeria v Union Bank of Nigeria* (18 October 2001) (Laddie J).
107 In *Avco Financial Services Ltd v Topma Electronics Ltd* [1999] 4 HKC 193 it was held that s.21B was compatible with art 31 of the Basic Law.
108 *REM Assets Ltd v MIR Investments Ltd* [2008] 5 HKLRD 828, 837 (Poon J).
109 *Bayer v Winter (No 1)* [1986] 1 WLR 497; *cf Bayer v Winter (No 2)* [1986] 1 WLR 540.
110 *Bayer v Winter (No 2)* [1986] 1 WLR 540.
111 Common law powers are discussed in *Al Nahkel for Contracting v Lowe* [1986] QB 235; *Allied Arab Bank v Hajjar* [1988] QB 787 (Leggatt J).
112 *Kuwait Airways Corp v Iraqi Airways Co* [2010] EWCA Civ 741.
113 *Derby v Weldon (No 2)* (*The Times*, 20 October 1988).

> of an order of the court in this jurisdiction for the purpose of civil or criminal proceedings in any other jurisdiction." And
>
> "The plaintiff will not without the leave of the court seek to enforce this Order outside Hong Kong [or seek an order of a similar nature including orders conferring a charge or other security against the Defendant or the defendant's assets]."

(f) In aid of foreign proceedings

3–062 Under ss.21M and 21N of the HCO and O.29 r.8A it is possible now to obtain interim relief in the Hong Kong courts in aid of substantive proceedings anywhere in the world:

> "21M (1) Without prejudice to section 21L(1), the Court of First Instance may by order appoint a receiver or grant other interim relief in relation to proceedings which –
>
> (a) have been or are to be commenced in a place outside Hong Kong; and
> (b) are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.
>
> (2) An order under subsection (1) may be made either unconditionally or on such terms and conditions as the Court of First Instance thinks just.
> (3) Subsection (1) applies notwithstanding that –
>
> (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction; or
> (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in Hong Kong
>
> (4) The Court of First Instance may refuse an application for appointment of a receiver or interim relief under subsection (1) if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application."
>
> "21N (1) In exercising the power under section 21M(1), the Court of First Instance shall have regard to the fact that the power is –
>
> (a) ancillary to proceedings that have been or are to be commenced in a place outside Hong Kong, and
> (b) for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings

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(2) The Court of First Instance has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under section 21M as if the order were granted under section 21L in relation to proceedings commenced in Hong Kong."

3–063 Previously the Hong Kong court had no jurisdiction to grant *Mareva* relief in aid of substantive proceedings abroad.

3–064 The Hong Kong court will be circumspect when considering an asset freezing injunction in aid of proceedings abroad. So an order will not necessarily be made merely because some claim is proceeding before a foreign court. In an appropriate case, a worldwide freezing order may be made in aid of proceedings abroad notwithstanding the absence of any assets in Hong Kong.[114]

3–065 The Working Party, in recommending that what is now ss.21M and 21N were enacted, considered the circumstances in which it might be appropriate for the Hong Kong court to make an order ancillary to proceedings before a foreign court. They suggested[115] that the Hong Kong courts might look to English authority to guide how discretion should be exercised.[116]

(g) Individuals and businesses

3–066 Where the injunction is against an individual, the individual will usually be entitled to living expenses and legal costs,[117] unless there is a proprietary claim[118] or where he is resident abroad and is unlikely to need his local assets to pay his living expenses. The position needs careful consideration where the defendant is a company. Where the company trades here, problems will arise because the court will not wish to make any order which affects the normal trading and business of a trading company or transactions in the normal course of business.[119] Extreme care should be taken in seeking orders against trading companies lest the court subsequently takes the view that it is inappropriate or too complicated to maintain an order against a trading company and there is a substantial potential liability on the cross-undertaking.[120]

114 *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2013] 1 Lloyd's Rep 327 (Gloster J).

115 Final Report, paras.328, 358. The Working Party made reference to the judgment of Neuberger J in *Ryan v Friction Dynamics* [2001] CP Rep 75.

116 See eg *Motorola Credit Corp v Uzan* [2004] 1 WLR 113.

117 *Kanematsu-Gosho (HK) Ltd v Lee Boon Chean* [1986] HKLR 59, 64; *Indian Corridor Sdn Bhd v China Idea Development Ltd* (HCA 1/2008, [2008] HKEC 177); see *Cantor Index v Lister* [2002] CP Rep 25, where Neuberger J said that it was irrelevant that moneys spent on living expenses and legal bills exceeded the value of the injunction.

118 See para 3-071 in this chapter.

119 *Avant Petroleum v Gatoil* [1986] 2 Lloyd's Rep 236, 243; *Normid Housing v Ralphs and Mansell* [1989] 1 Lloyd's Rep 274; *Goldleaf Investments v Monteverdi Onyx* (7 June 1990).

120 An attempt was made to freeze the assets of a bank in *Polly Peck International v Nadir* [1992] 4 All ER 769. Although there was strong evidence against the bank of complicity in wrongdoing, the impracticality of the order led to the Court of Appeal making a narrower and specific order limited to certain items against which specific tracing remedies were claimed.

On the other hand, the courts have become increasingly wary of defendants seeking indirect evasion of the injunction by a variation of the order to enable debts to be paid which are, in effect, outside the normal course of business. The test is whether the variation is consistent with the underlying purpose of the asset freezing injunction.[121]

5. NOMINEES: THE *CHABRA* JURISDICTION

3–067 A problem that occurs regularly is where the defendant puts his assets in the name of his wife or nominee. Theoretically, an asset freezing injunction against him will cover assets he holds through his wife or nominee, but that is not how it will work in practice: the defendant may dispute that the wife or nominee holds the asset for him. That means that it may be necessary to obtain an order directly against the wife or nominee. Even though there is no cause of action against the wife or nominee, they may still be joined as defendants to the action and an injunction obtained against them directly, albeit limited to the assets held as nominee. It is necessary to show that there is a good arguable case that the disputed assets are held as nominee for the principal defendant.[122] This is known as the *Chabra* jurisdiction. If necessary, the court will have to order the trial of an issue as to whether the asset is in fact held on trust for the principal defendant. In *XY LLC v Jesse Zhu*,[123] Kwan JA observed[124] that:

"A convenient starting point is a summary of the *Chabra* jurisdiction taken from the judgment of Popplewell J in *PJSC Vseukrainskyi Aktsionernyl Bank v Maksimov*[125]

(1) The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to

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121 Thus, in *Atlas Maritime Co v Avalon Maritime* [1991] 4 All ER 769 the Court of Appeal said that in determining whether a loan to a creditor could be repaid from the frozen assets it was necessary to determine whether a variation constituted an effective evasion of the purpose of the injunction. Similarly, in considering whether a subsidiary company needed funds to carry on its business, it was relevant to consider the financial relationship between subsidiary and parent. If the financial relationship was such that the parent could be expected to make funds available if necessary to assist the subsidiary, that might be relevant in considering whether a variation was appropriate. A one-off case of interest on this point is *Commissioners of Customs and Excise v Anchor Foods* [1999] 3 All ER 268. Neuberger J. refused to permit a sale of the entirety of a business at an arm's-length valuation made by accountants on the basis that there was a respectable argument that their valuation was wrong and that would amount to a dissipation of assets outside the normal course of business. If this can be justified, it appears to be an extension of the principles by some degree.

122 *Mercantile Group v Aiyela* [1994] QB 366; *TSB Private Bank International v Chabra* [1992] 2 All ER 245; *SCF v Masri* [1985] 1 WLR 876., *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* (2013) 163 NLJ 324 (Popplewell J).

123 [2017] 5 HKC 479.

124 *Ibid.*, [24].

125 [2013] EWHC 422 (Comm), [7] as approved by Tomlinson LJ in *Lakatamia Shipping*, [32].

some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable on his substantive claim (the CAD).

(2) The test of 'good reason to suppose' is to be equated with a good arguable case, that is to say one which is more than barely capable of serious argument, but yet not necessarily one which the judge believes to have a better than 50% chance of success.

(3) In such cases the jurisdiction will be exercised where it is just and convenient to do so. The jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive defendants and have not acted to frustrate the administration of justice.

(4) A common example of assets falling within the *Chabra* jurisdiction is where there is good reason to suppose that the assets in the name of the NCAD are in truth the assets of the CAD. Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner.

(5) Substantial control by the CAD over the assets in the name of the NCAD is often a relevant consideration, but substantial control is not the test for the existence and exercise of the *Chabra* jurisdiction. Establishing such substantial control will not necessarily justify the freezing of the assets in the hands of the NCAD. Substantial control may be relevant in two ways. First, evidence that the CAD exercises substantial control over the assets may be evidence from which the court will infer that the assets are held as nominee or trustee for the NCAD as the ultimate beneficial owner. Secondly, such evidence may establish that there is a real risk of dissipation of the assets in the absence of a freezing order, which the claimant will have to establish in order for it to be just and convenient to make the order. But the establishment of substantial control over the assets by the CAD will not necessarily be sufficient: a parent company may exercise substantial control over a wholly owned subsidiary but the principles of separate corporate personality require the assets to be treated as those of the subsidiary not the parent. The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD."

3–068 Citing *XY LLC*, in *Company A v Company D*[126] Recorder Eugene Fung SC made the following comments on the *Chabra* jurisdiction:

"Where a plaintiff seeks a *Mareva* injunction on the *Chabra* basis, it seems to me that the risk of dissipation factor should principally focus on the NCAD's conduct as regards the NCAD's assets:

126 (HCCT 31/2018, 15 February 2019), [83].

(1) The underlying premise of a *Mareva* injunction on the *Chabra* basis is that there is good reason to suppose that assets held in the NCAD's name would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment or award against the CAD. The plaintiff's ability to enforce the judgment or award against the CAD would necessarily be impaired if the effect of NCAD's conduct would be to frustrate the enforcement of any judgment or award, or the NCAD's assets are no longer available to be enforced against. In considering the risk of dissipation of assets, the principal focus should therefore be on NCAD's conduct and his assets.

(2) In cases where there is substantial control by the CAD over the assets in the name of the NCAD, it may become relevant to examine the conduct of the CAD to determine whether there is a risk of dissipation of NCAD's assets."[127]

3–069 Thus the evidence in support of a *Chabra* order will need to focus both on the position of the defendant (referred to in these authorities as the CAD) and the *Chabra* Defendant (the NCAD). If the evidence shows that the defendant is likely to dissipate his assets, then it may be possible to infer that he will dissipate assets held through a nominee or spouse. But it depends on the nature of the asset, the degree of permanence of the asset, the level of control held by the *Chabra* Defendant, and the extent to which the evidence shows that the actions of the *Chabra* Defendant are independent of those of the defendant.

3–070 In *Lakatamia Shipping Co Ltd v Nobu Su*,[128] Mr Su directly or indirectly owned or controlled three non-defendant companies. Tomlinson LJ said that the assets of the defendant were not directly affected by the order. However, if Mr Su allowed one of the companies he controlled to dispose of its assets, that would have the effect of impermissibly diminishing the value of his own assets, namely the value of his shareholdings in the companies. Accordingly, the assets of the companies were affected by the injunction. For practical purposes, as Tomlinson LJ pointed out, that meant dispositions other than in the ordinary course of business were enjoined. This was because transactions in the ordinary course of business of a company do not ordinarily result in a diminution in the value of shareholdings in that company.[129] The Court of Appeal also recognised the possibility of seeking a freezing order against a non-defendant company pursuant to the *Chabra* jurisdiction.

6. Disclosure in Tracing Claims

3–071 The asset freezing injunction is typically employed where the claimant is able to show a good arguable case that the defendant owes him money. Where he can claim

127 Referring to *XY LLC*, [24(5)].
128 [2015] 1 WLR 291.
129 *Ibid.*, [23].

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then he must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth.

(g) If a solicitor is or becomes aware that the list of documents or any verifying affidavit or statement of truth is inadequate and omits relevant documents or is wrong or misleading, he is under a duty to put the matter right at the earliest opportunity and should not wait till a further order of the court. His duty is to notify the client that he must inform the other side of the omitted documents, and if this course is not assented to he must cease to act for the client. If the client is not prepared to give full disclosure, then the solicitor's duty to the court is to withdraw from the case.

(h) A solicitor should not do anything in the course of practising as a solicitor which compromises his duty to the court.

8–005 The above summary of the duties of a solicitor from *Hedrich* was common ground in the case. It treats as axiomatic that the solicitor will take relevant files into his control, in order to determine which documents are relevant. This may not be practicable where the number of documents or files is large. That part of the summary needs to be treated with a measure of caution. What happens if the documents are located abroad? The originals may be required, for example for the purpose of keeping statutory records. It also rather ignores the fact that most disclosure nowadays is electronic. On the other hand, the solicitor must "engage personally in the disclosure exercise" and not delegate disclosure to the client.[10]

8–006 The lawyer is in charge of the process and supervises it. He is an officer of the court. The court and the process relies on the lawyer to ensure that it is carried out properly and correctly. The other party will often not be in a position to challenge the disclosure, so the only person who can challenge the client and see the process is operated properly is the lawyer. Moreover, as when deciding whether it is permissible to make a claim for privilege in a debatable case, the legal adviser is judge in his own client's cause,[11] hence, the heavy burden on the lawyer. The lawyer is an officer of the court and is required not merely to inform his client as to the client's obligations and make sure he understands them, but also to supervise the process. The system relies on the lawyer's integrity and efficiency, because if important documents are not disclosed, the opposing party may never learn of their existence. In general, the solicitor will need to interrogate the client. On what basis has the search been carried out? The lawyer may well have agreed the parameters with the client in advance, but if he has not, he will need to question the client on this. Has the client done it himself or has he delegated part? If he has delegated, do the delegates understand what they had to do? What other files might be available? Might they be in other offices? When the suitcase has been sorted, does it indicate that there are additional documents? Where are these?

10 *Icon SE LLC v SE Shipping Lines PTE Ltd* [2012] EWCA Civ 1790, [24] (Rimer LJ); *CMCS Common Market Commercial Services AVV v Taylor* [2011] 3 Costs LO 259.

11 This vivid way of making the point derives from Neuberger J in *Bank Austria Aktiengesellschaft v Price Waterhouse* [1997] CLY 464.

8–007 Does the lawyer need to visit the premises himself in order to do the sifting exercise? Often this will be necessary, and in larger disclosure operations it may be difficult for the lawyer to be satisfied that the job has been done properly unless he does this. But it would be difficult to say that this was always necessary. The lawyer cannot be the guarantor of the client's obligations. The key is proportionality—the extent of the obligation will be determined by the size of the case. Sometimes the client will provide the solicitor with his original files. The solicitor may then offer inspection of the original documents. But in other cases, particularly larger cases, the originals may be abroad. Should the solicitor obtain the originals or will it be adequate to obtain copies? If the solicitor has to travel abroad to see the documents it may be impractical for him to take back all the originals: to do so might involve cannibalising a large numbers of files. The originals may be required, for example for the purpose of keeping statutory records.

8–008 But the lawyer cannot discharge his "heavy burden" without adopting a proactive role in taking overall control of the operation and satisfying himself, to the extent reasonable in the particular circumstances that the job has been done properly. In *Woods v Martins Bank*,[12] Salmon J said:

> "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their clients' [list]."[13]

2. Late Discovery

8–009 Experience shows that clients are often wrong in their worries as to the disclosure process. In cases in which there is late disclosure and a bundle of documents appears at the last minute, the documents are as often of assistance in proving the case as they are a hindrance. What sometimes causes the damage is that the circumstances of their late disclosure may enable the adversary to present a prejudicial forensic picture which outweighs the value of the documents themselves.

8–010 Late discovery is unsatisfactory. It has the potential to disrupt trials and delay matters. Courts inevitably complain about it. But if solicitors as officers of the court take their obligations seriously, and make sure their clients do the same, then it is hardly unusual that late discovery may appear in the course of a trial or otherwise at the last minute. Indeed, what needs to be avoided is a culture where nothing at all is said about documents found at the last minute and they are never disclosed.

12 [1959] 1 QB 55, 60.

13 For comments on the obligation to withdraw in the event of the client not complying with proper advice in respect of disclosure see *Myers v Elman* [1940] AC 282, 293–294, 300–301, 322–323.

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8–020 Here the authority most commonly cited in Hong Kong is *Paul's Model Art Gmbh v UT Ltd*[19] where Cheung JA set out principles as follows:

> (1) There is no jurisdiction to make an order under RSC, O.24, r.7, for the production of documents unless
>
> (a) there is sufficient evidence that the documents exist which the other party has not disclosed;
> (b) the document or documents relate to matters in issue in the action;
> (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.
>
> (2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure.
> (3) The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure.

8–021 Cheng JA said the issue must be one identified in the pleadings.[20] On the other hand, the fact that an issue is raised in the pleadings is not determinative as to whether it relates to a matter. Discovery is not required of documents which relate to irrelevant allegations in pleadings which even if substantiated could not affect the result of the action.[21]

8–022 In *Berkeley Administration v McClelland*,[22] Mustill LJ said:

> "It is not an answer to an assertion that documents falling within a particular category are disclosable that no such documents are in the other party's possession or power, although if this information has already been conveyed on oath in the course of the proceedings this would furnish a reason why, in the exercise of the court's discretion, it might well not make an empty order."

8–023 It is important that the applicant under O.24 r.7 should define the class of documents with precision. If the class is defined too widely so that it includes irrelevant documents an order may be refused.[23] The class must constitute documents of the

19 [2005] HKEC 2071.
20 *Sun Yuet Tai Ltd v British American Tobacco Co (HK) Ltd* [1999] HKEC 1208.
21 *Allington Investments Corp First Pacific Bancshares Holdings Ltd* [1995] 2 HKC 139.
22 [1990] FSR 381, 382.
23 *Fuji Photo Film Co v Carr's Paper* [1989] RPC 713; *Molnlycke AB v Proctor & Gamble (No 3)* [1990] RPC 498.

same nature.[24] The burden of satisfying the court is on the party applying.[25] It may be necessary to set up the application in correspondence with a view to ascertaining the extent of the search carried out by the disclosing party.

8–024 The court will need to consider O.24 r.8 and O.24 r.13: these rules require the court to order discovery and inspection only if necessary.[26]

8–025 It has been said that an application for specific discovery in cases in the commercial list may be subject to particular scrutiny. In *Anbest Electronic Ltd v CGU International Insurance plc*[27] it was said:

> "It is a feature of the commercial court that an effort is made to restrict discovery to that which is essential. Discovery has become more and more extensive. It is often extremely onerous. Sometimes it would appear that it is used as a means of frustrating the progress of a case by deliberate excessive demands for discovery. It is for that in specialist lists an effort is made to contain discovery."

8–026 It might be said that effective case management to contain excessive discovery requests for discovery was a function of the commercial court, rather than a more restrictive approach to discovery in commercial cases, which seems very surprising. However, the new Electronic Discovery Practice Direction, presently only applicable to certain cases in the Commercial Court, itself provides for a narrower test for relevance when it applies.

(d) Disputed claims of relevance

8–027 In *Shah v HSBC Private Bank Ltd*,[28] the Court of Appeal considered what must be shown on an application for specific disclosure in the face of a witness statement from the respondent disputing relevance. Lewison LJ cited a passage from Hoffmann LJ:[29]

> "The party's oath on the question of relevance is conclusive unless the court can be satisfied, not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of

24 *Deak & Co (Far East) Ltd v NM Rothschild & Sons* [1981] HKC 78.
25 *Ibid., Full Range Electronics Co Ltd v General-Tech Industrial Ltd* [1997] 1 HKC 541; *Dolling-Baker v Merrett* [1990] 1 WLR 1205, 1209.
26 See *Morinda International Hong Kong Ltd v Next Magazine Publishing Ltd* [2003] 1 HKC 494.
27 (CACV 17/2007, [2007] HKEC 739) (Rogers ACJHC and Burrell J).
28 [2012] Lloyd's Rep FC 105.
29 The citation from Hoffmann LJ was from *GE Capital Corporate Finance Group Ltd v Bankers Trust* [1995] 1 WLR 172, which was a case where redactions were challenged.

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the case, that the affidavit does not truly state that which it ought to state. The ultimate question was:

> "Can one in this case see from the documents produced that the affidavit must be wrong in claiming that the blanked-out passages do not relate "to any matter in question," in accordance with the *Peruvian Guano* test?"

8–028 Lewison LJ[30] said the question was not whether the affidavit "may" be wrong but whether it "must" be wrong. Nugee J regarded himself as bound by *Shah* in *Ward Hadaway v DB (UK) Bank*.[31] A document was referred to in another document disclosed by the defendant and specific disclosure was sought. The defendant refused to disclose it, as it was commercially sensitive. The defendant served a witness statement which explained the confidentiality and stated that the document was not being relied on by the claimant, nor did it adversely affect the claimant's case or the defendant's case or support the defendant's case. The judge said that the test set out in *Shah* was not satisfied and declined to order disclosure.

8–029 This is a more restrictive test than is sometimes applied in practice. It arises where one party seeks disclosure, and the respondent puts in evidence that the document exists and it is not relevant. Often the way in for the applicant is to show that the evidence of the respondent is inadequate, perhaps because it fails to deal with the disputed document adequately. However, in *Nokia Corp v TCT Mobile Ltd*,[32] Peter Ng J reaffirmed that it is not a function of specific discovery to give a party an opportunity to check up on whether his opponent has given sufficient discovery: a proper case must be shown as to a deficiency in the discovery.

(e) Form of order

8–030 You persuade the court an order should be made for specific disclosure. What form should the order take where classes of documents are to be looked for? If an order was made for disclosure of specific documents, they all had to be disclosed and it was not open to the other side subsequently to refuse to produce them on grounds of relevance because the court had already (by definition) decided they were relevant in making the order. But if the court made an order for disclosure of a class of documents, the solicitor was still entitled to form a view as to whether particular documents which fell within that class were relevant within *Peruvian Guano*, and not to disclose those which he determined were not relevant.

(f) Discovery applications: strategies for litigation

8–031 In England, discovery is used by the legal advisers as a means of putting pressure on the other side. Clients often consider that the other side are holding back important

30 Making clear that the position was no different in England under the CPR.
31 [2013] EWHC 4538 (Ch).
32 (HCCL 19/2011, [2013] HKEC 1232).

documents, and consider that pressing hard for further or specific discovery is likely both to be the key to success in the litigation and will be sufficiently unwelcome to the other side to assist in a settlement. Clients never like giving discovery themselves, and swearing affidavits identifying all the searches conducted or what has happened to documents no longer in their possession is rarely welcome.

8–032 Of course, much litigation does not depend on discovery. But discovery is important in very many cases. One cannot help taking the view that Hong Kong practitioners are not making the most of the opportunities available here. In any case where discovery is likely to be of significance, once discovery has been given, the lawyers should consider, ideally with the client, what further documents or categories of documents are likely to exist which are relevant, and write a lengthy letter to the other side asking for discovery of these items (or confirmation that they have been searched for and do not exist) thereby setting up a discovery application in the event that a satisfactory response is not received.

4. PROBLEM AREAS

(a) Fishing

8–033 It has always been a general principle that disclosure may not be used as a fishing expedition to seek out possible claims or defences.[33] The expression is still used in relation to claims for specific disclosure.[34] It involves seeking discovery in order to try to find a case, rather than discovery in relation to the issues on the pleadings.[35] It has been said that fishing is an attempt to find something as yet unknown to "turn a non-issue into an issue".[36]

(b) Credit

8–034 The well-established rule was that disclosure would not be ordered on matters which went solely to cross-examination as to credit.[37] The distinction was not always as clear cut as it sounds. Where fraud was alleged, the state of mind of the defendant was an issue in the case and documents which showed what that state of mind was went directly to the issue. But if the documents showed that in respects not referable to the pleaded case the defendant was a scoundrel, the only relevance was that he

33 *Radio Corp of America v Rauland Corp* [1956] 1 QB 618; *British Leyland Motor Corp v Wyatt Interpart* [1979] FSR 39, 45.
34 See eg *Shah v HSBC Private Bank* [2012] Lloyd's Rep FC 105, [49]: "The more I listened to the explanation of why the claimants wanted the names, the more convinced I became that, to use the familiar cliché, this was a fishing expedition" (Lewison LJ).
35 See *Vo Thi Do v Director of Immigration* [1998] 1 HKLRD 729 (Litton VP); *HKFE Clearing Corp Ltd v Yicko Futures Ltd* [2006] 2 HKC 233.
36 *HKFE Clearing Corp Ltd v Yicko Futures Ltd* [2006] 2 HKC 233, [17].
37 *Thorpe v Chief Constable of Greater Manchester* [1989] 1 WLR 665, 669; *Kennedy v Dodson* [1895] 1 Ch 334.

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should not be believed in his evidence and thus the matter went solely to credit.[38] In *Favor Easy Management v Wu*,[39] the Court of Appeal recently said that the position remained that set out in case of *Thorpe v Chief Constable of Greater Manchester*:[40]

> "the court should not order discovery, or interrogatories which are a form of discovery, on matters which would go solely to cross-examination as to credit ... It would indeed be an impossible situation in my view if discovery had to be given of every document, not relevant to the actual issues in the action, which might open up a line of inquiry for cross examination of the litigant solely as to credit."[41]

(c) Documents from previous proceedings

8–035 Where there are previous proceedings, there may be an obligation to list the documents. Where the documents were those of the party disclosing in the second proceedings, no problem arises. But what if the documents were disclosed by the opposing party? There, at least if the documents have not been read out in open court, an implied undertaking will be applicable. It follows that there is an obligation to list the documents (usually done by class) but the disclosing party will not be able to give inspection without breach of the implied undertaking. So it may be necessary to make an application for permission, or the matter will come before the court on an application by the other party for inspection of the documents in question, which may involve serving the party to the previous proceedings.[42]

(d) Judicial review

8–036 In *Tweed v Parades Commission for Northern Ireland*,[43] the House of Lords said that in the past in judicial review proceedings the practice had been that orders for disclosure were generally limited to specific documents and would not be granted to allow a complainant to go behind the defendant's written evidence to ascertain whether statements in that evidence were correct unless there was material outside that evidence which suggested that it was inaccurate, misleading or incomplete in some material respect. The court should henceforth adopt a more flexible, less prescriptive approach. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.[44]

38 See *Macmillan Inc v Bishopsgate Investment Trust Plc* [1993] 1 WLR 1372, a case on subpoenas.
39 [2011] 1 WLR 1803.
40 [1989] 1 WLR 665.
41 *Ibid.*, 669A, see also 672G, 673A (Neill LJ).
42 These issues are considered in respect of the implied undertaking in Chapter 24.
43 [2007] 1 AC 650.
44 Citing *Science Research Council v Nasse* [1980] AC 1028.

(e) Disclosure of funding

8–037 In general, the court will not make an order for disclosure of funders in the course of proceedings[45] but permit the action to proceed to trial and then if necessary exercise the power to make orders in this regard in support of the court's jurisdiction to order a non-party to pay costs under s.52A of the HCO. The jurisdiction to award costs against a non-party under s.52A carries with it case management powers on the part of the court to ensure that such proceedings are resolved fairly. That must include powers to order disclosure. On the other hand, the court must ensure that such applications do not turn into lengthy satellite litigation.[46] The question whether disclosure should be ordered is therefore fact specific.[47]

(f) Disclosure under supervision of opponents or experts

8–038 What happens if one side manifestly fails to give disclosure? The problem tends to arise in relation to searching computers. A strike out application is a possible remedy. Seeking an appointment of a receiver could also be an extreme remedy. But there are a number of cases where the applicant may wish to consider other possible remedies. A strike out might be disproportionate. The disclosure might be useful in pursuing related claims against other parties. Sometimes it may be thought better to have the disclosure than to ask the trial judge to draw inferences from its absence. There is a line of cases in England on this but the power does not seem to have been used in Hong Kong. In an appropriate and exceptional case it might be a useful adjunct to the court's powers.

8–039 It is obvious that an order requiring a party to give access to his opponent to enable disclosure to be effected is an exceptional remedy and gives rise to serious issues which need addressing.[48]

8–040 In *Mueller Europe Ltd v Central Roofing (South Wales) Ltd*,[49] it had become apparent that the defendant did not have the expertise to perform a meaningful search for back-up tapes, which had been previously ordered. Coulson J held that he had power to order that the search be carried out by a suitably qualified IT consultant on behalf of that party in order to ensure that the orders of the court were effectively complied with. In *CBS Butler Ltd v Brown*,[50] after a search order, an application was made

45 *Abraham v Thompson* [1997] 4 All ER 362 (CA). There is power to stay the action because of the way in which it is funded: *Condliffe v Hislop* [1996] 1 WLR 753 (CA); *Hamilton v Al Fayed (No 2)* [2002] 3 All ER 641. It may be necessary to look at the English authorities with caution given that the defence of champerty is largely obsolete in England.
46 See generally *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807.
47 See eg *Thomson v Berkhamsted College School* [2010] CP Rep 5 (QB) (Blake J); *Owners of the Kamal XXVI v Owners of the Ship Ariela* [2011] 1 All ER (Comm) 477 (Burton J); *Gill Germany v Flatman* [2012] 2 Costs LR 271 (Eady J).
48 See *Nucleus Information Systems v Palmer* [2003] EWHC 2013 (Ch) where an order was refused, in the light of privacy issues and privilege.
49 [2012] EWHC 3417 (TCC) (Coulson J).
50 [2013] EWHC 3944.

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1. THE MODERN VIEW OF PRIVILEGE

(a) Introduction to legal professional privilege

12–001 In *B v Auckland District Law Society*,[1] Lord Millett described privilege as "a right to resist the compulsory disclosure of information".[2] Legal professional privilege is a manifestation of the principle protecting confidentiality. The privilege is based on the need to obtain legal advice and assistance and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or disclosure in order that legal advice may be obtained safely and sufficiently.[3]

12–002 In the past, there has been more than one view as to the function and ambit of legal professional privilege. The narrow view portrays privilege as a right which entitles a litigant or his successor in title to withhold evidence from production during the course of legal proceedings.[4] Certainly, privilege arises most commonly in the case of disclosure and inspection, and entitles a litigant to refuse to produce documents for inspection. It also protects a witness from being required to answer questions in evidence. It follows, therefore, that in one sense, privilege can be described as a rule of evidence. But the wider view is that privilege is more than that: it is a substantive legal right. Any definition of privilege which treats it merely as a rule of evidence ignores the role of privilege outside adversarial proceedings. Privilege may be claimed in many types of investigative proceedings brought by regulators, for example where no proceedings exist or are in contemplation.[5] It now is clear that the wider view has prevailed across the common law world.

12–003 The rationale for legal professional privilege appears from *Anderson v Bank of British Columbia*[6] where Jessel MR said:

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating [of] his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be

1 [2003] 2 AC 736.
2 *Ibid.*, [67].
3 *Wheeler v Le Marchant* (1881) LR 17 Ch D 675, 681.
4 See eg Diplock LJ in *Parry-Jones v Law Society* [1969] 1 Ch 1; the Law Reform Committee, *Sixteenth Report on Privilege in Civil Proceedings* (Cmnd 3472) (HMSO, 1967).
5 See *Price Waterhouse v BCCI Holdings* [1992] BCLC 583.
6 (1876) 2 Ch D 644, 649.

> kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

12–004 In *Wheeler v Le Marchant*,[7] Jessel MR said "It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety". A more modern exposition appears from Bingham LJ in *Ventouris v Mountain*:[8]

> "The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision."[9]

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(b) The right to claim privilege

12–005 The English and Hong Kong courts have confirmed that that legal professional privilege is to be treated as a rule of substantive law. The Australian courts have taken this view of the effect of legal professional privilege for some time. In *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission*,[10] the High Court of Australia said, in holding that legal professional privilege could be relied upon in answer to a statutory obligation to provide information and documents to a regulator:

> "It is now settled that legal professional privilege is a rule of substantive law which may be availed by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal services or the provision of legal services, including representation in legal proceedings."

12–006 Lord Hoffmann described legal professional privilege in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[11] as "a fundamental human right long established in the common law"[12] with the concurrence of the other members of the

7 (1881) LR 17 Ch D 675.
8 [1991] 1 WLR 607.
9 For a rationale in Canada see *R v McClure* 2001 SCC 14, [36]–[39].
10 [2002] HCA 49 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
11 [2003] 1 AC 563.
12 *Ibid.*, [7].

House.[13] In *Three Rivers DC v Bank of England (No 6)*,[14] Lord Carswell, in a speech with which the other members of the House agreed, reaffirmed this. In Hong Kong, as we will see, privilege is a fundamental right protected by the Basic Law.

12–007 The right created can be described as a right not to be required to disclose materials which fall within the protection of legal professional privilege. The right is not to be required to disclose:

(a) communications passing between lawyer and client in relation to the seeking or obtaining of legal advice;
(b) documents which were created for the dominant purpose of gathering evidence for use in proceedings.

12–008 The right is substantive in that it can be asserted in answer to any demand for the documents, and is not restricted to exercising that right in civil proceedings.

12–009 The consequences of privilege being treated as a fundamental right can be seen both in litigation and as a defence to a request for documents under statutory powers. In litigation, it means that privilege may not be overridden by some higher or superior right.[15] In cases of requests for production under statutory authority, it means that a statute is to be assumed not to override privilege unless made clear by express words or necessary implication.

12–010 In *Glencore International AG v Commissioner of Taxation*,[16] the High Court of Australia considered whether a claim for privilege could be relied on to found a cause of action. Confidential and privileged papers relating to Glencore were stolen from a Bermuda law firm as part of the "Paradise Papers" and found their way to the Commissioner of Taxation without any wrongdoing on his part. The "Paradise Papers" had been widely published in the international media so that no claim of confidence could now be asserted. Glencore sought delivery up of the papers from the Commissioner. The HCA held that privilege, albeit a fundamental right, was an immunity from the exercise of powers which would otherwise compel the disclosure of privileged materials. It did not give rise to a cause of action. As Glencore could not assert confidentiality, they had no remedy against the Commissioner. Once privileged communications had been disclosed, resort must be had to equity for protection. The juridical basis for relief in equity was confidentiality.

13 Approving the judgments in the New Zealand Court of Appeal in *IRC v West-Walker* [1954] NZLR 191. See also *R v Derby Magistrates Court ex p B* [1996] AC 487, 509 (Lord Taylor CJ).
14 [2005] 1 AC 610.
15 *R v Derby Magistrates Court ex p B* [1996] 1 AC 487. In Canada, by contrast, privilege may be overridden by a superior right such as public safety, see *Jones v Smith* [1999] 1 SCR 455 discussed below.
16 [2019] HCA 26.

(c) Privilege and the Basic Law

12–011 Article 35 of the Basic Law provides:

> "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies…."

12–012 In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*,[17] Ribeiro PJ highlighted that the right to confidential legal advice subsisted even where such advice does not bear on any existing or contemplated court proceedings.

12–013 In *Solicitor v Law Society of Hong Kong*,[18] the solicitor was convicted of breaching s.8AA of the Legal Practitioners Ordinance (Cap.159) in failing to produce documents required by the Law Society's inspectors. The provision which required their production was s.8B which provided that:

> "documents required by the Council under section 8A or by an inspector under section 8AA shall be produced or delivered notwithstanding any claim of solicitor-client privilege but documents that are subject to a solicitor-client privilege may only be used for the purpose of an inquiry or investigation under this Ordinance."

12–014 The solicitor argued that s.8B was contrary to art.35 of the Basic Law. Bokhary PJ recognised that legal professional privilege was a fundamental right. So the question for the court was whether it was open to a statute to abrogate legal professional privilege.

12–015 Bokhary PJ said:

> "The client is not a party to the disciplinary hearing for which disclosure of the documents is sought. And, in circumstances like these, whether any interference with privacy resulting from such disclosure is lawful or unlawful depends on whether the disclosure is compatible with the right to confidential legal advice."

12–016 However, Bokhary PJ said that another fundamental condition was the existence of a legal profession of efficiency and integrity. There were a number of safeguards in s.8B. Firstly, it was relevant to have in mind that legal professional privilege was that of the client, not the solicitor, and the disclosure would take place under strict confidentiality. So no private complainant could see the documents.

17 (2006) 9 HKCFAR 234, [48].
18 [2006] 2 HKLRD 116.

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12–017 Secondly, the Solicitors Disciplinary Tribunal had power to direct that a party need not serve a list of documents which could include privileged documents. Thirdly, the Law Society Council alone was able to direct the inspectors to require the production of privileged documents under ss.8AA and 8B. So the CFA held that s.8B(2) was not disproportionate to what was needed to maintain high standards within the solicitors' profession and the derogation from legal professional privilege was compatible with Basic Law protection.

(d) *Solicitor v Law Society of Hong Kong*:[19] Discussion

12–018 Firstly, the CFA affirmed that privilege is a fundamental right in Hong Kong.[20] The statute expressly abrogated privilege, so the "necessary implication" question was not in issue.

12–019 Secondly, it is apparent that any statute which purports to abrogate legal professional privilege will be scrutinised by the courts under Basic Law principles to ascertain whether the encroachment on Basic Law rights is proportionate. If the court determines that the encroachment is disproportionate, it will strike down the statutory provision.

12–020 *Solicitor v Law Society of Hong Kong*[21] has been criticised by Johannes Chan as to its finding that in the case of the particular statutory provision, the abrogation of privilege was proportionate.[22] No doubt the CFA were influenced by Lord Hoffmann's speech in *Morgan Grenfell*, discussed below.

12–021 A further question not decided in *Solicitor v Law Society of Hong Kong* is whether legal professional privilege is subject to public interest exceptions, such as in Canada where the lawyer's obligation to keep his client's privileged documents confidential is subject to exceptions which are not recognised in other common law jurisdictions.

(e) Other Basic Law and Hong Kong Bill of Rights issues

12–022 Article 35 of the Basic Law is the central provision relevant to discovery and privilege. However, privacy rights are also important, as guaranteed by art.30. Consideration needs also to be given to Hong Kong Bill of Rights art.10 (equality before courts and right to fair and public hearing), art.11(2)(d) (right to legal advice), art.14 (privacy right) and art.22 (equality before and equal protection of law).

12–023 These rights leave open the possibility of challenge to any statutory or other provision which purports to interfere with them. Where restrictions are placed on the law of privilege there is obvious scope under art.35, as we have seen in *Solicitor v*

19 (2006) 9 HKCFAR 175.
20 See to same effect *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739 (CFA).
21 (2006) 9 HKCFAR 175.
22 "Legal Professional Privilege: Is It Absolute?" [2006] HKLJ 461.

Law Society of Hong Kong. When the Working Party considered changes to the RHC, they recognised as part of their decision making process, that some proposed changes might, at least arguably, give rise to Basic Law challenges.[23] Other areas of law relevant to this book where there may be scope for some sort of statutory challenge are as follows:

(a) Privilege against self-incrimination is considered in detail at Chapter 19
(b) Orders for disclosure against non-parties raise privacy issues, although these are unlikely to be significant if applications are made in conformity with the rules and caselaw
(c) Orders for disclosure between the parties to litigation which affect confidentiality of third parties[24]
(d) Confidentiality clubs[25]
(e) Statutory abrogation of privilege, considered at Chapter 19
(f) In criminal cases, there have been Basic Law issues in relation to preventive surveillance.[26]

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2. DERBY MAGISTRATES

(a) *R v Derby Magistrates Court, ex p B*: The right to claim privilege

12–024 Once privilege is established, the right to withhold the document or to refuse to answer the question is an absolute right, and there is no balancing act to be performed by the court.[27] This important principle can be distinguished from the principle discussed above, namely that privilege is a fundamental or substantive right: the latter affects the nature of the right and when it may be claimed; the absolute right, however, prevents a claim for privilege being overridden by competing public policy considerations.

12–025 In recent years there have been many attempts to introduce balancing acts into the law of privilege, almost invariably misconceived.[28] What has been said is that to the extent that there was any balancing exercise, it was settled 500 years ago. The balancing exercise which was then settled is between, on the one hand, the public interest in permitting persons to confide in their lawyers without fear that they may be required to reveal confidential communications, and, on the other, the public interest in ensuring that all relevant materials are put before the court for the purpose of determining a dispute. It is the resolution of that balancing exercise which gives

23 Such as, for example, adopting of English CPR rules of privilege in instructing experts: see Chapter 21.
24 See Chapter 10.
25 *Ibid*.
26 See *Secretary for Justice v Shum Chiu* [2008] 1 HKLRD 155.
27 The position is different in respect of public interest immunity.
28 In different areas of the law, examples are as follows: *R v Ataou* [1988] QB 798 (admission of evidence in criminal trials); *Webster v James Chapman & Co* [1989] 3 All ER 939 (mistaken disclosure); *Hayes v Dowding* [1996] PNLR 578 (implied waiver).

right to the right to assert a claim for privilege. There is not a balancing exercise in respect of any individual case.

12–026 In *Citic Pacific Ltd v Secretary for Justice*,[29] the Court of Appeal reaffirmed that as a fundamental right, legal professional privilege in Hong Kong does not involve a balancing of interests.[30]

12–027 This was dramatically shown by the landmark decision of the House of Lords in *R v Derby Magistrates Court ex p B*.[31] A was charged with murdering a girl. He initially admitted guilt. Then shortly before the trial, he changed his story and blamed his stepfather. He was acquitted at the trial. Many years later, after a civil claim brought against the stepfather by the family of the murdered girl had succeeded amidst great publicity, the stepfather was charged with the murder. At his committal proceedings, counsel for the stepfather sought to cross-examine A about instructions given to his solicitors after his confession but prior to the retraction. The magistrates and the Divisional Court ordered the instructions to be disclosed although A refused to waive privilege. The Divisional Court held that the court had to perform a balancing exercise as to whether to order disclosure. The House of Lords set aside the disclosure order. It held that the right to claim privilege was an absolute right, and it was impossible to perform a balancing exercise in particular cases.[32] Lord Taylor CJ said:

> "The principle that runs through all [the authorities] is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."[33]

12–028 It would be hard to imagine documents more relevant to the case against the stepfather than those in issue: documents which could potentially provide a defence to a charge of murder. The House of Lords made clear there was for this purpose no distinction between the criminal authorities and those applicable in civil cases, and cited at length the nineteenth century authorities which provide the basis for the modern law of privilege.[34]

29 (CACV 7/2012, [2015] HKEC 1263) (CA).

30 *Ibid.*, [38]; see also *Secretary for Justice v Florence Tsang Chiu Wing* (2014) 17 HKCFAR 739, [29] (Ribeiro PJ).

31 [1996] 1 AC 487.

32 See in particular Lord Nicholls who averred that the idea of a balancing exercise was "a veritable will o'the wisp".

33 *Derby Magistrates* [1996] 1 AC 487, 507.

34 See modern restatements to similar effect Lord Bingham of Cornhill CJ in *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183, 1188; and Deane J in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, HC of Australia. The *Carter* case also held that privilege could not be overridden notwithstanding the documents were required for a defence to a serious criminal charge.

12–029 Lord Taylor CJ said:

> "… if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."[35]

12–030 Lawrence Collins J made the point in *Istil Group Inc v Zahoor*:[36]

> "there is nothing in the authorities which could prevent the application of the rule that confidentiality is subject to the public interest. In this context, the emergence of the truth is not a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege".

12–031 In *B v Auckland District Law Society*,[37] on appeal from the New Zealand Court of Appeal, the Privy Council reaffirmed *Derby Magistrates*. The Privy Council differed from the New Zealand Court of Appeal which had treated the case as requiring a balancing act in the individual case to be struck between private and public interests. The Privy Council thus provided a strong reaffirmation of *Derby Magistrates*.[38] The decision has also been followed in Australia.[39] In *Three Rivers DC v Bank of England (No 6)* the principle was reaffirmed without reservation by Lord Scott.[40]

12–032 Lord Hoffmann has suggested in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[41] that a claim for privilege protected a document from production only where disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege. This is not the traditional view of privilege and is highly controversial. A number of subsequent English authorities followed Lord Hoffmann without dealing with the problems created by what he said.[42] Now the Court of Appeal have at last set the position

35 *R v Derby Magistrates Court ex p B* [1996] 1 AC 487, 508.

36 [2003] 2 All ER 252, [93].

37 [2003] 2 AC 736.

38 *B v Auckland District Law Society* [2003] 2 AC 736, [46]–[56].

39 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 128 (HCA) (especially Brennan J), approving *dicta* of Mason and Wilson JJ in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54, 64–65. See also the dissenting judgment of Dawson J in *Attorney General for the Northern Territory of Australia v Kearney* (1985) 158 CLR 500, 532 which was approved in *Carter*. In New Zealand see *R v Uljee* [1982] 1 NZLR 561, 576 to the same effect.

40 [2005] 1 AC 610, [25]. See also Lord Carswell, [87].

41 [2003] 1 AC 563.

42 Lord Hoffmann was dealing with *Parry-Jones v Law Society* [1969] 1 Ch 1 which was decided at a time when the prevalent view was that privilege was a rule of evidence rather than a

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1. WHAT PRIVILEGE INVOLVES

(a) The requirement of confidentiality

13–001 There can be no privilege without confidentiality.[1] If, therefore, an otherwise privileged document has entered the public domain there can be no claim for privilege. But in the normal course, communications between solicitor and client will be presumed confidential.[2] If a solicitor sends his client a transcript of a hearing in open court or a copy of a letter sent to the opposing party, there is no relevant confidentiality in that document so no claim for privilege can be made.[3] Similarly, a conversation with a solicitor in the presence of the police is not confidential and not privileged.[4] There can be no privilege unless the communication is confidential but not all confidential communications can be said to be privileged.

(b) Two categories of privilege

13–002 The two categories of privilege are legal advice privilege and litigation privilege. Legal advice privilege is narrower in ambit but can be claimed more widely. It protects communications between client and lawyer which are part of the continuum of the giving and getting of legal advice. It does not require the existence or contemplation of legal proceedings. Litigation privilege only applies where adversarial proceedings are in reasonable contemplation, but is wider in ambit. It protects communication which come into existence for the dominant purpose of gathering evidence for use in proceedings, and will include communications with third parties if they come into existence for that dominant purpose. These two forms of privilege are considered in detail in Chapters 15 and 16.

13–003 In the Court of Appeal in *Three Rivers DC v Bank of England (No 6)*,[5] Lord Phillips MR had suggested that in 2004 it was not easy to see the justification for legal professional privilege outside litigation. The Court of Appeal had suggested that privilege was a privilege "in aid of litigation", owing its public policy justification to the need for a client to be able to act with candour to his lawyer in litigation. When *Three Rivers DC v Bank of England (No 6)*[6] was heard by the House of Lords, this analysis was rejected. All their lordships recognised that the maintenance of legal advice privilege was as important as litigation privilege, and that the public policy justification, namely of ensuring that those who consult lawyers do so with candour in the knowledge that the lawyer's mouth is "shut for ever".[7] Lord Carswell said:

> "... the cases establish that, so far from legal advice privilege being an outgrowth and extension of litigation privilege, legal professional privilege is a single

1 See *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 discussed in Chapter 12.
2 *Minter v Priest* [1930] AC 558, 581 (Lord Atkin). The solicitor has an obligation to keep the affairs of his client confidential: *Parry-Jones v Law Society* [1969] 1 Ch 1.
3 See Chapter 14.
4 *R v Braham and Mason* [1976] VR 547.
5 [2005] 1 AC 610 (HL).
6 *Ibid.*
7 See *Wilson v Rastall* (1792) 4 Term Rep 753, 759 (Buller J).

> integral privilege, whose sub-heads are legal advice privilege and litigation privilege ...".[8]

(c) Legal professional privilege distinguished from other objections to disclosure

13–004 By contrast to the absolute nature of privilege, in the case of public interest immunity, the balance to be drawn between the different interests is central to the decision whether to require disclosure;[9] and although "without prejudice" privilege is commonly regarded as a form of privilege, it differs from privilege simpliciter in that it is based on a mixture of contract and public policy and cannot in general be waived by one party alone. The privilege against self-incrimination shares with legal professional privilege that it permits a person to decline to give disclosure or to answer questions, and can be waived by the party entitled to the privilege; however, it is not concerned with lawyer-client communications.

13–005 The fact that a document may be privileged does not affect its admissibility, as privilege may be waived. Where one party has obtained privileged material, even improperly, the evidence remains admissible even though an injunction may be granted in advance of its use to prevent it.[10] Although privilege belongs to the party and not the lawyer, as a matter of practice, privilege is usually claimed by the lawyer rather than the party,[11] although the position is different where the privilege is against self-incrimination.

(d) Privilege belongs to the client

13–006 The rule is established for the client's benefit, not for the lawyer. Privilege can therefore be waived by the client but not the lawyer.[12] The lawyer is under a professional obligation to assert the privilege until it is waived by the client.[13] Thus, the lawyer has no locus to assert the privilege in his own right or commence proceedings in his own name for that purpose.[14] The lawyer cannot invoke the privilege or use it for his own benefit if the client waives it.[15] Nor can the person to whom the lawyer communicates under the cloak of litigation privilege claim to rely on it.[16]

8 *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610, [105].
9 The distinction was pointed out by Scott VC in *Re Barings* [1998] 1 All ER 673.
10 See eg *Calcraft v Guest* [1898] 1 QB 759 (Chapter 23).
11 *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794; *Evans v Evans* [1904] P 378.
12 *Wilson v Rastall* (1792) 4 Term Rep 753; cited in *R v Derby Magistrates Court ex p B* [1996] AC 487.
13 *R v Central Criminal Court ex p Francis & Francis* [1989] AC 346, 381 (Lord Griffiths).
14 *Abbey National Plc v Clive Travers & Co* [1999] Lloyd's Rep PN 753; *Francis & Francis* [1989] AC 346.
15 *Re International Power Industries* [1985] BCLC 128 (lawyer sought to rely on the privilege in answer to a personal subpoena despite fact client had waived it).
16 *Schneider v Leigh* [1955] 2 QB 195; *Lee v South West Thames RHA* [1985] 1 WLR 845.

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(e) Duration of privilege

13–007 As privilege is a substantive right, if the circumstances of the creation of the document are such as to attract privilege, whether legal advice or litigation privilege, privilege will be an answer to any subsequent request for the document, whether in proceedings or otherwise. The principle "once privileged always privileged" applies.[17] This means that if a document is privileged in one action, the party entitled to assert that privilege or his successor in title may assert the same privilege in a subsequent action in which the document is relevant. There is no requirement of identity or substantial identity of subject-matter in the different proceedings.[18] Thus, it has been said that once the privilege is established, the lawyer's mouth is "shut for ever".[19] The principle is illustrated in an extreme form from the Court of Appeal decision in *Calcraft v Guest*.[20] There documents privileged for use in an assault action in 1787 against Calcraft as owner of a fishery were found by a subsequent Mr Calcraft who had succeeded to ownership of the fishery and were relevant to a trespass action brought 110 years later. The documents were held privileged.

13–008 In *R v Derby Magistrates Court ex p B*,[21] Lord Nicholls said obiter that in circumstances where the client has no interest in asserting the right to privilege and the enforcement of the right would be seriously prejudicial to another in defending a criminal charge or in some other way, he would not expect the law to protect the right. But Blackburne J in *Nationwide Building Society v Various Solicitors*[22] having referred to cases in New Zealand[23] and Canada[24] where courts had said that no rule of policy requires the continued existence of the privilege when the person claiming the interest had no longer any interest to protect concluded after reviewing the speeches of the majority of the House of Lords in *Derby Magistrates*, that the majority had rejected Lord Nicholls' view:

> "I take the view that whether or not the client has any recognisable interest in continuing to assert privilege in the confidential communications, the privilege is absolute in nature and the lawyer's mouth is 'shut for ever'."[25]

13–009 No subsequent authority has given any encouragement to the invitation contained in Lord Nicholls' speech. In the case of legal advice privilege, there is no reason to do so. In litigation privilege, it might be legitimate to change the law to mirror that in

17 See *Aegis Blaze* [1986] 1 Lloyd's Rep 203 (CA); confirmed in *R v Derby Magistrates Court ex p B* [1996] 1 AC 487, 503G–503H; and *B v Auckland District Law Society* [2003] 2 AC 736, [44]; however, see the *dicta* of Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 considered above.
18 *Aegis Blaze* [1986] 1 Lloyd's Rep 203 (CA); confirmed in *R v Derby Magistrates Court ex p B* [1996] 1 AC 487, 503G–503H; and *B v Auckland District Law Society* [2003] 2 AC 736, [44].
19 *Wilson v Rastall* (1792) 4 Term Rep 753, 759 (Buller J).
20 [1898] 1 QB 759.
21 [1996] 1 AC 487.
22 [1999] PNLR 52.
23 *R v Craig* [1975] 1 NZLR 597, 599 (Cooke J).
24 *R v Dunbar and Logan* (1982) 138 DLR (3d) 231, 252.
25 *R v Derby Magistrates Court ex p B* [1996] 1 AC 487, 69.

Canada[26] but a rule which depended on whether there was a valid reason on the facts of the case for continuing to claim privilege might lead to greater uncertainty.

(f) Adverse inferences and the claim for privilege

13–010 No adverse inference can be drawn from a claim for privilege.[27] It would be inconsistent with privilege existing as a fundamental right on which the administration of justice is based for a court to draw any adverse inference from the making of a valid claim to privilege. In *Wentworth v Lloyd*,[28] the Master of the Rolls had laid it down that where a party chose to exercise his privilege to prevent his solicitor as witness from divulging confidential information he must be subject to the rule that the keeping back of evidence must be taken most strongly against the person who does so. In the House of Lords, Lord Chelmsford protested most strongly against any such proposition as being entirely at variance with principle and utterly in contradiction to the principle of professional confidence and as denying him the protection afforded him by the law for public purposes, and taking away a privilege which could thus only be asserted to his prejudice. In *Sayers v Clarke Walker*,[29] the Court of Appeal more recently reaffirmed this principle, holding that it was not permissible to draw adverse inferences from a refusal to waive privilege. The position is less clear in relation to privilege against self-incrimination and the point is considered in detail in Chapter 19.

(g) Dissemination of privileged material

13–011 There are two situations to distinguish. The first is where a record of advice given is disseminated internally, within a company. Here the law is relatively clear that privilege may be claimed.[30] The more difficult case is where privileged material is disseminated to third parties. In *USP Strategies v London General Holdings Ltd*,[31] Mann J held that where privileged advice is disclosed to a third party, the privilege is capable of attaching to the third-party communication.[32] As the actual advice was privileged, so it must follow that the client's own written record of what his lawyer told him orally must be privileged. Mann J. said that where the advice was passed to a third party in confidence, the privilege was not lost and the person entitled to the privilege would be entitled to restrain the persons to whom he had passed the advice from giving secondary evidence of the privileged material.[33] It does not matter

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26 *General Accident Assurance Co v Chrusz* (1999) 45 OR (3d) 321, [43].
27 *Wentworth v Lloyd* (1864) 10 HLC 589.
28 *Ibid.*
29 *Sayers v Clarke Walker* [2002] EWCA Civ 910.
30 See *Good Luck, The* [1992] 2 Lloyd's Rep 540 (Note) (Saville J); *British & Commonwealth Holdings v Quadrex* (4 July 1990) (Gatehouse J); *The Sagheera* [1997] 1 Lloyd's Rep 160 (Rix J); *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch) (Mann J).
31 [2004] EWHC 373 (Ch) (Mann J). The decision predated the House of Lords decision in *Three Rivers (No 6)* [2005] 1 AC 610.
32 Relying on *Good Luck, The* [1992] 2 Lloyd's Rep 540 (Note); and *Gotha City v Sothebys* [1998] 1 WLR 114.
33 *USP Strategies v London General Holdings Ltd* [2004] EWHC 373, [19d] (Ch); relying on *Gotha City v Sothebys* [1998] 1 WLR 114, 119.

occasions but there is no clear resolution of the problem. They have recognised that the issue is a difficult one but when required to make a decision have generally applied the *lex fori*.[49]

13–019 It might be argued that the wording of s.39A(2) compels a conclusion that the *lex fori* applies. On the one hand, s.39A(2) may do no more than establish the principle that privilege can be claimed for communications with foreign lawyers. But the reference to the same extent as solicitor client privilege might be argued to provide that privilege only applies where it applies in Hong Kong, and thus provide for the lex fori to apply.[50]

13–020 Although the s.39A(2) point does not seem to have been argued, the Court of Appeal recently came down in favour of the *lex fori* in *Super Worth International Ltd v Commissioner of Independent Commission against Corruption*.[51] The court found the observations of Besanko J in *Steward v Australian Crime Commission*[52] illuminating:

> "... although legal professional privilege is linked to the contract of retainer between the client and his or her lawyer, it is not a 'transaction' in the same sense as the formation of a contract or the commission of a tort. It is an immunity from what would otherwise be a coercive process dictated or mandated by, in the majority of cases, a statute or piece of delegated legislation of the forum where, to the extent that Parliament has not by express words or necessary intendment made its intention clear, the policy in the statute or piece of delegated legislation gives way to an important common law immunity based on consideration relevant to the administration of justice. Put another way, in the case of legal professional privilege, there are important connecting factors with the forum, namely, the production of documents or a request for their production and a claim or assertion of privilege. These matters considered together lead me to the conclusion that the governing choice of law rule in the case of legal professional privilege is the *lex fori*.

13–021 That said, the Court of Appeal recognised, as had done Allsop J in *Kennedy v Wallace*, that there was room for flexibility: an example given in the course of the

regarded as part of the law of evidence. However, even here the position is not straightforward as the basis of without prejudice privilege is a combination of public policy (usually governed by *lex fori*) and implied contract (law governing the implied contract).

49 *Kennedy v Wallace* (2004) 213 ALR 108, [203]–[204], [209].

50 There is a full review of the authorities by Stone J in the Federal Court of Australia in the recent case *Australian Crime Commission v Stewart* [2012] FCA 29. Stone J rejected the argument that the *lex causae* should apply because privilege was a substantive right. He said there was no bright line rule that determined the issues, but that an important issue was the degree of connection between the matter and each of the competing jurisdictions. However, on the facts he applied the *lex fori*. The decision of Stone J was upheld by the Full Court [2012] FCA 151, although the decision was influenced by the fact that it concerned interpretation of an Australian statute.

51 [2016] 1 HKLRD 281.

52 (2012) 294 ALR 505, [53], Federal Court of Australia.

hearing was a case where the documents were sought for legal proceedings in another jurisdiction.

13–022 To the same effect, in *Re RBS Rights Issue Litigation*[53] it was argued that the court should apply the law of the place which had the closest connection to the engagement or instructions to the lawyers in question. In reaffirming the *lex fori* rule Hildyard J said:[54]

> "The practical difficulties of applying some other law than the *lex fori* are fairly obvious: it was recognised in *Re Duncan* that any solution but the application of the *lex fori* requires determination of the application and content of foreign law, and even the identification of the relevant foreign law may be difficult according to the stage and context in which the issue arises. Those difficulties are compounded where, in multi-jurisdictional cases involving several parties, there is the potential for a variety of different putatively applicable laws, and the prospect of having to determine them at an interlocutory stage, with cross-examination of experts if there is a disagreement.
>
> In short, a convention may often be a reflection of both pragmatism and overall policy. In my assessment, it may well be that application of the *lex fori*, with a discretionary override, is the least objectionable course."

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3. WHICH PERSONS MAY CLAIM PRIVILEGE?

(a) Litigants in person

13–023 It seems relatively clear that a litigant in person can claim litigation privilege (although there is no authoritative decision to that effect)[55] but it is generally illogical for a litigant in person to be able to claim legal advice privilege. However, a firm of solicitors acting for themselves ought to be able to claim legal advice privilege for advice given by lawyers within the firm to the firm.[56] The issue is likely to be most acute where a firm of solicitors are sued for professional negligence.

(b) Witnesses

13–024 A witness may be served with a witness summons or asked questions in evidence. In considering whether he can claim privilege, there are two types of privilege in issue. First, his own privilege. Secondly, the privilege of the party to litigation in question.

53 [2017] 1 WLR 1991.

54 *Ibid.*, [174].

55 See para 16-041 in Chapter 16.

56 There is some authority to this effect in a comment by Clarke LJ in *Somatra v Sinclair Roche and Temperley* [2000] 2 Lloyd's Rep 673, [44].

13–025 The witness cannot ultimately determine whether to rely on the privilege of a party to litigation, as it is for the party to decide whether to waive it and it does not ensure for the benefit of the witness.[57] The witness may invoke his own privilege, that is, his own legal advice privilege where applicable, but not his own litigation privilege because, in the normal case, it will not be permissible to claim litigation privilege where he is served with a witness summons.[58] What he cannot do is rely on the party's privilege for his own benefit.[59]

(c) Principal and agent

13–026 The privilege is the privilege of the principal. His agent may assert the privilege, and will normally be obliged to do so. The principal may waive the privilege, in which case the agent is bound by the waiver and cannot assert privilege independently.[60] A communication between lawyer and client need not be made directly. Either client or lawyer or both may make the communication through an agent, so long as the agent is merely a medium of communication.[61] Thus, employees, officers and directors of a company who are party to proceedings may decline to answer questions if the company is entitled to claim privilege.[62] The principal can require the employee or agent to hand over the documents or to refuse to hand them over.[63] If necessary, the principal can intervene in the litigation or obtain injunctive relief to require his directions to be carried out; it would be a breach of the fiduciary obligation of the agent or employee to produce or refuse to produce documents contrary to the interests and directions of the company.

13–027 Where communications between a litigant and third party are protected by litigation privilege, the only party who can claim that privilege is the litigant, not the third party. It applies where a third party tries to rely in his own right on communications with the litigant.[64] In some circumstances, common interest privilege will apply.

57 The position is no different from that of an agent or the solicitors who were not permitted to invoke their client's privilege in answer to a subpoena because the client had waived it: *Re International Power Industries* [1985] BCLC 128.
58 See *United States v Philip Morris Inc (No 1)* [2004] 1 CLC 811.
59 *Schneider v Leigh* [1955] 2 QB 195; *Lee v South West Thames RHA* [1985] 1 WLR 845.
60 *Re International Power Industries* [1985] BCLC 128; *Nationwide Building Society v Various Solicitors* [1999] PNLR 52.
61 *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649; *Wheeler v Le Marchant* (1881) LR 17 Ch D 675, 682.
62 Compare *Harrington v North London Polytechnic* [1974] 1 WLR 1293.
63 See eg *Leicestershire CC v Michael Faraday & Partners Ltd* [1941] 2 KB 205, 216.
64 Such as where a defamation action is based on the letter written by a third party to the litigant which is privileged in the hands of the litigant: see *Schneider v Leigh* [1955] 2 QB 195; *Lee v South West Thames RHA* [1985] 1 WLR 845; see also by analogy, *Re International Power Industries* [1985] BCLC 128; *Nationwide Building Society v Various Solicitors (No 2)*, (*The Times*, 1 May 1998).

(d) The police and government

13–028 The principles are no different here. It is important to consider the capacity in which the documents were created. This is illustrated by *Goodridge v Chief Constable for Hampshire*.[65] Privilege was claimed for documents passing between police and the Director of Public Prosecutions in connection with a homicide offence. Moore-Bick J. held that although legal professional privilege could come into existence between police and the DPP where the relationship was tantamount to client and legal adviser, where the police were reporting to the DPP pursuant to their statutory duties, no such relationship arose and thus the claim for privilege failed.

4. IN-HOUSE LAWYERS

(a) Privilege applies to in-house lawyers

13–029 It is well established that in-house lawyers enjoy the same privilege in English law as external lawyers. This was established in *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comms (No 2)*.[66] In the case of in-house lawyers, it will be important to consider whether the individual is consulted as lawyer or executive; not all communications with in-house lawyers are likely to be for the purpose of obtaining legal advice. Moore-Bick J in *United States v Philip Morris Inc*[67] observed:

> "Lawyers do not cease to be regarded as professional legal advisers simply because they are employed by their clients, for example in a company's legal department, but in the nature of things those who are employed in that capacity are more likely than independent practitioners to become involved in aspects of the business that are essentially managerial or administrative in nature. To that extent it is less easy to maintain that all communications passing between them and the company's management attracts privilege."

13–030 The position is not the same in Australia: in *Waterford v Commonwealth of Australia*,[68] the High Court of Australia held advice from in-house lawyers was privileged if there was a professional relationship which secured to the advice an independent character notwithstanding the employment relationship. Thus, in Australia it appears the issue depends on whether the lawyer is genuinely independent of the client.

13–031 The European Court of Justice has taken a different view of in-house lawyers in holding that parties to antitrust investigations into possible breaches of Arts 101 and 102 of the Treaty of Rome could not claim privilege for communications with

65 [1999] 1 All ER 896 (Moore Bick J).
66 [1972] 2 QB 102, 129; the point was not challenged on appeal.
67 [2003] EWHC 3028 (Comm); the decision of the Court of Appeal at [2004] 1 CLC 811.
68 (1987) 163 CLR 54.

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2. Exceptions to the "Without Prejudice" Principle

18–024 Modern authorities usually cite Robert Walker LJ in *Unilever v Procter & Gamble*,[44] as the seminal analysis as to the principal circumstances in which without prejudice communications could be admitted in evidence. In *R v K*,[45] Moore Bick LJ said[46] about *Unilever*:

> "The decision in *Unilever v Proctor & Gamble* is authority for the view that the protection afforded by the 'without prejudice' rule is somewhat wider than had been recognised in the earlier cases and prevents any use by either party of the protected communications in a manner that would adversely affect the interests of the other."

18–025 The circumstances set out in *Unilever* are as follows:

(a) When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible.[47]
(b) To show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.[48]
(c) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel.[49]
(d) Evidence of negotiations may be given, in order to explain delay or apparent acquiescence. The fact of without prejudice negotiations, rather than in the normal case their content, may be relevant, for example, on an application to strike out for want of prosecution, on an issue of delay in amending a patent or any other claim based on laches.[50] In such circumstances, it will be permissible not merely to refer to the existence of without prejudice communications, but to put in evidence the material itself.[51]
(e) In cases of impropriety.

44 [2001] 1 All ER 783.
45 [2010] QB 343.
46 *Ibid.*, [61].
47 *Tomlin v Standard Telephones* [1969] 1 WLR 1378 (CA); *Gnitrow Ltd v Cape plc* [2000] 3 All ER 763; *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] 1 WLR 2722 (Burnton J).
48 *Underwood v Cox* [1912] 4 DLR 66.
49 *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191.
50 *Walker v Wilsher* (1889) LR 23 QBD 335, 338; *Family Housing Association (Manchester) v Michael Hyde & Partners* [1993] 1 WLR 354; *Rediffusion Simulation v Link Miles* [1992] FSR 195; *Simaan General Contracting Co v Pilkington Glass* [1987] 1 WLR 516, 518.
51 *Michael Hyde & Partners* [1993] 1 WLR 354 (CA). If one party states that the existence of without prejudice negotiations were the reason for the delay, the other party must be entitled to produced them to show that they do not justify the delay. But the material will not be admissible at trial. See further *Somatra v Sinclair Roche and Temperley* [2000] 2 Lloyd's Rep 673.

(f) In cases where there is no public policy justification for the exclusionary rule.[52]
(g) Where the words are used "without prejudice save as to costs" and the correspondence may be admitted on questions of costs.
(h) In matrimonial cases,[53] where there is a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation.

18–026 A further exception was established in the recent Supreme Court case *Oceanbulk Shipping and Trading v TMT Asia Ltd*.[54] It was held that without prejudice material was potentially admissible as part of the factual matrix for the purposes of construing a contract concluded after without prejudice negotiations. This follows logically from the principle that without prejudice communications are admissible to determine whether without prejudice communications have resulted in a concluded compromise agreement. In most cases, the without prejudice material will not tell the court anything about the factual matrix which cannot be put in evidence by other means.

18–027 In *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd*,[55] the issue arose as to whether without prejudice communications could be relied upon as part of a sequence of events which amounted to repudiation of an agreement. Flaux J held that they could not be admitted.

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3. Statements of Fact and Acknowledgements

(a) *Re Daintrey*

18–028 In the old case *Re Daintrey*[56] it was said that a without prejudice letter was admissible when it contained a statement which amounted to an act of bankruptcy. The Court of Appeal said that "the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed". *Re Daintrey* is referred to in most of the modern cases but none of the cases seem to follow it directly. Robert Walker LJ in *Unilever v Procter & Gamble*[57] suggested that the decision was based on abuse of a privileged occasion and that the real point of the decision was that "the veil was never there in the first place".[58] He emphasised that parties must be able to speak freely at without prejudice meetings, without concern that their

52 This is *Muller v Linsley & Mortimer* [1996] PNLR 74 (CA).
53 *Re D* [1993] 2 All ER 693, 697.
54 [2011] 1 AC 662.
55 [2016] 4 WLR 59.
56 [1893] 2 QB 116.
57 [2001] 1 All ER 783.
58 In *Cadle Co v Hearley* [2002] 1 Lloyd's Rep 143 it was said that the exception merely covered independent unrelated facts, and thus did not apply when a without prejudice acknowledgement was made of a debt. However, this now must be read subject to *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 and *Ofulue v Bossert* [2009] 1 AC 990.

(b) The three-party situation

18–033 In most cases, the documents for which privilege are claimed pass between the immediate parties to the litigation. As between those parties, problems of disclosure (as opposed to admissibility) will only rarely arise because the parties will themselves have copies of the privileged correspondence. If an issue does arise, the documents are privileged from disclosure as well as use in evidence.[75] But there may be circumstances in which the issue arises as to whether documents which came into existence in previous proceedings should be disclosed or admitted in subsequent proceedings.

18–034 This issue arose in *Rush & Tompkins Ltd v Greater London Council*,[76] Rush & Tompkins, who were main contractors, settled proceedings arising from a building contract with the employer, the GLC. The proceedings continued between Rush & Tompkins and its sub-contractor, who sought disclosure of the without prejudice correspondence between Rush & Tompkins and the GLC, anticipating that there might be discussion of the strength of the case of the sub-contractor and admissions by Rush & Tompkins. The Court of Appeal held that once the prior proceedings had concluded, the purpose of the privilege was satisfied and the correspondence admissible. The House of Lords unanimously reversed this decision, holding that the public policy basis for the privilege would be weakened if a party negotiating with one defendant could not express his views openly for fear that if he reached a compromise with that defendant, admissions made in those negotiations would be admissible either in the same action or another action taken against another party.[77]

(c) *Muller v Linsley & Mortimer*

18–035 However, the Court of Appeal undermined *Rush & Tompkins* in *Muller v Linsley & Mortimer*.[78] Claimants who sued in negligence against their solicitors had taken prior proceedings in mitigation of loss. The prior proceedings had been settled. In the subsequent negligence proceedings, the Court of Appeal held that the without prejudice negotiations in the prior proceedings should be disclosed. Hoffmann LJ drew a distinction between the two party and three party situation. Where in the three party situation the rationale is public policy, and not implied contract, Hoffmann LJ said the privilege operates as an exception to the general rule on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of a party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not, however, concerned with the admissibility of statements that are relevant, other than as admissions that is, independently of the facts alleged to

75 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280.
76 *Ibid.*
77 Although the negotiations may be without prejudice, the resulting agreement will not be, and thus the agreement will be disclosable where relevant: see *Gnitrow Ltd v Cape plc* [2000] 1 WLR 2327 (CA).
78 [1996] 1 PNLR 74.

have been admitted.[79] Hoffmann LJ distinguished *Rush & Tompkins* as being a case where the documents were required as evidence of admissions against interest. As in *Muller v Linsley & Mortimer* the documents were relevant not as admissions but as to the reasonableness of the settlement, there was no public policy reason to refuse to admit them. Indeed it was not likely that the defendants to the subsequent litigation would be able to make use of any earlier admissions, because the weaker the case in the original litigation, the stronger the argument that the settlement was reasonable.

18–036 In *Ofulue v Bossert*,[80] Lord Neuberger was critical of *Muller v Linsley & Mortimer* and appears to overrule it. But the speeches in *Ofulue* do not make for easy reading and it is not easy to see exactly what they were saying about *Muller*. The Court of Appeal recently delivered judgment in *Avonwick Holdings Ltd v Webinvest Ltd*.[81] Lewison LJ dismissed *Muller* in the following terms:

> "That was a case in which the plaintiff asserted that a settlement that he had made was a reasonable settlement and the defendant asserted that it was not. The reasonableness of the settlement was therefore directly in issue and it was the plaintiff who had put it in issue. It is hardly surprising that in those circumstances the court ordered disclosure of the negotiations leading to the settlement. The general rule however is still that stated in *Rush & Tompkins Ltd v Greater London Council*[82] namely that without prejudice negotiations once privileged remain privileged even after settlement. Moreover, Hoffman LJ's reasoning in *Muller* which distinguished between an admission and other statements was disapproved by The House of Lords in *Ofulue* (see Lord Neuberger[83] with whom the other Lords agreed)."

18–037 Thus when based on the public policy ground, in a three-party situation, the exclusion of without prejudice correspondence was not limited to proving admissions against interest. That follows from Lord Neuberger. So far so good. But rather than hold that *Muller* was wrongly decided, Lewison LJ went out of his way to say that on the facts it was rightly decided. Here lies the problem. Lewison LJ's explanation of why *Muller* was decided as it was is not satisfactory or clear. Without prejudice correspondence is of no interest unless it is relevant, so to say it was *relevant* (or "directly in issue" which merely provides emphasis) takes the matter no further and does not address the key issue of admissibility. To say that the claimant put the matter is issue seems neither correct nor material. Technically, as on a failure to mitigate the burden is on the defendant, it will normally be the defendant who puts it in issue. But so what? What legal principle is there invoked?[84]

79 *Muller v Linsley & Mortimer* [1996] 1 PNLR 74, 79.
80 [2009] 1 AC 990. See above.
81 [2014] EWCA Civ 1436.
82 [1989] AC 1280.
83 *Ibid.*, [95].
84 For a lengthy if somewhat inconclusive analysis of *Muller*, see *Briggs v Clay* [2019] EWHC 102 (Ch).

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(d) Limited to the same or related proceedings?

18–038 In *Rush & Tompkins* Lord Griffiths said:

> "I have come to the conclusion that the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the same litigation."[85]

18–039 Elsewhere in the same speech, with which the other law lords agreed, he expressed the principle more widely:

> "I would therefore hold that as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject-matter proof of any admissions made in a genuine attempt to reach a settlement."

18–040 In *Ofulue v Bossert*,[86] Lord Neuberger said[87] it was strongly arguable that the principles which govern the admissibility in subsequent proceedings, of a statement made in without prejudice negotiations to settle earlier proceedings, should be the same as those which would govern its admissibility in the earlier proceedings. Lord Neuberger left open the question of whether, and if so to what extent, a statement made in without prejudice negotiations would be admissible if it was "in no way connected" with the issues in the case the subject of the negotiations. Thus Lord Griffiths in *Rush & Tompkins*[88] had referred to *Waldridge v Kennison*[89] in which a without prejudice letter was admitted solely as evidence of the writer's handwriting, a factor wholly extraneous to the contents of the letter, which Lord Griffiths[90] described as:

> "an exceptional case [which] should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts".

(e) "Without prejudice" material in the hands of a third party

18–041 In *R v K*,[91] the Court of Appeal considered a point not previously encountered: whether a third party into whose hands evidence of damaging admissions made in the course of without prejudice communications had fallen was entitled to rely on

85 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280.
86 [2009] 1 AC 990.
87 *Ibid.*, [87].
88 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1300.
89 (1794) 1 Esp 143.
90 *Ibid.*, 1300.
91 [2010] QB 343.

those admissions in subsequent proceedings against the party who made them. As Moore-Bick LJ put it:[92]

> "if a waiter bringing in the coffee at a 'without prejudice' meeting overhears a damaging admission, can he be called as a witness by a third party in subsequent unrelated proceedings to give evidence of it?"

18–042 In fact, the third party in question was the Crown, which wanted to lead the admissions of tax evasion made at the "without prejudice" meeting as evidence into the subsequent criminal trial, and Moore-Bick LJ acknowledged that the position might not be the same when the admission was required for the purpose of subsequent civil proceedings.[93] The Court of Appeal held that the public interest in prosecuting crime was sufficient to outweigh the public interest in the settlement of disputes and therefore that admissions made in the course of "without prejudice" negotiations were not inadmissible simply by virtue of the circumstances in which they were made; it was nevertheless for the criminal judge to decide whether to exclude the evidence in his general discretion.

5. PROBLEM AREAS

(a) Admissibility of without prejudice negotiations in interlocutory applications

18–043 In *Family Housing Association (Manchester) v Michael Hyde*,[94] the Court of Appeal held that in an application to strike out for want of prosecution, to explain delay, both the fact and the content of without prejudice correspondence is admissible. It was conceded that reference could be made to the fact of without prejudice correspondence having taken place, but the plaintiff sought to put in the correspondence itself. The Court of Appeal allowed in the correspondence. Hirst LJ said that this did not contravene the public policy preventing the admission of without prejudice negotiations, because the correspondence was not being used as evidence of admissions.

18–044 This decision is not at all easy to reconcile with the principles. The Court of Appeal appeared to draw a distinction between use in an interlocutory application and use at trial. It seems implicit in the decision that even though the documents were allowed in for the purpose of this interlocutory hearing, they would not be admissible at trial, as they were classic without prejudice offers and admissions against interest. But the distinction between use in interlocutory proceedings and use at trial is not made out in other authorities in this way.[95] The Court of Appeal provided a rationalisation of

92 *R v K* [2010] QB 343, [61].
93 *Ibid.*, [64].
94 [1993] 1 WLR 354.
95 For example, where privilege was waived in interlocutory proceedings in *Derby v Weldon (No 10)* [1991] 1 WLR 660 privilege in associated material was treated as being waived at the trial. If the correspondence is admissible on the application to strike out for want of prosecution, it will be difficult to keep it out at a subsequent trial.

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these principles in *Somatra v Sinclair Roche and Temperley*,[96] by going back to the public policy element of the rule. Clarke LJ said that because the without prejudice rule is concerned with the exclusion of evidence of admissions against interest, where the correspondence is not relevant as evidence of admissions in relation to issues that will be before the trial judge but for some other purpose, the rule of exclusion no longer applies.[97] He pointed out that Hirst LJ had approved this principle in *Family Housing*. It is suggested that it is preferable to do what the Court of Appeal did in *Somatra*, namely to hold *Family Housing* as authority for this principle, rather than to suggest that there was a general principle which enabled the court to exclude without prejudice correspondence used on an interlocutory application from consideration at trial, which seems to have been implicit in the thinking of the Court of Appeal in *Family Housing*.

18–045 The principal application of these cases recently is in the area of ex parte applications. The position here is not straightforward. In *Giovanna*,[98] Rix J held that the claimant could not properly make an application without notice without referring to without prejudice communications where an offer to provide security had been made on a without prejudice basis, and the offer would be relevant to rebut inferences that the defendant was likely to dissipate assets. In response to counsel's contention that the correspondence was not admissible, the judge relied on *Family Housing Association (Manchester) v Michael Hyde*.[99] The offer of security did not impact of the issues which would be before the trial judge and would not have been evidence of any admission, so the exclusionary rule would have no application on the basis of *Family Housing* as explained by the Court of Appeal in *Somatra v Sinclair Roche and Temperley*.

18–046 Of course, a litigant must never mislead, particularly on an application without notice, and it may be misleading to ask the court to draw an inference without referring to without prejudice correspondence which might rebut the inference. This was the point made by Christopher Clarke J in *Linsen International v Humpuss Sea Transport*.[100] So it may be prudent (particularly given the somewhat uncertain state of the law here) to refer to the existence of without prejudice correspondence, albeit not the correspondence itself. Yet if the court does not see the correspondence, how can it evaluate its importance? And if the defendant cannot subsequently put in the correspondence, how can the point be taken against the claimant? It is suggested that the only circumstances in which the correspondence may be referred to will be where it is not relevant as evidence of admissions on issues that will be before the trial judge, as in *Giovanna*.[101]

96 [2000] 2 Lloyd's Rep 673.
97 *Ibid.*, [33]–[34].
98 [1999] 1 Lloyd's Rep 867. This case does not seem to have been cited to the Court of Appeal in *Somatra v Sinclair Roche and Temperley* [2002] 2 Lloyd's Rep 673, but it supports their rationalisation.
99 [1993] 1 WLR 354.
100 [2010] EWHC 303 (Comm).
101 [1999] 1 Lloyd's Rep 867.

(b) Admissibility of without prejudice correspondence on issues of costs

18–047 The inadmissibility of without prejudice negotiations on issues of costs[102] is said to demonstrate that the rationale is not merely public policy but also implied contract, as there is no public policy justification for refusing to admit such negotiations. The practice has grown of writing letters "without prejudice save as to costs" with the intention that they are not to be relied upon on issues of liability for costs. These letters are sometimes referred to as "Calderbank letters" and are well established.[103] The position is regulated by O.22 r.25 where either party to civil litigation may make a sanctioned offer to settle, which is treated as "without prejudice except as to costs".

(c) Waiver of "without prejudice" privilege

18–048 Waiver here is different to waiver in the case of other forms of privilege, because it takes the consent of both parties to waive the privilege.[104] So it is not really comparable in this regard to ordinary privilege.

18–049 In *Somatra v Sinclair Roche and Temperley*,[105] Somatra sued its former solicitors Sinclair Roche and Temperley (SRT) for negligence. SRT counterclaimed for their fees and obtained a freezing injunction ex parte in support of their counterclaim. For the purpose of compliance with their duty of full and frank disclosure, they referred to without prejudice meetings. Somatra alleged that by referring to the discussions in this way, there was a waiver of the without prejudice communications which enabled them to lead evidence and tapes of the without prejudice communications. In the Court of Appeal Clarke LJ said that although there were circumstances in which without prejudice material was admissible for certain interlocutory purposes, this was not one of them and, by putting the without prejudice material in issue on the *Mareva* application, the other party became free to rely on it. The Court of Appeal accepted that without prejudice documents would be admissible for some purposes, such as delay, when they remained inadmissible at trial.[106] But it rejected the extension of that principle to applications such as discharge of an injunction where, at least to an extent, the court would need to look at the merits of the underlying dispute and there was thus an overlap with the issues at trial.[107] Clarke LJ said:

> "It seems to me that no party which has taken part in without prejudice discussions should be entitled to use them to his advantage on the merits of the case in one context, but then assert a right to prevent its opponent from doing so on the merits at the trial."

102 *Walker v Wilsher* (1889) LR 23 QBD 335.
103 See *Calderbank v Calderbank* [1976] Fam 93; *Cutts v Head* [1984] Ch 290.
104 A recent example is *Re a Company* (1 November 2005) (Lewison J), where allegations made in the course of a mediation (and thus without prejudice) were subsequently referred to in pleadings by both parties.
105 [2000] 2 Lloyd's Rep 673.
106 As was decided in *Michael Hyde* [1993] 1 WLR 354 (CA), when the documents themselves and not merely the evidence of the existence of negotiations, were admitted.
107 Following the decision of Vinelott J in *Derby v Weldon (No 10)* [1991] 1 WLR 660.

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18–050 In *Briggs v Clay*,[108] Fancourt J summarised the waiver principle as follows:[109]

> "...when a party to without prejudice negotiations deploys the content of without prejudice negotiations as evidence on the merits of the claim, even for a limited purpose, he thereby waives his right to insist on the protection of the rule in relation to those negotiations if the counterparty accepts that the negotiations may be referred to. (The counterparty can of course instead seek to restrain the unauthorised deployment of the material.) But where the content of negotiations is not deployed in that way (e.g. where reference is made to the negotiations in correspondence, or where only the fact of them is referred to in evidence) the court must ask itself whether, given the purpose of the rule, any reference to the negotiations is such that it would be unjust for that party to insist on the protection of the rule at trial."

6. UNAMBIGUOUS IMPROPRIETY

(a) The Principle

18–051 One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety. "Unambiguous impropriety" was the expression used by Hoffmann LJ in *Forster v Friedland*[110] and appears in all the subsequent cases.[111]

18–052 The principle is uncontroversial. There are some statements that are part of negotiations that cannot be protected by without prejudice privilege. A defendant who told the claimants that unless they withdrew their claim he would give perjured evidence, bribe other witnesses to do the same and, if the claimants succeeded, leave the jurisdiction rather than pay damages was plainly on the wrong side of the line.[112] So too the claimant who admitted his claim for money lent was bogus and when the defendant said: "You are not going to force my hand by blackmailing me", the claimant said: "But I have got to. What would you do if you had been me?"[113]

18–053 The Court of Appeal has warned that the exception should only be applied in the clearest cases of abuse of a privileged occasion.[114] There is a tension between the public interest in ensuring that those who make admissions in the course of

108 2019 EWHC 102 (Ch).

109 *Ibid*., [80].

110 *Forster v Friedland* (10 November 1992) (CA).

111 See also *Independent Research Services v Catterall* [1993] ICR 1; *Hawick Jersey International v Caplan* (*The Times*, 11 March 1988); *Michael Mallis SA Packing Systems v Harold Supplies* (3 March 1996); and *Knightstone Housing Association v Crawford* (27 October 1999) (EAT).

112 *Greenwood v Fitts* (1961) 29 DLR (2d) 260, British Columbia.

113 *Hawick Jersey International v Caplan* (*The Times*, 11 March 1988).

114 *Forster v Friedland* (10 November 1992); *Fazil-Alizadeh v Nikbin* (*The Times*, 19 March 1988).

negotiating to settle are not endlessly looking over their shoulders and the public interest in ensuring that negotiations should not be used as a cloak for blackmail or perjury. The boundary between over enthusiastic negotiation and unambiguous impropriety may be a thin one. There is important recent authority in this area and it may be important to draw a distinction between perjury cases and blackmail cases.

(b) Perjury

18–054 In *Savings and Investment Bank Ltd v Fincken*,[115] Mr Fincken had sworn an affidavit of means, as a result of proceedings based on a debt he owed. SIB sought to rescind a subsequent compromise agreement claiming that Mr Fincken had failed to disclose assets. At a without prejudice meeting it was alleged that Mr Fincken admitted that the shares of a particular company (in which he had previously denied an interest) were held for him by a nominee. SIB sought to amend its pleaded case in support of its claim for rescission to rely upon the statement as an admission. Mr Fincken did not lead evidence to challenge the evidence put in by the other party as to what he had said at the without prejudice meeting. SIB argued that it would be wrong for the court to permit the without prejudice privilege to cloak what amounted to an admission of perjury.

18–055 Here the claimant sought to rely upon the admission in without prejudice negotiations as an admission that what Mr Fincken had said previously was untrue and therefore perjured. Mr Fincken had not admitted making the statement at the meeting, or the perjury. He had simply put in no evidence on the interlocutory application. In such cases, Rix LJ said there was a grave risk that the principle that parties should be able to negotiate without prejudice would be undermined. If the claimant put in evidence that a particular statement had been made at a without prejudice meeting, it would be incumbent on the defendant to put in evidence to explain or deny it. Particularly where dishonesty allegations are in issue, a defendant who makes admissions in the course of negotiations runs the risk that there is an "unambiguous impropriety" issue if he subsequently denies, or even perhaps simply does not admit, the fraud. This may make negotiation almost impossible. It may make it difficult for the defendant to exercise his privilege against self-incrimination in subsequent proceedings. Moreover, negotiation in serious cases often requires a degree of contrition: it would be wrong if admissions made in such circumstances were to be used against a defendant. The court refused to admit evidence of the alleged admission.[116]

18–056 Rix LJ recognised that it may be wrong to refuse to admit evidence of an admission of perjury merely in consequence of an assertion that it may have been made in a without prejudice meeting. But *Fincken* shows that where a party claims a significant

115 *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630.

116 See *Berry Trade Ltd v Moussavi* [2003] EWCA Civ 715. The court in *Savings and Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630 did not follow the decision of Deputy Judge Jack QC in *Merrill Lynch Pirce Fenner v Raffa* (11 May 2000).

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