**DOCUMENTARY EVIDENCE: an update**

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## Confidentiality clubs

1. Confidentiality clubs take much of the heat out of disclosure in cases where there are confidential documents. The lawyers and experts sign up to the club, they see the documents but can't show anyone outside the club. In theory, if it becomes obvious some of the confidential documents need to be shown to someone from the client, it might be necessary make an application to court, identifying the particular documents, and explaining why instructions need to be taken on them but that seems very rarely to be necessary and almost all confidentiality club issues seem to go through without great problems.

2. So in *Constantin Medien AG v Ecclestone* [1] when faced with extensive non-party disclosure applications under CPR 31.17 (more of that later) Vos J did not need to consider the issue of confidentiality in making an order because it was agreed that there should be such a confidentiality club. There was a particular concern as to confidentiality because the managing director and sole factual witness of the claimants was said personally to be a business competitor of the non-parties. The application for the managing director to be admitted to the club was abandoned.

3. The claimants obtained the documents, and then shortly thereafter brought an application that they should have free use of the documents at trial and the confidentiality club should be disbanded. For this purpose they relied upon a Supreme Court decision on closed material in criminal cases which appeared to say that you could not have a trial conducted where a party was deprived of access to significant parts of the material, followed in a subsequent case by David Richards J in the Chancery Division, *McKillen v Barclay*[2]. There David Richards J held that, in the light of the speech of Lord Dyson in the Supreme Court in *Al Rawi and Others v The*

[1] 2013 EWHC Ch 2674 (Ch)
[2] 2012 EWHC 1158 Ch

*Security Service and Others* [3] there was no power to conduct a trial on the basis that one party was not given access to the evidence against him.

4. David Richards J said[4]

> 47…*One of the particular features to which Lord Dyson drew attention in his judgment was that the special advocate was in the difficult, if not impossible, position that he was unable to take instructions from his client in relation to the closed material which formed part of the case against his client.*
> *48. That, it may be observed, would be precisely the effect of the regime which Mr. McKillen was proposing in this case. The lawyers for the defendants would have access to the evidence, but they would be unable to discuss it with their clients and would be unable to take instructions from their clients on it. The only feature of the special advocate regime proposed in Al Rawi which is not present here is that the special advocates in question were separate from the lawyers regularly acting in the case for Mr. Al Rawi. But in my judgment the essential feature was the inability of Mr. Al Rawi to know the evidence against him or to give instructions to his lawyers.*
> *49. If such a departure from the principles of natural justice is not permitted in a case where there are good grounds for considering that serious issues of national security arise, it can hardly be supposed that it would be available in a case concerning the financial circumstances of a party.*
> *50. In the light of the decision and discussion in Al Rawi, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest only.*

5. This is radical stuff. So what was asserted in *Constantin* was that once the matter reached trial all bets were off, as it were, and the court could not impose confidentiality club restrictions. Sadly the application was resolved before a court hearing. But it is worth making a few comments about this.

6. There are always difficulties in depriving a party of his right to see evidence which is part of the case against him (or for him). So in the HL decision on the forerunner of 31.16 (the corresponding provision on pre-action disclosure and in the days when it only applied to cases of personal injuries of death) the HL held in *McIvor v Southern Health and Social Services Board*[5] that it was impermissible to make an order for pre-action disclosure of hospital records to lawyers and experts without letting the prospective plaintiff see them too. And that was before open justice was seen as important.

[3] [2011] 3 WLR 388.
[4] [47]-[50]
[5] 1978 2 All ER 625

7. But that shouldn't mean that some evidence can't be withheld from some people. It is harder as between the parties than in relation to non-party disclosure, it is harder when the party is an individual rather than a company (where some people but not others can be given access) and it may be wrong, as argued in M*cKillen*, to withhold large parts of the evidence at trial or have a largely closed trial, but surely it is a question of degree? It must surely be possible to withhold parts of the evidence even from an individual claimant?

8. There is a long tradition of the courts dealing with third party confidentiality issues. Thus in relation to non-parties, or when non-party confidentiality is in issue, the court will be anxious to ascertain whether the relevant information could be obtained by other means which did not involve third party confidentiality problems, such as by sealing up parts, otherwise redacting sensitive information or restricting disclosure; see for example *Science Research Council v Nasse*[6] , *Wallace Smith Trust v Deloitte Haskins Sells.* [7]

9. The *Al Rawi* issue was considered in a different context by the Competition Appeal Tribunal in *BMI Healthcare Ltd v Competition Commission*[8] . It seems obvious that proceedings before the Competition Appeal Tribunal cannot involve free access to materials as between business competitors who are parties to a reference[9] yet if David Richards J was correct in what is said to be his interpretation of A*l Rawi* it is hard to see that there could be a basis for a distinction being drawn. At paras 45 the CAT concluded that:

> *"We are very confident that the Supreme Court did not have in mind market investigation references in the Commission in either Al Rawi or Bank Mellat, and certainly these were not considered by the Supreme Court. Before us, none of the parties suggested that these decisions did anything more than highlight the fact that closed material procedures – and we use that term widely to embrace both confidentiality rings and data rooms – have to be justified by the circumstances, and should be as narrowly used as is possible in those circumstances. But, what those circumstances are is of enormous significance. "*

[6] 1980 AC 1028
[7] *1977 1WLR 257.*
[8] 2013 CAT 24, 2 October 2013
[9] Indeed, substantial references are regularly conducted with confidentiality clubs maintained throughout the hearing, as was (for example) the case in the recent Pay TV reference.

**Back to Constantin**

10. *Constantin* is an important decision on non-party disclosure, The law has been long confused by the Court of Appeal decision in *Three Rivers (No 4)*[10] which on the one hand said that if an application was made for a class of documents under CPR 31.17, the evidence had to satisfy the court that each document in the class was "likely" (meaning "may well" and encompassing a less than 50% chance) to fall within standard disclosure, but on the other hand made an order for disclosure of a vast number of documents, suggesting that a document might fall within standard disclosure for this purpose if it was relevant in putting other documents in context.

11. Vos J in *Constantin* did not delve into that particular area. But he did consider the extent to which the order made against a non-party could require a non-party to carry out an exercise of judgment. It had been argued that an order which required the non-party to carry out an exercise of judgment would be bad, because, not being familiar with the issues, a non-party must be able on looking at any particular document to identify clearly whether the document did or did not fall within the order. He said[11]

> 66. *Much has been said in the authorities to which I have referred about the question of the "exercise of judgment". In my judgment, however, the "exercise of judgment" is not really the central issue. A party receiving an order against him will always have to exercise some judgment in carrying it out. For example, a person ordered to disclose bank statements relating to all accounts in his name and in his possession would have to decide whether the terms of that order included trust accounts held by him as trustee and perhaps trust accounts held by him as a joint trustee. Even more difficult questions may arise in respect of which he may have to exercise judgment. If such a person is in doubt as to what was intended to be covered, he can obviously apply to the court for further and better directions.*
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> *67. When a non-party is required to make disclosure, it must be told by the order what documents he has to disclose. That instruction must be made without any reference to the issues in the case. A non-party should not be expected or required to understand the case that is in issue between other parties. A non-party should not be required to familiarise himself with the issues in litigation to which he is not a party "*
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> *68.…Chadwick LJ was also obviously right at paragraph 36 in Three Rivers to say that the threshold condition cannot be circumvented by an order putting on the non-party the burden of identifying which documents in a composite class met the condition itself. Also, of course, the court must be satisfied that the threshold*

[10] 2003 1WLR 210 CA
[11] [66]

*test is satisfied: namely that each document in the relevant class of documents may well advance the applicant's case or damage the case of another party to the litigation.*

*69. In the circumstances, it seems to me that this is a bit of a non-issue. It must be clear from the order what the non-party must produce. The order must be framed without regard to the issues in the case, or to the relevance of the documents in the non-party's possession to those issues. "*

**Electronic disclosure**

12. Most disclosure is now electronic disclosure. This has not directly affected the rules in relation to disclosure obligations because electronic documents are "documents" as much as are paper documents. But it presents new challenges and opportunities. In 2003 it was estimated that if the data from just one desktop computer were to be printed out, the scale of the mountain of paper would be the height of Snowdon. Computers have generally increased in capacity since then. Perhaps we are already beyond Everest. 95% of disclosure in business cases is electronic disclosure. It means that old-fashioned searches are simply impractical.

13. Lord Woolf's "Access to Justice" report which led to the CPR was too early for electronic disclosure. The CPR have always lagged behind on electronic disclosure. The new CPR 31.5 requires information to be provided prior to the first CMC with a Statement of truth about electronic documents and costings of giving disclosure designed to assist the court in making sensible electronic disclosure orders.

14. The 2004 Cresswell Report was the first review of electronic disclosure. Subsequently Senior Master Whitaker chaired a sub-committee of the Rule Committee with the remit of producing a new e-disclosure Practice Direction and e-disclosure questionnaire. The Electronic Disclosure Questionnaire arose out of this review. Practices in the US are much more advanced in relation to e-disclosure. The new Practice Direction 31B and the e-disclosure questionnaire take account of developments in the US and other jurisdictions.

15. Question 14 of the electronic documents questionnaire is as follows:

> "Have you given an instruction to preserve Electronic Documents, and if so, when?"

16. The draftsman seems to have failed to appreciate that the instruction will be privileged, and great caution should be exercised before answering this question other than with "this information is privileged." It is suggested that this question should neither be asked nor answered. An answer to this question may give the client problems if subsequently it transpires that documents were not retained after the advice was given.

17. The usual means of searching is to identify a number of custodians (persons whose computers are searched) and a number of search terms (words or names searched for on those computers) and a matching population of documents identified. The population of documents is then searched manually for relevance. It is obvious that the custodians and search terms need to be chosen with great care. If they are too narrow, then the searches will miss important documents, which will never be identified. If they are too wide, then the population of documents identified will be enormous, making the disclosure exercise overlarge and over expensive.

18. Agreement of custodians and search terms has given rise to real practical difficulties. Take the following example. The claimant writes to the defendant and proposes to search the computers of 12 custodians with 18 search terms. The defendant wants additional searches and proposes a total of 24 custodians and 33 search terms. The parties come to the case management conference having compromised on 18 custodians and 26 search terms. The judge makes an order to that effect. It then transpires that this involves a population of 1.5 million documents. The claimant seeks a quotation from a document management company for this exercise and is told that it will cost £750,000, a sum out of proportion to the dispute. The claimant then asks the defendant to be permitted to reduce the exercise in the circumstances. The defendant has little incentive to alleviate the disclosure burden on the claimant. On the contrary, an onerous obligation of this nature on the claimant might be just the thing to encourage a settlement. And after all, the court has already made an order that these searches were appropriate. In cases where these problems arose, the cost of the disclosure exercise proves entirely disproportionate to the importance of disclosure and the sums involved. The moral is to obtain proper costings for the proposed disclosure exercise prior to making any firm proposal to the other party, and certainly well in advance of the case management conference.

19. It is not uncommon for employees to be suspected of stealing company information by copying it onto memory sticks. Thus key evidence may only reside on a memory stick: evidence of the use of a memory stick may in turn be very important in establishing a user's activity and identifying the location of potentially key evidence. Portable media players such as iPods have significant amounts of storage space that can hold data files as well as music and videos. It is usually easy for anyone to transfer material between these devices and individual computers. These devices are sometimes used as a means of storing and moving files, whether for practical reasons or as a covert method of taking data from an organization. Some also use the devices with microphones to record statements or conversations. Similarly, digital cameras are capable of storing large volumes of data in a small amount of space. Sophisticated PDAs (portable digital assistant) such as BlackBerries may combine many of the features referred to above.

20. Those familiar with computers will wish to consider in an appropriate case other modern forms of information. We have yet to see an application for passwords to enable access to a Facebook entry or information on IPods, Twitter or similar carriers, but it will not be long[12.] There have been a number of such applications in the US[13.] If people treat emails as correspondence, they are likely to be even more careless in their use of social media.

21. At present, the population of documents identified is normally searched for relevance by solicitors or paralegals. In the US electronic searching is beginning to be introduced (predictive coding). Tests have shown that it is more reliable than review by humans. No doubt this will be with us soon.

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[12] In Hays Specialist Recruitment Ltd & ors -v- Ions & ors [2008] EWHC 746 (Ch), a pre-action disclosure application was to obtain the contacts and messages from the Defendant's LinkedIn account (the equivalent of Facebook for professional networking), in respect of a potential misuse of confidential information claim. Applause Store Productions Limited & Firsht -v- Grant Raphael [2008] EWHC 1781 (QB), refers to an earlier Norwich Pharmacal application against Facebook Inc (apparently unreported) in order to obtain details of who had set up a Facebook page which was the subject of a dispute. In Australia an order was made for service of a default judgment on Facebook: MKM Capital v Corbo & Poyser 2008 (Sup Ct (ACT) unreported), discussed at 2009 CJQ 297.

[13] EEOC v. Simply Storage Mgmt., LLC, No. 1:09-cv-1223-WTL-DML (S.D. Ind. May 11, 2010), where the Court ordered production of content and pages from MySpace and Facebook, Crispin v. Audigier (C.D. Cal.) (May 26, 2010), concerned another discovery application (this time unsuccessful) for content from MySpace and Facebook, Romano v. Steelcase Inc., 2010 WL 3703242 (N.Y. Sup. Ct. Sept. 21, 2010), where the Court allowed discovery of all of the Plaintiff's Facebook and MySpace pages and messages, including deleted ones, Barnes v. CUS Nashville, LLC No. 3:09-cv-00764, 2010 WL 2265668, *1 (M.D. Tenn. June 3, 2010), where the Judge became an online "friend" with a party in order to access/authenticate content on Facebook.

**Accountants and new business structures**

10. The traditional view is that only members of the legal profession consulted in a professional capacity can be the subject of privilege. This includes in-house lawyers but only if they are consulted as lawyers. In the *Pandolfo* litigation an attempt was made to extend that to accountants. The attempt failed at first instance and in the Court of Appeal. A 7 member Supreme Court dismissed the appeal 5-2.[14] The majority thought the rule was hard to justify but it was for parliament not the courts to change it.

11. Practical problems may arise where staff who are not legally qualified are involved in the giving of advice in a department supervised by qualified lawyers. The unqualified staff may be paralegals working supervised in a department.[15] So long as the paralegals are properly supervised in accordance with solicitors' regulatory requirements, the advice will be the advice of the firm or the legal department rather than the advice of the paralegals themselves and thus will be privileged. Or the department may be a combination of accountants and lawyers giving tax advice. In this example, the issue is whether the advice is sought and obtained from lawyers professionally consulted in that capacity, or from accountants. In the former case, it is privileged, in the latter not. That means that whether the advice is privileged is likely to be determined by an analysis of the regulatory and professional organization of the department.

12. The Legal Services Act 2007 will change the way legal services are provided in this jurisdiction. It gives rise to issues as to the availability of privilege.[16]

13. Firstly, it introduces the concept of "reserved legal services". Reserved legal services can only be provided by solicitors, barristers or registered foreign lawyers or persons authorized to provide such services working under their supervision. Persons authorised to provide advocacy services, litigation services, conveyancing services or probate services or a person through whom an authorized body provides those

[14] 2013 UKSC 1
[15] See in Canada Descoteaux v Mierzwinski [1982] S.C.R. 860, 873, 878-879.
[16] See Legal professional privilege and the alternative business structure, Stockdale and Mitchell, (2012) 33 The Company Lawyer 204.

services and acts at the direction and under the supervision of a barrister, solicitor or registered foreign lawyer will be able to claim privilege pursuant to Legal Services Act 2007 s190. Thus persons who provide non-reserved legal services will fall outside the protection of privilege when they do not have practising certificates.

14. Secondly, the Legal Services Act allows legal disciplinary practices, known as LDPs, with up to 25% non-lawyers as members as well as Alternative Business Structures, known as ABSs, which permit external ownership of legal practices (sometimes referred to as "Tesco law" because it has been suggested supermarkets would provide legal services) and multi-disciplinary practices involving lawyers and other professional such as accountants. This looks like a fertile ground for arguments about privilege, and it is presumably in the light of this that the Legal Services Board intervened in *Pandolfo*. Where a law firm is retained, there will be a presumption in favour of communications with the client being privileged. But where a variety of services are provided to the client, no such presumption is likely to arise.

15. It will be apparent from the above that in claiming privilege the structure of the department or firm is crucial, the way it is set out, the extent and nature of the supervision, the identity and qualifications of the persons doing the supervision, and the relevant regulatory framework. So it will be important for those setting up these new business structures to provide a clear and transparent structure which will enable a claim for privilege to be readily justified. Companies have for many years had similar issues with inhouse lawyers who fulfil both executive and legal roles. The alternate business structures problems should be capable of ready resolution so long as there are proper structures in place. After all, for other purposes such as in order to recover costs in litigation it will be necessary to identify which parts of the advice is legal advice.

**Limited waiver**

16. As a matter of English law, a person who shows a privileged document to another does not necessarily debar himself from claiming the privilege. In *Gotha v Sothebys*[17] Staughton L.J. cited "*Documentary Evidence*" with approval:

[17] [1998] 1 W.L.R. 114.

> "If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of the friends sues him, because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world."

17. This passage was also cited by the judge in *USP Strategies v London General Holdings Ltd*.[18] Mann J. said[19] that it followed A would be able to restrain each of the friends from disclosing to the outside world what he was told on the basis that it remained confidential. The friends would not be able to give secondary evidence of the privileged material because it would be evidence of privileged communications, or their evidence would evidence such communications and thus could be restrained.[20] This principle has been described as "selective waiver".

18. If the document is disclosed on terms that the recipient should treat it as confidential, the analysis set out above is likely to apply, and there is unlikely to be a difficulty in a subsequent claim for privilege. However, where the document is disclosed to one or more third parties with no express or implied requirement that the third party should treat the document as confidential, it is hard to see why there should be any legal bar on the third party disclosing the document or making it available when served with a witness summons. If the third party is himself free to disclose the document to someone else without restriction, a stranger should be entitled to obtain the document from him on a witness summons. Mann J recognized this, and commented in *USP Strategies v London General Holdings Ltd*[21] that it followed (in the example of the six friends) A would be able to restrain each of the friends from disclosing to the outside world what they were told on the basis that it remained confidential. The analysis of Mann J in *USP* was that where the document is privileged in the hands of A, and he discloses it to B, so long as the document is disclosed on terms as to confidentiality, A would be able to restrain B from giving secondary evidence of its contents.

19. The limited waiver doctrine really started after the decision of the Privy Council in *B v Auckland District Law Society*.[22] There in the course of investigating a complaint against a law firm, certain privileged documents had been handed over to counsel

[18] 2004 EWHC 373 Ch.
[19] Para.19d.
[20] See Three Rivers v Bank of England (No.5) [2003] Q.B. 1556.
[21] 2004 EWHC 373 Ch para.19d.
[22] [2003] 2 A.C. 736.

appointed by the Law Society. The letter handing over the documents stated that the letters were made available to counsel for the limited purposes of the investigation and "on the express basis that in doing so privilege is not waived". The Law Society sought to use the documents in subsequent disciplinary proceedings brought against the law firm. It argued that once the documents had passed into its hands "the question is no longer one of privilege but admissibility".[23] Or, to put it colloquially "privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back".[24] What was being argued, therefore, was that once A's privileged documents came into the hands of B, the lack of confidentiality in those documents as between those persons precluded a claim for privilege as between those persons notwithstanding that a claim for privilege might be asserted against the rest of the world. The Privy Council rejected this. Lord Millett said that it did not follow that privilege was waived generally because a privileged document has been disclosed for a limited purpose only:

20. In *B v Auckland* the waiver was expressly on a limited basis. But what is the position if there is no discussion as to the basis of the waiver? The recent decision of the Court of Appeal in *Berezovsky v Hine*[25] provides what may prove to be a significant widening of the principle. Mr Berezovsky's lawyers had sent privileged draft witness statements in relation to Berezovsky's action against Mr Abramovich to solicitors acting for his friend Mr Patarkatsishvili in an asylum application because it was thought they might be useful in the asylum application. The latter died and his estate wanted to use the statements in subsequent litigation against Berezovsky. The judge held that as the statements had been disclosed without any express limitation on their use, it was not open to Berezovsky to prevent their use by the estate against him. The Court of Appeal disagreed. Lord Neuberger MR said that the statements were obviously intended to remain confidential and were disclosed for a limited and defined purpose. The intention was that they should be used for that purpose and not to be used for any other purpose unless it was a purpose to which Mr Berezovsky assented or (perhaps) one which could not damage him in any way but would in any event not involve the contents going beyond the individuals, their successors, or their advisers:

[23] Hoffmann J. in Black & Decker v Flymo [1991] 1 W.L.R. 753, 755.
[24] At [68].
[25] *2011 EWCA Civ 1089; see also Balu v Dudley Primary Care Trust 2010 EWHC 1208 (Admin)*

> "where privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving, the documents in question, and what they must or ought reasonably to have understood"[26]

21. If A discloses privileged documents to B without any express or implied obligation of confidentiality, it must follow that B would be free to disclose those documents to a third party. It must equally follow that B would be obliged to disclose the documents when served with a witness summons by another party. There will be cases where there is no express conduct or words which the court can rely on to determine whether providing privileged documents to a third party was to be subject to implied restrictions of confidentiality and implied restrictions as to their further use.

22. The *Berezowsky* case is important is opening a door that had previously been little more than ajar. What the courts are now doing is treating a waiver of privilege made to a limited class and for a limited purpose as though the disclosure were almost on a "without prejudice" basis. It is normally the position that once there is no confidentiality between the parties, there can be no claim for privilege between those parties. In these cases there is no confidence between the parties, but a claim for privilege can still be made between them.

23. A problem not yet worked out is what happens if the recipient of a limited waiver disclosure himself discloses the documents elsewhere. Some forms of disclosure may be implicit in the limited waiver. What would be the position if Mr Patarkatsishvili had used the documents he received from Mr Berezovsky for the purposes of his asylum application and in consequence the documents had come into the hands of third parties, and perhaps into the public domain? As the advancing of the asylum application was the purpose of the limited waiver, it must follow that Mr Berezovsky would be treated as having taken the risk that in consequence of his limited waiver the documents came into the public domain so that he could no longer claim privilege in them for any purposes. And there might be further consequences if in the course of that application Mr Patarkatsishvili disclosed the documents to a regulator.

[26] [35] Followed in Hong Kong by Citic Pacific Ltd v Secretary for Justice 2012 HKCA 153

24. If these are the consequences of proper use of the documents pursuant to a limited waiver, what would be the position if the use was not proper? What if the documents had been used for a purpose not within the waiver? What if they were sent to the press? No doubt Mr Berezovsky could have obtained an injunction to prevent use if he applied in time, but if the consequence was that the documents entered the public domain, it is assumed that the privilege would be lost. But there might even here be an argument to the contrary. In these limited waiver cases, privilege may be claimed notwithstanding a lack of confidentiality between the parties. To that extent there is an analogy with "without prejudice" correspondence where both parties know what the documents say, but there is a prohibition on use in court. Might the court take a similar view in such a case? It would be a significant extension of the principle to refuse to permit use even when the documents were in the public domain.

25. A particular problem arises when the person entitled to the privilege voluntarily shows the document to a regulator. In Australia in *Mann v Carnell*[27] the defendant sent privileged documents, which made reference to the claimant, in confidence to a legislative colleague. The claimant sued the defendant for libel. The majority of the High Court of Australia applied what was then an early version of the limited waiver doctrine and held that disclosure to a third party for a limited and specific purpose did not lead to a loss of the privilege as against a person opposed in litigation. In Hong Kong, in *Citic Pacific v Secretary for Justice* [28] the Court of Appeal recently applied *Berezovsky* to a case where legal advice was provided to a regulator in circumstances where Citic's general counsel merely said that that the company was willing to cooperate fully with the regulator in its investigation and would produce the documents (containing legal advice) for that purpose but no broader statement was made. The case raises the question as to whether, for example, the regulator could have passed the documents over to another law enforcement agency.

26. If there are no express restrictions on the use which the regulator can make of the document, will the courts treat the document as subject to a limited waiver? Whilst the courts have not really canvassed the public policy issues of limited waiver in the context of regulators, it seems likely that the court will in future deal with such cases under the limited waiver principle. That should produce a satisfactory and fair result.

[27] [1999] H.C.A. 66.
[28] 2012 HKCA 153

27. This opens up the following potential issue. A is an employee or director of B co. In the course of his employment he is shown a privileged document. He then leaves the company and sues B. Can he use the privileged document? There is first instance authority in *Derby v Weldon No 10*[29] to the effect that privilege cannot be claimed by B in such circumstances (and that certainly has been the law in the past) but could a different view now prevail on the basis that the disclosure to the employee is a form of limited waiver and it would be unfair to let the employee use the document for a different purpose from that for which the disclosure was made?

[29] 1991 1 WLR 660; see also NRG v Bacon & Woodrow 1995 1 All ER 976