SUBSEQUENT USE OF DOCUMENTS DISCLOSED IN CIVIL PROCEEDINGS

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ABSTRACT

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Rule 31.22 of the Civil Procedure Rules 1998 provides, as a general rule, that those who receive documents through disclosure during civil proceedings may use them only for the purpose of the proceedings at hand. The general rule is subject to three exceptions, and judges have discretion to authorise subsequent use for other purposes. However, the foundational presupposition underpinning CPR 31.22 is that subsequent use, generally speaking, is improper.

The thesis has two primary aims: (1) to demonstrate that the rule governing subsequent use (as developed in the case law) is theoretically and practically flawed, and that maintaining a blanket, general rule against subsequent use is unsound in principle, unjust, and procedurally inefficient; and (2) to generate a normative and procedural framework suitable for reform.

Part I outlines the content, origins and operation of CPR 31.22. Through historical analysis, it suggests that presumptively categorising as improper all forms of subsequent use beyond the original litigation contradicts traditional authority. By identifying and examining the three principal rationales said to justify the modern rule, it argues that none affords sound justification. By analysing the exceptions to the rule, including judicial discretion, it seeks to show that such measures are incapable of remedying the defects in the underlying rule.

Part II attempts to formulate a theoretically defensible, procedurally viable model for reforming CPR 31.22. It suggests that the presumption against subsequent use should be abolished, and the law reoriented around two central norms: the harm principle and a balancing approach. It tests this theoretical model by applying it to seven paradigmatic categories of subsequent use. Finally, it outlines a possible structure for procedural reform.

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Dominus illuminatio mea.

METHOD OF CITATION

This thesis largely follows the Oxford Standard Citation of Legal Authorities (OSCOLA) 2000. In relation to case citations, it observes the following special rules.

Cases included in the List of Abbreviations are cited in the text and in footnotes thus:

> The *Harman* case
> The *Riddick* case 896

All other cases are cited in full where they first appear in each chapter, both in the text and in the footnotes. In subsequent references, the party names may be abbreviated. Thus:

> First reference: *GIO Personal Investment Services Ltd v Liverpool & London Steamship Protection & Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 (CA)
>
> Thereafter, in the text: the *GIO v Liverpool* case
>
> Thereafter, in footnotes: *GIO v Liverpool* [1999] 1 WLR 984 (CA)

American authorities are cited with their full procedural histories where they first appear in each chapter. In subsequent references, the procedural histories are omitted. Thus:

> First reference: *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559 (EDNY 1985) aff'd 821 F 2d 139 (2nd Cir 1987) cert denied *sub nom Dow Chemical Co v Ryan*, 484 US 522, 108 S Ct 344 (1987)
>
> Thereafter, in the text: the *Agent Orange* litigation
>
> Thereafter, in footnotes: *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559 (EDNY 1985)

LIST OF ABBREVIATIONS

DEFINED CASES

The *Alterskye* case	Alterskye v Scott [1948] 1 All ER 469
The *Cobra* case	Cobra Golf Inc v Rata; Taylor Made Golf Co v Rata & Rata (a firm) [1996] FSR 819
The *Crest Homes* case	Crest Homes plc v Marks [1987] AC 829 (HL)
The *Derby (No 2)* case	Derby & Co v Weldon (No 2) The Times, 20 October 1988
The *Distillers* case	Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd [1975] QB 613
The *Halcon* case	Halcon International Inc v The Shell Transport and Trading Co [1979] RPC 97 (CA)
The *Harman* case	Harman v Secretary of State for the Home Dept [1983] 1 AC 280 (HL)
The *Prudential* case	Prudential Assurance Co Ltd v Fountain Page Ltd [1991] 1 WLR 756
The *Riddick* case	Riddick v Thames Board Mills [1977] QB 881 (CA)
The *Sybron* case	Sybron Corporation v Barclays Bank plc [1985] 1 Ch 299

DEFINED TERMS

All ER Ann Rev	All England Law Reports Annual Review
ALR	American Law Reports
CCR	County Court Rules 1981
CJQ	Civil Justice Quarterly
CPR	Civil Procedure Rules 1998
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms

Fed R Civ P	Federal Rules of Civil Procedure for the United States District Courts, 1938 (as amended)
FOIA	Freedom of Information Act 2000
FRD	Federal Rules Decisions
HRA	Human Rights Act 1998
RSC	Rules of the Supreme Court 1965

ABBREVIATIONS

Andrews	Andrews, N *Principles of Civil Procedure* London: Sweet & Maxwell, 1994
Atiyah	Atiyah, PS *Pragmatism and Theory in English Law* London: Stevens & Sons, 1987
Bray	Bray, E *The Principles and Practice of Discovery* (1st edn) London: Reeves & Turner, 1885
Cross and Tapper	Tapper, C *Cross and Tapper on Evidence* (9th edn) London: Butterworths, 1999
Doré	Doré, LK 'Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement' (1999) 74 Notre Dame L Rev 283
Eagles	Eagles, I 'Disclosure of Materials Obtained on Discovery' (1984) 47 MLR 284
Friedenthal	Friedenthal, JH 'Secrecy and Confidentiality in Civil Litigation: Discovery, Settlement Orders, and Consent Decrees' (2000) 9 J Law & Policy 67
Gibbons	Gibbons, SMC 'Subsequent Use of Documents Obtained Through Disclosure in Civil Proceedings—The "Purpose of the Proceedings" Test' (2001) 20 CJQ 303
Gurry	Gurry, F *Breach of Confidence* Oxford: OUP, 1984
Haydock and Herr	Haydock, RS and Herr, DF *Discovery Practice* (3rd edn) Gaithersburg: Aspen Law & Business, 2000

Marcus (1983)	Marcus, RL 'Myth and Reality in Protective Order Litigation' (1983) 69 Cornell L Rev 1
Marcus (1991)	Marcus, RL 'The Discovery Confidentiality Controversy' [1991] U Illinois L Rev 457
Matthews and Malek	Matthews, P and Malek, HM *Disclosure* (being the 2nd edn of *Discovery*) London: Sweet & Maxwell, 2001
MCL3	Federal Judicial Center *Manual for Complex Litigation, Third* St Paul: West Publishing, 1995
Miller	Miller, AR 'Confidentiality, Protective Orders, and Public Access to the Courts' (1991) 105 Harvard L Rev 427
Phipson	Howard, MN (gen ed) *Phipson on Evidence* (15th edn) London: Sweet & Maxwell, 2000
Prescott	Prescott, P 'Improper Uses of Discovery' (1978) 94 LQR 488
Style and Hollander	Style, C and Hollander, C *Documentary Evidence* (6th edn) London: FT Law & Tax, 1997
Woolf Interim Report	Woolf, H *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* London: HMSO, 1995
Woolf Final Report	Woolf, H *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* London: HMSO, 1996
WM&M	Wright, CA, Miller, AR and Marcus, RL *Federal Practice and Procedure* (2nd edn) vol 8, St Paul: West Publishing Co, 1994 (and 2000 supplement)
Zuckerman in Tapper	Zuckerman, AAS 'Privilege and Public Interest' in CFH Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* London: Butterworths, 1981

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CHAPTER 1—INTRODUCTION

A INTRODUCTION

In the spring of 1977 a quiet revolution took place within English civil procedure.[1] At that time, the Court of Appeal handed down its decision in the *Riddick* case. On its face, the decision did not purport to effect any radical change in the law. Yet, in reality, it altered fundamentally the rule relating to subsequent use of documents obtained through disclosure and inspection in civil proceedings.

Within common law civil procedure systems, the disclosure and inspection process enables litigants to acquire relevant information from other parties or non-parties for use in the litigation context.[2] The law governing subsequent use determines the extent to which litigants may reuse others' disclosed documents for additional purposes beyond resolving the immediate proceedings at hand. For over 100 years—from the mid-19th century until the mid-1970s—the rule governing subsequent use of disclosed documents was tolerably clear and straightforward. In short, parties could not publish others' disclosed documents, or otherwise divulge them to strangers to the litigation, for illegitimate or purely self-serving ends. Such

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[1] 'English' is used throughout this thesis to denote the law of England and Wales.

[2] For descriptions of the disclosure process, see *Matthews and Malek* ch 1; N Andrews 'Civil Procedure' in PBH Birks (ed) *English Private Law* (OUP Oxford 2000) vol 2, 950–8.

forms of subsequent use were considered 'improper'.[3] Parties could, however, with judicial approval, reuse others' disclosed documents for legitimate purposes—for example, to support further judicial proceedings.[4]

In 1977 the *Riddick* decision substantially recast the rule relating to subsequent use. Led by Lord Denning MR, the Court of Appeal effectively held that the rule did not apply simply to 'improper' forms of reuse akin to publication (as implicitly it had been understood to do since 1844). Instead, the Court held that the rule prohibited *any* form of subsequent use of disclosed documents whatsoever—even including reuse in subsequent litigation. The seeds for this dramatic expansion of the traditional rule had been sown in two slightly earlier cases. In 1948 in the *Alterskye* case, Jenkins J coined the 'implied undertaking' doctrine. He declared that an undertaking given by those who receive disclosed documents not to reuse them for 'improper' purposes (as traditionally understood) had come to be implied as a matter of course whenever disclosure took place. This claim, that implied undertakings—as opposed to undertakings expressly ordered by the court—had come to arise automatically in every case, is dubious.[5] Nevertheless, the decision paved the way for the second key authority, the *Distillers* case in 1975. There, Talbot J

[3] *Richardson v Hastings* (1844) 7 Beav 354, 49 ER 1102. See *Bray* 238. Historically, courts used the terms 'improper', 'collateral', 'ulterior' and 'alien' interchangeably: 36 below. For ease of reference, in this thesis the term 'improper' alone is used.

[4] *Tagg v The South Devon Railway Co* (1849) 12 Beav 151, 50 ER 1017; *Reynolds v Godlee* (1858) 4 K&J 88, 70 ER 37. See *Bray* 239.

[5] 40–42 below.

declared that the implied undertaking doctrine precluded not just publication, but 'any use' of disclosed documents otherwise than in the action in which they were disclosed. It was this all-embracing, all-prohibiting formulation of the doctrine that provided the foundation for the Court of Appeal's decision in the *Riddick* case.

At first blush, the modern reinvention of the rule governing subsequent use of disclosed documents in the *Riddick* case may not appear to be particularly revolutionary or momentous. The rule occupies merely one small corner of the wider body of laws governing disclosure and inspection. In turn, that body is but one (albeit an important) component of the English civil justice system. Perhaps the rule's relative smallness explains in part why the revolution occurred so quietly. When the *Riddick* case was decided it prompted virtually no comment, critical or otherwise.[6] In subsequent years the evolving rule has attracted a little more attention; principally from civil procedure commentators who have questioned its rationality or implications.[7] But the modern version of the rule has not, to date, been subjected to any sustained scholarly review. Rather, it has become increasingly entrenched. Today, it is no longer simply a creature of the common law. In 1998 it was enshrined within the new rules of court as CPR 31.22.[8]

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[6] Two notable exceptions are *Prescott* and JH Buzzard, R May and MN Howard *Phipson on Evidence* (13th edn Sweet & Maxwell London 1982) 323.

[7] See especially: *Eagles*; AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 336, 354; AAS Zuckerman 'Practice and Procedure' [1998] All ER Ann Rev 330, 350–1; AAS Zuckerman 'Practice and Procedure' [1999] All ER Ann Rev 273, 285–6.

[8] For the text of CPR 31.22, see Appendix A.

Despite its apparently modest stature, the implications and consequences of the recast rule governing subsequent use are significant. Building one upon the other, the *Alterskye*, *Distillers* and *Riddick* cases converted a traditional rule, barring only 'improper' forms of subsequent use, into a blanket rule presumptively banning *all* forms of subsequent use. At its core, the modern rule presupposes that any use of disclosed documents outside the purpose of the proceedings at hand is, ipso facto and *a priori*, improper. This thesis will seek to show that this presumptive general rule, now embodied in CPR 31.22(1), is fundamentally flawed. Inter alia, the rule overlooks or undermines important rights and interests that may militate in favour of allowing subsequent use across a wide spectrum of cases. It prevents judges from striking a correct balance between the various competing factors at stake in different types of case. At the same time, it generates systemic inefficiency and offends against key procedural principles and values—all without sound justification.

To illustrate the modern rule's propensity for injustice, unless special circumstances warrant making an exception,[9] the rule may make it impossible for a party who has a meritorious claim to bring it before the court to obtain legal redress. If that party learned of the existence a document crucial to sustaining its cause of action only through disclosure and inspection in earlier proceedings, and cannot reacquire the document (or the information contained therein) from a wholly independent source,[10] then its subsequent

[9] n 13 below.
[10] *Sony Corp v Time Electronics* [1981] 1 WLR 1293; the *Sybron* case.

action will be stymied. This is precisely what happened in the *Riddick* case.[11] During the course of proceedings related to dismissal from employment, TBM (Riddick's former employer) disclosed an internal memorandum. Riddick believed that it defamed him. So, after the first case had settled, he initiated defamation proceedings against TBM based on the memorandum. The parties were identical. Both already knew all of the relevant information. Yet, by redefining the rule against subsequent use so as to preclude *any* form of subsequent use outside the four corners of the original case, the Court of Appeal stifled Riddick's claim. He had no independent means of acquiring the memorandum on which his defamation action depended. His knowledge of its existence and contents derived exclusively from the earlier disclosure. Thus, the Court of Appeal's decision carried serious ramifications—as this thesis will seek to show, not just for Riddick, but for access to justice more generally.

In other situations, compelling grounds also may support allowing disclosed documents to be reused or disseminated outside the original proceedings. Examples may include cases where such documents reveal significant criminal or civil wrongdoing warranting investigation by the proper authorities; governmental corruption or incompetence; or subsisting dangers to public safety.[12] Yet, in each of these situations, once again, the modern general rule presumptively prohibits reuse. A few, narrow exceptions to the general rule have

[11] For an outline of the facts, see 52–53 below.
[12] See further ch 8 below.

been recognised.[13] But they are powerless to overcome the strong presumption against subsequent use except in a tiny number of cases. Meanwhile, the general rule presupposes that document-producers' confidentiality and privacy-related interests, and (more importantly under the rule) the public interest in protecting those interests, inevitably trump any competing considerations. This thesis will attempt to show how and why that presupposition is false. Contrary to what the courts have assumed since the mid-1970s when the *Distillers* and *Riddick* cases were decided, not every form of subsequent use of disclosed information outside the original litigation is inherently 'improper' or illegitimate. On the contrary—it is having a blanket, presumptive rule against any and all such forms of reuse that is intrinsically and instrumentally objectionable.

B THESIS STRUCTURE

This thesis has two primary goals. The first, attempted in Part I (Chapters 2–6), is to demonstrate that the current English rule governing subsequent use of disclosed documents under CPR 31.22 is unsound and undesirable—both in theoretical terms and in terms of its practical operation. The second goal, addressed in Part II (Chapters 7–9), is to formulate a new normative and procedural framework for reforming the rule. Part II outlines an alternative approach, arguably having the potential to protect document-producers' legitimate interests in restricting subsequent use

[13] Now embodied in CPR 31.22(1)(a)–(c) and discussed in ch 6 below.

of sensitive disclosed information, without unjustifiably sacrificing other parties' rights or other important interests that may favour allowing subsequent use to take place.

Beginning Part I, Chapter 2 traces the historical origins and content of the traditional English rule governing subsequent use as it was formulated during the 19th century. By analysing the earliest authorities and leading texts, it seeks to establish that the modern rule departs from the original rule in two fundamental respects. First, contrary to the 'implied undertaking' doctrine, historically subsequent use was not precluded automatically whenever disclosure took place. Second, traditionally only certain specific forms of reuse were singled out as being 'improper'. These differences are crucial. Much of the supposed legitimacy accredited to the current rule rests on a misreading of historical authority. The modern, blanket general rule in CPR 31.22, and the implied undertaking doctrine from which it emerged, lack sound historical foundation.

Chapters 3, 4 and 5 identify and question the three principal rationales put forward to justify the modern rule since the *Riddick* case. Each chapter considers a separate rationale. Taken together, they seek to demonstrate that none of the purported rationales affords adequate justification for the modern rule, either singly or in combination. Each rationale rests on questionable assumptions, an impoverished conception of what doing 'justice' entails, and a misunderstanding of the requirements of procedural fairness. None can encompass the full range of factors and interests potentially at stake in this context. For ease of reference, the three rationales are

termed the 'candour', 'confidentiality' and 'compulsion' rationales respectively. Briefly, the candour rationale (Chapter 3) is the oft-repeated assertion that precluding subsequent use of disclosed documents is necessary to encourage full and frank disclosure, which, in turn, is vital for ensuring accurate judicial decision-making. The confidentiality rationale (Chapter 4) is the claim that the public interest in protecting private confidentiality interests necessitates that subsequent use of disclosed documents be banned. The compulsion rationale (Chapter 5) holds that barring subsequent use is the *quid pro quo* for litigants being able to invoke the courts' coercive powers, thereby invading others' privacy or autonomy interests, by compelling others to divulge private papers against their will.

Completing Part I, Chapter 6 examines the three exceptions to the modern general rule now contained in CPR 31.22(1)(a)–(c). After tracing the emergence and evolution of judicial discretion to authorise subsequent use, it suggests that, while in some instances the exceptions may have ameliorated the harshness of the general rule, generally their use is deeply problematic. Rather than tackling directly the modern rule's inherent shortcomings, judges have exercised discretion so as to side-step them. The resulting pragmatic, largely ad hoc approach has compounded the underlying difficulties associated with the modern rule. Meanwhile, apart from authorising subsequent litigation use in a limited range of circumstances, judicial attitudes towards using discretion display marked ambivalence. Overall, the exceptions have diminished clarity, certainty and rationality in the law.

After Part I has exposed the deficiencies of the current rule, and argued why continued adherence to it is undesirable, Part II presents proposals for reform. Drawing upon the insights and lessons learned in Part I, Chapter 7 reconsiders from first principles the proper *telos* and scope of the law governing subsequent use. It examines American practice under Rule 26(c) Fed R Civ P as an illuminating comparative analysis.[14] In a nutshell, Chapter 7 argues that the presumption against allowing subsequent use should be abandoned, and the law reoriented around two central norms—the harm principle and a balancing approach. Legitimate forms of subsequent use should be permitted unless document-producers can show 'good cause' for preventing reuse of confidential information. Good cause should be recognised only where allowing reuse would undermine objectively valuable confidentiality-dependent interests, leading to unwarranted harm. In deciding whether to issue protective orders to limit or preclude reuse, judges should weigh the various competing factors, rights and interests at stake in each case in a controlled way.

Chapter 8 models and tests how the theoretical reforms proposed might affect English procedural law. Applying the normative approach developed in Chapter 7, it re-evaluates seven paradigmatic forms of subsequent use. It suggests that only two of these properly should be classed as presumptively illegitimate: publication of disclosed documents purely for self-serving purposes; and abusive deployment of the disclosure process solely to obtain information for

[14] On the benefits and limitations of comparative studies, see 264–265 below. For the text of R26(c), see Appendix B.

extra-judicial or extraneous ends. By contrast, at least five potentially legitimate forms of reuse can be identified. In short, they are: (1) use in subsequent litigation by original document-recipients; (2) use in subsequent litigation by similarly-situated litigants in separate proceedings (who would obtain equivalent disclosure in any event); (3) revelation of significant wrongdoing to the proper authorities; (4) publication of information concerning the operation of government or official conduct which it is in the public interest to reveal; and (5) publication of information on other matters of pressing social or public concern.

Finally, Chapter 9 moves from principle to practice by formulating one possible structure for concrete reform of CPR 31.22. It outlines how the procedural system might be reconstructed so as to realise in practice the theoretical reforms recommended in Chapters 7 and 8, in a procedurally efficient, workable and efficacious manner. Drafting and testing detailed concrete reform proposals is beyond the scope of this thesis. That must remain a project for future work. Nevertheless, Chapter 9 describes and explores one potentially promising direction for such reform, and considers briefly a number of key issues and implications.

The remainder of this chapter sets out relevant introductory and background information. It suggests why subjecting the law governing subsequent use to rigorous reappraisal at this time is worthwhile. It clarifies the terminology and key concepts used in this thesis. It then summarises the scope and substance of the current rule governing subsequent use under CPR 31.22 and the relevant case law.

C TIMELINESS OF REVIEW

Given that the modern rule governing subsequent use has attracted only limited critical attention to date, a thoroughgoing analysis of it is required. Undertaking such an analysis now is apposite. Three factors in particular make this so. The first is the recent formalisation of the rule under CPR 31.22. Because the rule's authority now derives from its status as a rule of court,[15] judges and commentators no longer need question its underlying legitimacy. Yet, this very status serves to conceal the fact that the modern rule is not intrinsically justifiable. Re-evaluating it from first principles is essential to show that CPR 31.22 has clothed the rule with an appearance of legitimacy and rationality that, in reality, it does not deserve.

Second, the incorporation of ECHR provisions into English domestic law under the HRA, Sch 1 potentially carries significant ramifications for the subsequent use rule regime. Three Convention rights in particular come into conflict in this area—the emerging right to privacy in Article 8; freedom of expression under Article 10; and the fair hearing guarantees in Article 6(1).[16] While Article 8 may favour preventing reuse in certain circumstances, Article 6(1)

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[15] The CPR were promulgated by statutory instrument (SI 1998/3132) pursuant to the Civil Procedure Act 1997.

[16] These articles are set out in Appendix C. Art 8 and Art 10 embody qualified rights. Art 6(1) embodies both express rights (absolute) and implied rights (eg access to a court; procedural equality of arms). See further R Clayton and H Tomlinson *The Law of Human Rights* (OUP Oxford 2000) vol 1, 636–7. Within the common law, fair trial also is well recognised as a basic constitutional right: *Raymond v Honey* [1983] 1 AC 1 (HL) 13; *R v Lord Chancellor, ex p Witham* [1998] QB 575, 585.

and Article 10 may well favour allowing it to proceed.[17] As it stands, CPR 31.22 could be vulnerable to attack under the HRA for failing to strike a correct balance between these rights in many situations (such as the examples mentioned above). As noted already, the blanket general rule in CPR 31.22(1) presumptively prioritises confidentiality and privacy-related interests above all other concerns. Yet, as the *Riddick* case shows, sometimes such interests may be negligible (for example, where all parties already possess the relevant information), while access to justice or freedom of expression, or both, may be of vital concern.

As Chapter 6 will argue, the exceptions to the general rule against subsequent use do not afford adequate safeguards for preventing unfair or unjust decisions. Under s 6(1) of the HRA it is unlawful for a public authority (including a court[18]) to act in a way that is incompatible with a Convention right.[19] Under s 3(1), courts further are required to interpret domestic legislation (including the CPR) in conformity with Convention rights, as far as possible. It is now generally accepted that these duties have horizontal, not just vertical, impact—that is, judicial decisions must uphold

[17] See especially the analysis in chs 4, 5, 7 and 8 below.
[18] HRA, s 6(3)(a).
[19] Unless primary legislation specifically allows or requires it: HRA, s 6(2).

Convention rights even in proceedings between private parties.[20] Had the *Riddick* case post-dated the HRA, Riddick might have been able to challenge the Court of Appeal's decision—and the modern rule against subsequent use—for violating unjustifiably both his Article 6(1) entitlements to effective access to a court and access to justice,[21] and his Article 10(1) freedom to convey relevant information within his knowledge to a court of law in order to vindicate his legal entitlements.[22] It is noteworthy that the modern rule against subsequent use once already has fallen foul of Article 10(1).[23]

Third, in recent years increasing emphasis has been placed on improving procedural efficiency and economy so as to enhance overall access to justice. Much of the impetus behind the CPR stemmed from the urgent need to reduce procedural delay, cost and complexity.[24] Such failings had become chronic—not just in England, but within

[20] See eg: N Bamforth 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 CLJ 159, 163, 168; G Phillipson and H Fenwick 'Breach of Confidence as a Privacy Remedy in the Human Rights Era' (2000) 63 MLR 660, 667; M Zander *The State of Justice* (Sweet & Maxwell London 2000) 83–4; *Douglas v Hello! Ltd* [2001] QB 967 (CA); M Elliott 'Privacy, Confidentiality and Horizontality: The Case of the Celebrity Wedding Photos' (2001) 60 CLJ 231, 233 (describing the *Douglas* case as conferring upon ECHR rights a 'measured degree' of horizontal effect).

[21] *Golder v UK* Series A No 18, (1979–80) 1 EHRR 524; *Airey v Ireland* Series A No 32, (1979–80) 2 EHRR 305, para 24; *Ashingdane v UK* Series A No 93, (1985) 7 EHRR 528.

[22] Although the point apparently has not arisen in English or ECHR jurisprudence to date, in the USA litigation is a protected form of speech (First Amendment, US Constitution): *In re Halkin*, 598 F 2d 176 (DC Cir 1979). See 312 n 28 below.

[23] *Harman v UK* (1985) 7 EHRR 146 (E Comm). See 243–246 below.

[24] *Woolf Interim Report* Pt I and ch 21; *Woolf Final Report* chs 1 and 9; *Andrews* 30 and ch 21.

many civil justice systems worldwide.[25] Economising measures feature throughout the CPR. The importance of party compliance with time limits and directions repeatedly is stressed.[26] Pre-trial procedures—especially disclosure and inspection—have been cut back substantially.[27] The 'overriding objective' defines dealing with cases 'justly' (inter alia) as ensuring that they are dealt with expeditiously and fairly, and allotted an appropriate share of judicial resources.[28] Yet, arguably, CPR 31.22 does not measure up to the CPR's own performance standards. Its general presumption against subsequent use necessitates that every party who wishes to reuse documents disclosed by another must apply to the court for express permission.[29] As Part II will contend, this approach entails considerable procedural waste; not least, because on every occasion an application and at least one hearing are required. The inefficiencies are multiplied in the mass litigation context.[30] Tellingly, the law reports are littered with cases where subsequent use applications have been pursued

[25] As evidenced by the essays in AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP Oxford 1999).

[26] CPR 3.4(2)(c) (courts may strike out party cases for procedural non-compliance); CPR 3.8, CPR 28.4 and CPR 29.5 (stipulating time limits that only courts may vary).

[27] Liberal discovery under the *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 test has been replaced by the principle of proportionality (CPR 1.1(2)(c)), and concepts of 'standard' and 'specific' disclosure. See CPR 31.5 and CPR 31.6 (fast track and multi-track disclosure normally limited to 'standard disclosure'); CPR 31.7 and CPR, PD 31, 2 (duty of 'reasonable' search); CPR 31.12 (specific disclosure). Under RSC Ord 24, rr 1 and 2 discovery was automatic. No court order was required. Under the CPR, disclosure was brought under judicial control to avoid unnecessary cost and delay: CPR 28.3; *Woolf Interim Report* ch 21.

[28] CPR 1.1(2)(d), (e).

[29] CPR 31.22(1)(b); unless document-producers (and document-owners, if the two are different) consent to reuse: CPR 31.22(1)(c).

[30] 316–319 below.

to appellate level—even to the House of Lords.[31] Thus, careful reappraisal of the law governing subsequent use at this time not only is opportune, it is long overdue.

D TERMINOLOGY AND CONCEPTUAL BACKGROUND

Several matters of terminology warrant clarification. For ease of reference, 'disclosure' in this thesis embraces the various mechanisms available in England for compelling parties (or non-parties) to produce relevant information where litigation is underway or reasonably anticipated.[32] As the next section will show, the rule governing subsequent use has been held to cover information acquired through a range of means. Accordingly, 'disclosure' herein extends beyond its meaning in the CPR where it connotes merely documentary disclosure and inspection.[33] Before the CPR came into force, the latter two processes together were known as 'discovery'.

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[31] At least 17 appellate cases have centred on subsequent use disputes. In the HL: the *Harman* case; the *Crest Homes* case; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL). In the CA: the *Halcon* case; *CBS Songs Ltd v Amstrad Consumer Electronics plc (Amendment & Discovery)* [1987] RPC 417 (CA); *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990); *Miller v Scorey; Miller v Forrest* (CA 12 September 1996); *Tejendrasingh v Metsons* [1997] EMLR 597 (CA); *Mahon v Rahn* [1998] QB 424 (CA); *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA); *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA); *Bourns Inc v Raychem Corp* (CA 17 January 2000); *Cassidy v Hawcroft* (CA 27 July 2000); *Nayler v Beard* [2001] EWCA Civ 1201, [2001] 3 FCR 61 (CA); *Bingham v Martin* [2001] EWCA Civ 1453 (CA); *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 02, [2002] 1 All ER 842 (CA); *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA). These cases represent one-fifth of the approximately 75 English authorities that have focussed on the rule to date.

[32] For convenient lists describing these mechanisms, see *Matthews and Malek* 5–7; Andrews in Birks (n 2 above) 950. Whether all disclosure mechanisms truly are compulsory is debatable: 185 ff below.

[33] CPR 31.2, CPR 31.3.

The term 'discovery' still is used in the USA. However, since 1993 an automatic 'disclosure' regime also has operated there.[34] To avoid confusion, 'disclosure' is used herein uniformly to refer to the relevant information-gathering mechanisms in England. 'Discovery' is used to refer to equivalent processes in the USA. 'Disclosure' is used in the American context (rarely) solely to refer to the automatic disclosure regime.

The term 'document' also is used in the broadest possible sense. In keeping with its definition under CPR 31.4 and in modern law,[35] it embraces anything in which information of any description is recorded. In keeping with the inclusive meaning of 'disclosure' noted above, terms such as 'documents', 'materials' and 'information' incorporate not only disclosed documents *stricto sensu*, but also anything produced in any form under any of the relevant information-gathering mechanisms. Moreover, such terms include any knowledge derived through disclosure, however it may be stored or retained—whether in the original document, in a copy, or in the mind.[36]

While the term 'claimant' generally is used to refer to the party who commences proceedings, on occasion the former term

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[34] 269 below. The co-existence of both processes, which is controversial, has been dubbed 'disclovery': *Haydock and Herr* 1:5.

[35] *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652; *Victor Chandler International v Customs & Excise Comrs* [2000] 1 WLR 1296 (CA). CPR 31.4 reproduces the enlarged statutory definition of 'document' contained in the Civil Evidence Act 1995, s 13.

[36] The *Sybron* case 318; the *Crest Homes* case 854; *Lubrizol Corp v Esso Petroleum Co Ltd (No 2)* [1993] FSR 53, 57.

'plaintiff' appears. This occurs primarily in Chapter 2 (which examines 19th century case law) and also in discussions of American procedure (as in the USA, once again, the term still is in use). 'Document-producer' denotes the party or non-party who gives disclosure. 'Document-recipient' refers to the litigant and any others (such as lawyers, witnesses or experts) who, through their association with the litigant or its advisers, gain access to disclosed information produced by others.

For many years, legal philosophers have debated the correct legal status and definition of, and relative priority and difference between, concepts such as 'rules', 'principles', 'standards', 'values', 'policies' and 'factors'.[37] All of these terms appear in this thesis. Rather than risk becoming lost in the jurisprudential fog, this thesis follows its own path, one without any pretension to theoretical sophistication. References to 'policies', 'factors', 'values' and 'standards' carry their general, non-technical meanings. 'Rule' refers to precise norms or definitive commands recognised under law—most especially, the modern rule governing subsequent use of disclosed documents now enshrined in CPR 31.22, and its 19th century counterpart. The term 'principle' is used in the same way as generally

[37] Examples from the extensive literature include: J Raz 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823; R Dworkin *Taking Rights Seriously* (rev edn Duckworth London 1978); HLA Hart *The Concept of Law* (2nd edn Clarendon Press Oxford 1994); CR Sunstein 'Problems With Rules' (1995) 83 California L Rev 995; J R-Toubes Muñiz 'Legal Principles and Legal Theory' (1997) 10 Ratio Juris 267; J Raz 'Reasoning with Rules' (2001) 54 CLP 1. For further leading references, see *Andrews* 11, n 1.

it is understood within civil procedure writings.[38] Thus, it refers to broad legal standards, expressive of underlying values, but lacking precise content or fixed consequences. The term 'interests' is used in a similar manner, and includes those values or concerns that underlie specific rights recognised under law (such as the right to privacy, or freedom of expression). In this thesis it is assumed that principles, interests and (qualified) rights may vary in their weight or importance in different circumstances or over time. Moreover, they may conflict with one another. Where they do, their priority is taken to be conditional or relative,[39] varying with respect to the circumstances of each case.

At least four core, overlapping principles can be seen to underpin the English civil disclosure system. They are worth examining briefly, to draw out certain key concepts and ideas associated with the disclosure system that form part of the theoretical backdrop to this thesis.[40] The principle of pre-trial disclosure, or avoidance of surprise, is premised on the now dominant procedural philosophy that civil proceedings should be conducted 'cards face up on the table'.[41] Within the adversarial context, this principle affords a

[38] *Andrews* 11–6 and ch 2; JIH Jacob *The Fabric of English Civil Justice* (Stevens & Sons London 1987) 5–29, 66–7.

[39] R Alexy 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294, 296–7 (describing principles as 'optimization commands' requiring decision-makers to establish correct priority relationships between countervailing principles in different contexts).

[40] Many seminal articles on procedural law and theory are conveniently collected together in DJ Galligan (ed) *Procedure* (Dartmouth Aldershot 1992).

[41] *Naylor v Preston Area Health Authority* [1987] 1 WLR 958 (CA); *Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428 (CA) 431–2; *Ridehalgh v Horsefield* [1994] Ch 205 (CA) 224.

key justification for disclosure—namely, that it enhances procedural efficiency and lowers the transaction costs of resolving disputes.[42] By mandating the early exchange of information between disputants, disclosure can help to clarify and narrow issues, reduce surprise, and enable parties to evaluate the strength of their competing cases in an accurate, informed way—thereby promoting settlement, expediting proceedings, and reducing cost. In addition, it may assist courts to filter proceedings and terminate unmeritorious claims or defences before excessive resources have been wasted on them.[43]

A second major theoretical justification for disclosure is that it supports procedural fairness. Disclosure reflects the principle of equality of treatment; especially procedural equality of arms. The latter is an essential component of the right to a fair hearing, both under Article 6(1) of the ECHR[44] and the common law.[45] Inter alia, it requires that each party must be afforded a reasonable opportunity to prepare and present its case under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent(s). By granting all parties equal access to the same pool of information (being that which

[42] On the value of disclosure generally and various purposes that it serves, see eg: *Matthews and Malek* 4; *Andrews* 283 ff; P Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (MacMillan Reference London 1998) vol 1, 609–15.

[43] CPR 3.4(2)(a), CPR 24.

[44] *Dombo Beheer BV v The Netherlands* Series A No 274-A, (1994) 18 EHRR 213, para 33; *De Haes and Gijsels v Belgium* Reports 1997-I, (1997) 25 EHRR 1, para 53; *Nideröst-Huber v Switzerland* Reports 1997-I, (1997) 25 EHRR 709, paras 23, 24.

[45] CPR 1.1(2)(a); *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 1 WLR 447 (CA) 462; *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskin & Sells (a firm)* [1997] 1 WLR 257 (CA) 267. See also Jacob (n 38 above) 94.

is subject to disclosure[46]), the disclosure process fosters procedural equality, access to justice and, hence, overall fairness.

The principle of full, unimpeded access to evidence is integral to the disclosure process.[47] This principle goes to the accuracy (and therefore justice) of judicial decision-making. Disclosure may promote accurate outcomes by enabling litigants to obtain the best evidence available. More fundamentally, by compelling parties to divulge information detrimental to their own cases or supportive of their opponents' cases, disclosure traditionally has been justified on the ground that it enables judges to render just decisions by getting to the 'truth'. Underpinning this view is an assumption that partisan presentation of disputes, aided by full disclosure, results in all relevant evidence being presented to the court. In turn, this equips judges to arrive at 'just' outcomes that reflect the 'true' facts.

The perceived link between justice and truth-finding has a long heritage in English law. It formed the crux of Bentham's influential theorem of 'rectitude of decision', which posited the direct 'end of justice' as being the correct application of the substantive law to the true facts.[48] Another celebrated passage—specifically rationalising

[46] As opposed to privileged information, or information subject to other exclusionary rules (eg, under the public interest immunity doctrine).

[47] *Zuckerman in Tapper* 248–51.

[48] J Bowring (ed) *The Works of Jeremy Bentham* (Russell & Russell New York 1962) vol 6, 204–5 and vol 2, 7–10. For Bentham, the indirect or 'collateral' end of justice is avoiding 'unnecessary delay, vexation, and expense' along the way: vol 6, 212–3. See generally W Twining *Theories of Evidence: Bentham & Wigmore* (Weidenfeld & Nicolson London 1985) 88–94. For similar views, see LL Jaffe *English and American Judges as Lawmakers* (Clarendon Press Oxford 1969) 12; P Devlin *The Judge* (OUP Oxford 1979) 3.

disclosure as an instrument for the ascertainment of truth—is Lord Langdale MR's dictum in *Flight v Robinson* (1844) 8 Beav 22, 33–4; 50 ER 9, 13–4:

> However disagreeable it may be to make the disclosure, however contrary to [a party's] personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. . . . [By this means] the greatest security. . . is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court. . . has, at all times, proved to be of transcendent utility in the administration of justice.

Over recent decades, legal scholars have identified significant problems in equating the doing of 'justice' with finding the 'true facts'.[49] As Zuckerman has observed, English law's procedural commitment to truth-finding (at least, the legally-constructed characterisation of what is 'truth' in any given case) is largely mythical. Undoubtedly, the system places considerable importance on decisional accuracy. Disclosure of even the most private of documents is compelled. Yet, many evidence-suppressing rules exist. Indeed, CPR 31.22 is one of them.[50] English judges (unlike their civilian counterparts) have no independent duty to ascertain 'objective truth'.[51] Their responsibility ends with deciding cases based on the

[49] For a good summary of the truth-finding theory, and critique of the assumed synonymy of truth and justice, see MP Golding 'On the Adversary System and Justice' in R Bronaugh *Philosophical Law: Authority, Equality, Adjudication, Privacy* (Greenwood Press London 1978) 106–13.

[50] See generally *Zuckerman in Tapper*. Some courts have suggested that legal professional privilege may enhance rectitude of decision by facilitating lawyer–client candour: *Bolton v Corporation of Liverpool* (1833) 1 M&K 88, 39 ER 614; *Baker v Campbell* (1983) 153 CLR 52 (HCA) 88.

[51] M Cappelletti *The Judicial Process in Comparative Perspective* (Clarendon Press Oxford 1989) 249. Cf Germany, *Zivilprozeßordnung* (Civil Procedural Code) para 286(1).

evidence and arguments presented by the parties.[52] Even if English courts had such a duty, as Rawls has observed civil procedure is a form of imperfect procedural justice. Even fair civil procedures may not always produce just results. No external criterion or 'super-test' is available for gauging or guaranteeing the factual correctness of outcomes.[53]

The CPR further have displaced the traditional predominance of truth-finding within English procedural theory. Under the CPR 1.1(2)(c) proportionality principle (the lynchpin of the overriding objective), accurate decision-making must be traded-off (as appropriate) for time, cost and resource-related efficiency gains. Thus, the scope of disclosure materially has been cut back. 'Standard disclosure' is now the norm—assuming disclosure to be ordered at all.[54] In economic parlance, restricting the ambit of disclosure based on the perceived value or importance of the litigation reflects a definite policy shift in favour of 'rational ignorance': a decision not to acquire information because the cost of doing so exceeds the expected benefit.[55] This is coupled with far-reaching judicial case management

[52] In practice, the impact of objective errors is minimised by the rules of stare decisis and res judicata. For two procedural models not having accuracy as their central aim, see KE Scott 'Two Models of Civil Process' (1975) 27 Stanford L Rev 937.

[53] J Rawls *A Theory of Justice* (rev edn OUP Oxford 1999) 74–5; AAS Zuckerman 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 OJLS 353, 355.

[54] n 27 above.

[55] M Parkin, M Powell and K Matthews *Economics* (3rd edn, 1997) G12 (glossary). Like many economic axioms, it presumes that the decision not to acquire evidence is objectively correct. In reality, determining whether disclosure can be restricted or dispensed with safely under CPR 31 without jeopardising a just outcome may be rather more precarious.

powers, including power to exclude issues or evidence summarily,[56] and to impose penalties for procedural breaches that carry substantive consequences.[57]

Given the difficult problems associated with the truth-finding theory, several commentators have attempted to construct alternative schemes for assessing the legitimacy of legal processes that do not turn on the efficacy (or accuracy) of the results produced. These accounts seek to identify inherently (rather than instrumentally) worthwhile 'process values'.[58] They suggest that procedures that implement such values (or 'benefits') may be deemed good independently of their contribution to accurate decision-making.[59] Applying this approach to disclosure, the disclosure regime could be seen as beneficial because, for example, it facilitates party participation,[60] respects human dignity,[61] or promotes party satisfaction.[62] Whether or not process values have theoretical force or content apart from their contribution to rectitude of decision

[56] CPR 1.4(2)(c), CPR 3.1(2)(k) (power to exclude issues from consideration); CPR 27.5, CPR 35.4 (authority to control expert evidence).
[57] eg, CPR 3.4(2)(c).
[58] RS Summers 'Evaluating and Improving Legal Processes: A Plea for "Process Values" ' (1974) 60 Cornell L Rev 1; RB Saphire 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection' (1978) 127 U Pennsylvania L Rev 111; LH Tribe *American Constitutional Law* (2nd edn Fountain Press Mineola 1988) 666–7; MD Bayles 'Principles for Legal Procedure' (1986) 5 Law & Philosophy 33; MD Bayles *Procedural Justice: Allocating to Individuals* (Kluwer Academic Publishers London 1990) chs 1 and 6.
[59] Which, as Rawls (n 53 above) has shown, cannot be measured empirically in any event.
[60] MD Bayles (n 58 above) 130–1.
[61] JL Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston UL Rev 885.
[62] Golding (n 49 above) 112–6.

is debatable.[63] Either way, despite the recent civil justice reforms, seeking the 'truth'—in the sense of constructing the best legal version of the facts possible in the circumstances (being the sense in which the term 'truth' is used hereafter in this thesis)—so as to facilitate tolerably accurate judicial decision-making unquestionably remains an essential ingredient of English procedural justice. Even Zuckerman, a staunch proponent of the view that 'justice' has three interrelated dimensions (truth, time and cost), still identifies 'getting at the truth' as being the 'foundation' of procedure.[64] Given this fact, it is appropriate to question whether, to the extent that CPR 31.22 inhibits courts from reaching accurate decisions on the merits in litigation, it can be justified. It will be argued that it cannot.

A final important concept underpinning the analysis in this thesis is that of justice. A vast body of jurisprudential literature addresses the complex, interrelated concepts of 'justice', 'equality' and 'fairness'.[65] Again, this thesis does not claim any philosophical sophistication or theoretical precision in using these terms. But it does comprehend 'justice' in a special sense, as conveying a broader meaning merely than procedural (and substantive) justice

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[63] MH Redish and LC Marshall 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 Yale LJ 455; RM Dworkin *A Matter of Principle* (Clarendon Press Oxford 1986) ch 3; Zuckerman (n 53 above) 356.

[64] AAS Zuckerman 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP Oxford 1999).

[65] Leading works include: Rawls (n 53 above); JM Finnis *Natural Law and Natural Rights* (Clarendon Press Oxford 1982) chs 6 and 7; P Westen 'The Empty Idea of Equality' (1982) 95 Harvard L Rev 537; T Honoré *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press Oxford 1987) ch 9; P Westen *Speaking of Equality* (Princeton UP Princeton 1990).

for individual litigants within the confines of discrete proceedings. 'Justice' also is seen to embrace wider policy elements and social concerns. Thus, precluding subsequent use under CPR 31.22 may be thought 'just' within a given case because the rule is applied fairly and faithfully on its terms, and does not inhibit the court's ability to reach a correct decision. Yet, the rule's operation—indeed, the rule itself—may be unjust in other, more important ways outside the boundaries of those proceedings. It may stifle other meritorious claims, or suppress information about dangers to the community, for example. Such wider consequences may well implicate more pressing private and public interests than those protected under the rule. In this sense, 'justice' is seen as spilling over the borders of individual proceedings, to comprehend broader notions of what it is good to do in the legal context.[66] It places litigants and litigation within a more communitarian framework. In this thesis, this idea is described as justice in its *holistic* sense. As will emerge,[67] to adopt an holistic understanding of the broader imperatives of justice carries significant normative consequences—both for the content and application of the rule governing subsequent use, and the proper function and role of civil courts in modern mass societies.

[66] For similar (although quite different) accounts of justice, see Finnis (n 65 above) 161 ff (identifying the basic principle underpinning justice as looking to the common good of the relevant community, not to the good of individuals or groups within it in disregard of the well-being of others); Honoré (n 65 above) 193–4 (seeing justice between individuals as partial, and overall justice always as social).

[67] Especially in ch 8 below.

E OVERVIEW OF THE RULE GOVERNING SUBSEQUENT USE

Before turning to Part I to examine the historical, theoretical and practical underpinnings of the rule governing subsequent use, it is helpful to trace the rule's development since the *Riddick* case in 1977, and to outline its salient features.

In the 25 years since the *Riddick* case, over 75 cases have centred on disputes concerning the law governing subsequent use.[68] The scope of the modern rule has expanded significantly. Its evolution has not always been smooth or gradual. The first of three abrupt reforms was the (re)introduction of judicial discretion to allow subsequent use barely 15 months after the *Riddick* case had declared any reuse outside the original proceedings to be unacceptable.[69] The second abrupt reform was the introduction of RSC Ord 24, r 14A in the aftermath of the *Harman* litigation.[70] That rule provided that any undertaking (express or implied) not to reuse disclosed documents outside the immediate litigation ceased to apply once documents had been read to or by the court, or referred to, in open court, unless the court ordered otherwise. The rule was introduced to acknowledge that such

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[68] Further cases have addressed the rule's impact on other areas of law, eg *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL) and *Twentieth Century Fox Film Corp v Tryrare Ltd* [1991] FSR 58 (both concerning its effect on self-incrimination privilege in the disclosure context). Tellingly, only two reported cases focused on the law governing subsequent use during the whole of the 20th century prior to the *Riddick* case (namely, the *Alterskye* and *Distillers* cases). The veritable avalanche of satellite litigation triggered by the *Riddick* decision appears even more dramatic if one recalls the high proportion of appellate decisions (n 31 above).

[69] The *Halcon* case.

[70] 140, 243–246 below.

documents enter the public domain, and that parties' hands should not remain tied when the public can access, use and distribute the information contained therein freely. Third, the modern rule was restated comprehensively when it was incorporated into the CPR. CPR 31.22 provides:

> 31.22 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
> (b) the court gives permission; or
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
> (a) by a party; or
> (b) by any person to whom the document belongs.

The pre-CPR case law remains relevant for fleshing out the bare bones of the new rule. CPR 31.22 itself offers no guidance on many key points. These include how the rule should operate; its ambit; how terms such as 'the purpose of the proceedings in which it is disclosed' or 'read. . . or referred to' should be interpreted; and what factors and principles should guide and inform the exercise of judicial discretion to allow reuse. The case law addresses each of these points. From that case law, and from CPR 31.22 itself, the main features of the current rule governing subsequent use can be derived and stated succinctly.

1. The general rule governing subsequent use prohibits document-recipients from using others' disclosed documents

except for the purpose of the proceedings in which they are disclosed.[71] Reuse presumptively is precluded even in related proceedings between the same parties, and in further litigation addressing the same subject matter or cause of action.[72] Reuse in subsequent arbitration proceedings,[73] or proceedings before quasi-judicial or administrative bodies,[74] similarly is banned. Disclosed documents may be used only for those purposes reasonably necessary for the proper conduct of the action in which they are disclosed.[75]

2. This general prohibition against subsequent use binds both litigants and any others (for example, lawyers, witnesses or expert advisers) who receive documents disclosed by others knowing that they were acquired through disclosure.[76] As already noted, the rule protects the information contained in disclosed documents however it may be stored, including in copies or in document-recipients' memories.[77]

3. The rule governing subsequent use has been extended to cover a wide range of materials, directly or by analogy. It embraces not only disclosed documents *stricto sensu*, but also other materials

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[71] CPR 31.22(1).
[72] The *Riddick*, *Crest Homes* and *Cobra* cases. See also the *Sybron* case.
[73] *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155.
[74] The *Halcon* case (Netherlands Patent Office Appeal Board); *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43 (European Patents Office).
[75] The *Riddick* case 896, 901–2, 910; the *Cobra* case 830; *Miller v Scorey* [1996] 1 WLR 1122, 1129 (aff'd *Miller v Scorey; Miller v Forrest* (CA 12 September 1996)).
[76] The *Distillers* case 621; the *Harman* case 302, 307; *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31.
[77] n 36 above.

produced under compulsion, such as: lists of disclosed documents;[78] affidavits sworn under some form of compulsion,[79] including those containing information about the location of assets subject to freezing injunction applications (formerly Mareva injunctions);[80] hearing transcripts;[81] documents produced by a witness under subpoena duces tecum;[82] materials taken pursuant to search orders (formerly Anton Piller orders);[83] information revealed during taxation of costs;[84] and arbitration papers.[85] Under CPR 32.12, similar provisions apply to witness statements.

4. Judges have power under their inherent jurisdiction to recognise equivalent obligations of confidentiality and non-reuse in respect of materials divulged in contexts other than civil litigation.[86] Thus, analogous obligations have been imposed in respect of

[78] *Dory v Richard Wolf GmbH* [1990] FSR 266.
[79] *Medway v Doublelock Ltd* [1978] 1 WLR 710; *Lubrizol v Esso* [1993] FSR 53; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA).
[80] The *Derby (No 2)* case; *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA) 1003. See now CPR 25.1(1)(f), (g).
[81] *S v S (Judgment in chambers: disclosure)* [1997] 1 WLR 1621. Cf *Re R (MJ) (an infant) (proceeding transcripts: publication)* [1975] Fam 89.
[82] The *Sybron* case.
[83] *Bayer AG v Winter (No 2)* [1986] FSR 357; the *Crest Homes* case; *Tate Access Floors Inc v Boswell* [1991] Ch 512; the *Cobra* case. See now CPR 25.1(1)(h).
[84] *Bourns v Raychem* [1999] FSR 641 (CA).
[85] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA); *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243. Awards and reasons may be disclosed to strangers where reasonably necessary to enforce or protect rights: *Hassneh v Steuart J Mew* [1993] 2 Lloyd's Rep 243; *Insurance Company v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.
[86] *Esterhuysen v Lonrho plc* The Times, 29 May 1989 (CA). Some judges see these obligations as flowing from the equitable duty of confidence, to which the rule governing subsequent use is closely aligned: 123–126 below.

documents produced (or seized) under statutory requirement[87] and transcripts of evidence taken under statutory powers of examination.[88] The prohibition against subsequent use is implied into arbitration agreements as a matter of English law.[89] The rule also applies directly to prosecution materials disclosed during criminal proceedings. Compliance by prosecuting authorities with their duty to disclose all materials (including those unused) to criminal defendants generates an implied undertaking at common law, binding on defendants, not to use the materials except for the purposes of their defence.[90]

5. The duty under the general rule not to reuse disclosed information outside the immediate proceedings is a legal obligation owed to the court.[91] However, judges have discretion to authorise subsequent use.[92] To date, English judges have

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[87] The *Sybron* case; *EMI Records Ltd v Spillane* [1986] 1 WLR 967; *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158; *Marcel v Comr of Police of the Metropolis* [1992] Ch 225 (CA).

[88] *British & Commonwealth Holdings plc (in admin) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86.

[89] *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA). Unlike Australian law: *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10 (HCA).

[90] *Taylor v SFO* [1999] 2 AC 177 (HL), disapproving *Mahon v Rahn* [1998] QB 424 (CA). See also *ex p Coventry Newspapers Ltd* [1993] QB 278 (CA). The Criminal Procedure and Investigations Act 1996, s 17 also may be relevant: *Matthews and Malek* 370–1; *Phipson* 603–5.

[91] The *Harman* case; the *Crest Homes* case 854; the *Prudential* case 764–5. In the *Riddick* case (901) Stephenson LJ described the obligation as being owed both to the court and to document-producers. In the *Prudential* case (764–5) Hobhouse J described it as being owed to the court for the benefit of parties.

[92] CPR 31.22(1)(b). In the *Cobra* case (832) Laddie J suggested that approving non-litigation uses (eg, publication) would exceed the courts' role. But under the HRA (especially ECHR, Art 10(1)) courts may be required to consider non-litigation uses. Cf *A v A; B v B* [2000] 1 FCR 577.

used their discretionary power solely to permit limited forms of subsequent litigation use in restricted circumstances.[93] Document-producers (and document-owners, if the two are different entities) also (jointly) may authorise subsequent use.[94]

6. Violating the rule against subsequent use constitutes civil contempt of court.[95] It also may sound in costs.[96] Inadvertence is irrelevant to guilt, as the test is objective. But inadvertence is relevant to penalty.[97] Document-recipients who intend to reuse disclosed information without judicial permission or party consent may be restrained by injunction.[98] Subsequent proceedings brought using protected documents without permission or consent constitute an abuse of process and are liable to be struck out.[99] Judges may have jurisdiction to grant

[93] The *Halcon* case; the *Crest Homes* case; *Killick v PricewaterhouseCoopers* (ChD 11 October 2000). See ch 6 below.
[94] CPR 31.22(1)(c). See the *Harman* case 322; the *Prudential* case. In the *Cobra* case (831) Laddie J indicated that document-producers' consent normally should be sought before applications are made to the court.
[95] The *Harman* case 304; the *Prudential* case 765; the *Cobra* case 830.
[96] *Zaiwalla v Elstub* (CA 21 February 1997); *Adoko v The Law Society* (EAT/219/97 22 June 1999).
[97] *Miller v Scorey* [1996] 1 WLR 1122; *Watkins v AJ Wright* [1996] 3 All ER 31.
[98] The *Distillers* case; the *Prudential* case 765. See also *Ali Shipping v Shipyard Trogir* [1999] 1 WLR 314 (CA) (arbitration).
[99] Proceedings struck out to date include the *Riddick* case; *Nothman v Hartigan* (CA 23 October 1980); *Tejendrasingh v Christie* [1995] EMLR 152; *Tejendrasingh v Metsons* [1997] EMLR 597 (CA); *Taylor v SFO* [1999] 2 AC 177 (HL).

leave retrospectively after unsanctioned use occurs. However, any use of such a power should be 'rare'.[100]

7. The prohibition against subsequent use ceases to apply to disclosed documents if they are read to or by the court, or referred to, at a hearing held in public.[101] Such documents thereby enter the public domain. They need not be read out *in extenso*. It will suffice if they are pre-read privately by judges in their chambers and referred to (even if no part of them is read aloud) by counsel or the court;[102] or if they are drawn specifically to a judge's attention (whether or not he or she actually reads them).[103] Judges have discretionary power to enter protective orders that continue to prohibit subsequent use even after disclosed documents have been read or referred to in open court.[104]

8. If the danger of improper subsequent use of disclosed information is particularly strong in a given case, the court may make suitable special orders. Inter alia, courts may require document-recipients to give express undertakings not to reuse sensitive disclosed documents outside the proceedings at hand,

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[100] *Miller v Scorey* [1996] 1 WLR 1122, 1133. CPR 31.22 is silent as to the timing of reuse applications. The *Cobra* case (830–1) states that applications must be made before reuse. Yet, in *WJ Morray Engineering Ltd v Cesare* (ChD 25 April 1997) permission effectively was granted retrospectively. The court held that the unauthorised reuse did not amount to contempt, since the error was 'one of the most technical nature'.

[101] CPR 31.22(1)(a), formerly RSC Ord 24, r 14A (CCR Ord 14, r 8A).

[102] The *Derby (No 2)* case; *Mahon v Rahn* [1998] QB 424 (CA); *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA) 9.

[103] *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 02, [2002] 1 All ER 842 (CA) 846.

[104] CPR 31.22(2); *Plant v Plant* [1998] 1 BCLC 38.

and limit those who are authorised to secure access to disclosed information.[105]

In addition to its expansion within English law, the modern rule against subsequent use (via the implied undertaking doctrine) has spread to other jurisdictions around the world. Leading Commonwealth countries that have embraced the English approach include Canada,[106] Australia[107] and New Zealand.[108]

[105] *Church of Scientology of California v DHSS* [1979] 1 WLR 723; *Davies v Eli Lilly* [1987] 1 WLR 428 (CA); *Black & Decker Inc v Flymo Ltd* [1991] 1 WLR 753, 756.

[106] All Canadian jurisdictions have adopted the implied undertaking rule: *Goodman v Rossi* (1995) 125 DLR (4th) 613 (Ont CA) 625–6 (see 619 ff for an extended survey of the law).

[107] *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 (CA); *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (HCA) 32–3. Some Australian jurisdictions have incorporated the rule into their rules of court, eg: Sup Ct Rules (NSW) 1970, Pt 23; Fed Ct Rules (Cth) O 15 r 18. See generally BC Cairns (title ed) *Civil Procedure* vol 5 of JA Riordan (ed-in-chief) *The Laws of Australia* (The Law Book Co Melbourne 1994–) paras 85, 89, 114.

[108] *Soft-Tech International Pty Ltd v Ball* (1990) 2 PRNZ 254; *Port Nelson Ltd v Commerce Commission* (1994) 7 PRNZ 344 (NZCA). See also High Court Rules r 309(4)(a), (b) and District Court Rules r 331(4)(a), (b) which are very similar to the NSW rules (n 107 above).

PART I

THE CURRENT RULE

CHAPTER 2—HISTORICAL ORIGINS AND MODERN REINVENTION OF THE RULE GOVERNING SUBSEQUENT USE

A INTRODUCTION

As Hazard noted nearly 40 years ago, historical research in the Anglo-American civil procedure field has been seriously neglected.[1] The position today is little changed. Yet, as Mullinex has observed, historical analysis can contribute significantly to our knowledge and understanding of procedures and procedural rules.[2] For this reason, it is appropriate to begin this reappraisal of the rule governing subsequent use of disclosed documents by examining its historical origins and evolution.

Since the mid-19th century, English courts have recognised the need to prevent litigants from misusing others' confidential documents for improper purposes. Over time, judges' practice of stepping in where necessary to prevent such misconduct—through issuing injunctions[3] or requiring express undertakings[4]—crystallised into a recognised rule. Its ambit, content and theoretical foundations

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[1] GC Hazard Jr *Research in Civil Procedure* (Walter E Meyer Research Institute of Law New Haven 1963) 114.

[2] LS Mullinex 'The Influence of History on Procedure: Volumes of Logic, Scant Pages of History' (1989) 50 Ohio State LJ 803, 803.

[3] *Prince Albert v Strange* (1849) 1 Mac&G 25, 41 ER 1171 (although the documents there were not disclosed by compulsory process). For a modern example involving an injunction to prevent improper use of disclosed documents, see the *Distillers* case.

[4] *Richardson v Hastings* (1844) 7 Beav 354, 49 ER 1102; *Williams v Prince of Wales Life, &c, Co* (1857) 23 Beav 338, 53 ER 133; *Hopkinson v Lord Burghley* (1867) 2 LR Ch App 447.

remained (and still remain) somewhat unclear. For example, the rule variously has been described as existing to prevent use for 'improper', 'collateral', 'ulterior' and 'alien' purposes, without such terms clearly being defined.[5] Despite the lack of precision, by the late 19th century a general rule against 'improper' subsequent use of disclosed documents had become reasonably well established.[6]

In the 20th century, the scope of this rule, and the mechanism by which it operates, altered dramatically. As Chapter 1 noted, a trilogy of modern cases brought about a sea change in the law. In the *Alterskye* case in 1948, Jenkins J inaugurated the so-called 'implied undertaking' doctrine. He held that courts need no longer require express undertakings where a danger of improper subsequent use exists, as every litigant is subject to an 'implied obligation to make no improper use of disclosed documents'.[7] Jenkins J confined the scope of proper use to that which is 'reasonably necessary for the conduct of the action'.[8] Similarly, in the *Distillers* case in 1975, Talbot J asserted that the implied undertaking doctrine precludes '*any use* of the

[5] *Richardson v Hastings* (1844) 7 Beav 354 (collateral); the *Alterskye* case (collateral, ulterior and improper); the *Distillers* case (improper); the *Riddick* case (ulterior and alien).

[6] Leading contemporaneous texts recognising the rule include: *Bray* 238; H Ayckbourn *The Practice of the High Court of Chancery* (6th edn Wildy & Sons London 1858) 321; WH Harrison and RH Leach (eds) *Seton's Forms of Decrees in Equity and of Orders Connected With Them* (3rd edn V&R Stevens & Sons London 1862) vol 2, Pt I, 940; WW Kerr *A Treatise on the Law of Discovery* (William Maxwell & Son London 1870) 72; S Hare (ed) *A Treatise on the Discovery of Evidence in the High Court of Justice* (2nd edn Butterworths London 1876) Pt IV, ch 3, 268 n (e).

[7] At 470.

[8] At 470.

documents otherwise than in the action in which they are disclosed'.[9] These dicta expanded significantly the scope of the traditional rule. Until the mid-20th century, it had precluded only those forms of reuse individually assessed as being 'improper'. After the *Distillers* case, *any* use of disclosed documents outside the original litigation became, ipso facto, objectionable.

In the *Riddick* case, the Court of Appeal elevated Talbot J's over-generalisation into a definitive statement of the modern law. As Lord Denning MR put it: 'A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose'.[10] The Court held that 'any use' of disclosed documents necessarily includes using them in subsequent litigation. Hence, it concluded, not even reusing previously disclosed documents to support further proceedings before a court of law is permissible. None of the *Riddick* judges described the rule as being discretionary.[11] They accordingly completed the modern reinvention of the traditional rule, by laying down an automatic, blanket prohibition against any form of subsequent use of disclosed documents of any description.

This chapter will suggest that the modern rule deriving from this trilogy of cases, now enshrined in CPR 31.22, differs in two crucial

[9] At 621 (emphasis added).
[10] At 896.
[11] Stephenson LJ contemplated that, exceptionally, a claimant might be allowed to bring an action on a previously disclosed document. He did not want to say 'that it could never be done without abusing the process of the court. But generally speaking it would be an abuse of its process' (902–3).

respects from the original 19th century rule. First, contrary to the 'implied undertaking' doctrine, historically the rule was not triggered automatically whenever disclosure took place. Judges precluded subsequent use only where particular need was shown—and then, only through express means. Second, not all forms of subsequent use beyond the purposes of the immediate action traditionally were deemed objectionable. Only certain specific forms of reuse were precluded. These two differences are fundamental. Much of the supposed legitimacy attributed to the modern rule rests on a mistaken assumption that it is the product of consistent, long-settled authority. But the implied undertaking is not a mechanism of 'respectable antiquity'.[12] Nor is CPR 31.22 a true descendent of the original law. It is a modern creation—that contradicts a substantial line of authority.

B THE IMPLIED UNDERTAKING DOCTRINE

1 Introduction

The leading dictum encapsulating modern assumptions about the historicism of the implied undertaking doctrine belongs to Lord Denning MR in the *Riddick* case:[13]

> The principle was stated in a work of the highest authority 93 years ago by Bray J, *Bray on Disclosure*, 1st ed. (1885), p 238:

[12] MN Howard, P Crane and DA Hochberg *Phipson on Evidence* (14th edn Sweet & Maxwell London 1990) 543 (omitted from 15th edition).
[13] At 896.

> 'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: . . . nor to use them or copies of them for any collateral object . . . If necessary an undertaking to that effect will be made a condition of granting an order: . . . '

Since that time such an undertaking has always been implied, as Jenkins J said in *Alterskye v Scott* [1948] 1 All ER 469, 471.

From the *Alterskye* decision in 1948 until CPR 31.22 took effect in 1999, this implied undertaking doctrine was universally accepted by English courts. However, it lacks sound historical foundation. This can be seen by tracing its emergence in the modern case law, and examining the authorities said therein to support it.

2 The *Alterskye* case

The principal authority cited in the *Riddick* case for the implied undertaking doctrine is the *Alterskye* case. This was an action for rescission of contract and damages for misrepresentation over the purchase of a hotel. Shortly after the defendant had made his first affidavit of documents, he received visits from Ministry of Food representatives and the police. One officer had with him a copy of the defendant's affidavit. Almost certainly the plaintiff had supplied it. The plaintiff subsequently sought a further and better affidavit of documents from the defendant. Since the plaintiff already had divulged documents in the action to third parties, the defendant sought to resist giving further disclosure until the plaintiff undertook

not to use any more disclosed documents 'for, in effect, any ulterior or collateral purpose'.[14]

Jenkins J rejected the defendant's contention. He held that no such general, express undertaking was required, as 'the implied obligation to make no improper use of disclosed documents under which each party is' afforded 'sufficient protection'.[15] He cited two grounds to support the doctrine's alleged pre-existence. Neither is compelling. The first was the fact that '[c]ounsel for the plaintiff does not dispute' that litigants are bound by an 'implied undertaking' not to use documents disclosed by other parties 'for any collateral or ulterior purpose'.[16] As empirical evidence that a working practice or understanding may have come to be shared among lawyers, this anecdote at best would be weak.[17] As authority for the automatic, global imposition of a legal obligation owed to the court, the breach of which potentially is punishable by committal for civil contempt, it is wholly inadequate.

His second ground was 'certain authorities in *Seton's Judgments and Orders*, 7th ed. Vol. I, p 76'.[18] Rather than quote the relevant extract, Jenkins J merely made passing reference to two cases mentioned in it. His omission to engage with the primary sources

[14] At 470.
[15] At 470.
[16] At 470.
[17] That counsel for both parties subsequently took silk confers negligible additional weight to the argument.
[18] AR Ingpen, FT Bloxam and HG Garrett *Seton's Forms of Judgments and Orders* (7th edn Sweet & Maxwell London 1912).

is regrettable. For, neither case supports the implied undertaking doctrine. Moreover, the Seton extract is misleading. It reads:[19]

> In all cases where documents are produced there is an implied undertaking, which may be enforced by injunction, not to divulge the contents: *Wms v P of W Ins Co*, 23 Bea. 338. And the Court will take care that no vexatious or improper use be made of documents ordered to be produced; *Mansell v Feeney*, 9 WR 610; and will be cautious where the party producing might be prejudiced thereby outside the case: *Carver v Pinto Leite*, 7 Ch. 90; *Heugh v Garrett*, 44 L J Ch. 305;...
>
> On ordering production of letters marked 'private and confidential', against the wish of the writer, an undertaking not to use them for any collateral object was required: *Hopkinson v Burghley*, 2 Ch. 447.

Prima facie, this passage appears to support an implied undertaking doctrine; at least, one precluding parties from divulging the contents of others' disclosed documents.[20] Other 'vexatious or improper' uses also are subject to judicial control.[21] But the authority cited for the 'implied' undertaking—*Williams v Prince of Wales Life, &c, Co* (1857) 23 Beav 338, 53 ER 133—does not support it. *Williams* was a shareholder's suit against an insurance company. The plaintiff believed that certain policies (under which the company had sustained large losses) had been granted improperly. Pending the suit, he

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[19] Seton (n 18 above) 76. In *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL) the respondents' counsel observed that Seton is problematic. The House of Lords was not persuaded.

[20] The passage first appeared in CCM Dale and W Clowes *Seton's Forms of Decrees, Judgments and Orders* (5th edn Stevens & Sons London 1891) 67, and was replicated verbatim in the following two editions. However, the earliest editions, dating back to 1830, make no reference to subsequent use undertakings, implied or express. Not until the 3rd edition of 1862 (n 6 above) (post-dating *Williams*) did reference to an 'implied undertaking' mechanism first appear in the text.

[21] The other cases cited in the first paragraph of the extract concern the court's power to allow defendants to seal up sensitive information that would not materially assist plaintiffs: n 72 below.

published prejudicial statements to that effect. When subsequently he sought production of documents the company resisted. It argued that the plaintiff's interest in the company was trifling, and that his real objective was to damage it through adverse publicity. Sir John Romilly MR ordered production, conditional 'upon the plaintiff undertaking not to make public or communicate to any stranger to the suit the contents of such documents, and not to make them public in any way'.[22]

The case makes no mention of any implied undertaking doctrine. This is consistent with the fact that an express undertaking was ordered. Had the plaintiff's conduct really been subject to an automatic implied undertaking (as Seton suggests), one might reasonably have expected to see some reference to this doctrine in the judgment. One also might have anticipated some explanation from the judge as to why he saw fit to impose an additional, express undertaking on the facts. The judgment is silent on both counts. The existence of an implied undertaking doctrine is neither alluded to, presumed, suggested nor contemplated.[23]

It is unclear why the writers of Seton mistook the *Williams* decision as being authority for an implied undertaking doctrine.

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[22] At 340.

[23] Leading texts on practice and procedure, disclosure, and evidence also conspicuously lack reference to implied undertakings until after 1948 (post-*Alterskye*). Only two pre-1948 texts mention them: Seton (n 18 above) and GO Morgan *Chancery Acts & Orders* (Wildy & Sons London 1858) and subsequent editions. Like Seton, Morgan erroneously attributes the implied undertaking to the *Williams* case. It is not inconceivable that the writers of Seton simply relied on Morgan.

Simple error seems unlikely. Elsewhere, they describe the case accurately as being authority for the more conservative proposition that a plaintiff 'may be stayed making public information derived from production of documents'.[24] They may have inferred the doctrine from Romilly MR's observation that 'it is not the right of a Plaintiff, who has obtained access to the Defendants' papers, to make them public. The Court has granted injunctions to prevent it, and I myself have done so, to prevent a Plaintiff, a merchant, from making public information obtained under the order for production'.[25] However, reading into the mere absence of a 'right' to publish the existence of an implied undertaking requires an intolerably long bow to be drawn. As the authorities prior to the *Williams* case demonstrate,[26] historically, express undertakings and injunctions were the only mechanisms used by courts to prevent parties from disseminating disclosed information. Even then, such tools were employed only where circumstances warranted positive judicial intervention.[27]

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[24] Seton (n 18 above) vol 2, Pt I, 940.

[25] *Williams v Prince of Wales Life* (1857) 23 Beav 338, 340. The only previous reported case in which Romilly MR ordered production subject to an undertaking is *Penkethman v White* (1854) 2 WR 380, 99 RR 885 (undertaking given to a third party not to part with possession of the documents to anyone else).

[26] *Richardson v Hastings* (1844) 7 Beav 354; *Tagg v The South Devon Railway Co* (1849) 12 Beav 151, 50 ER 1017 (discussed at 48–51 below). Neither case is mentioned in Seton or the *Alterskye* case.

[27] Another possible interpretation is that Romilly MR viewed document-producers as having an enforceable right to prevent publication (with a correlative duty on document-recipients). This would have afforded document-producers a far more powerful and elegant mechanism for protecting their interests. But it would have lacked the benefits that accrue from the duty being owed to the court rather than to document-producers personally (eg, availability of contempt as a remedy for non-compliance; ability for judges to protect non-party interests).

Curiously, having enunciated the implied undertaking doctrine, Jenkins J proceeded in his *Alterskye* judgment to state that express undertakings still may be appropriate. He noted that, '[i]n one or two of the cases' cited in Seton (identifying the *Williams* case and *Hopkinson v Lord Burghley* (1867) 2 LR Ch App 447 specifically), 'an undertaking was required to be given to the court' before production was ordered.[28] He regarded this as authority for the coexistence of implied and express undertakings (as, indeed, he had to do, in order to make sense of Seton's description of the *Williams* case). Yet, *Williams* involved only an express undertaking, while the *Hopkinson* case concerned quite a different issue. There, a club member sued club trustees and committee members taking out a summons for production of documents. The defendants refused to disclose two letters written in confidence by a non-member to the club secretary. At issue was whether the sender's refusal to permit disclosure should prevent the letters from being produced in the litigation. While the Court of Chancery ordered production, to placate the sender this was made conditional on the plaintiff undertaking not to publish the letters or use them 'for any collateral object'.[29] The case did not concern the obligations owed inter partes when litigants receive disclosed documents from others. It turned on whether litigants lawfully may give disclosure of confidential (non-privileged) communications received from third parties under a promise of confidence, and the extent to which letter-writers retain property

[28] At 470.
[29] At 448.

rights over their correspondence. Insofar as the case does touch upon subsequent use, there is no hint of any implied undertaking doctrine.

This contrasts with Jenkins J's acceptance in the *Alterskye* case of overlapping express and implied undertakings. Jenkins J offered no reason for why an express undertaking may be warranted to supplement the already all-embracing implied undertaking. One of his grounds for rejecting the express undertaking sought by the defendant (which was drafted in very general terms) was that it would be 'very difficult to formulate without embarrassing the party from whom it is required, affecting the proper conduct of the proceedings, and opening the door to endless wrangles whether it has been broken or not'.[30] Ironically, as subsequent case law has shown, the equally general implied undertaking doctrine suffers from precisely the same procedural afflictions.[31]

3 The *Distillers* case

Following the *Alterskye* case, the implied undertaking doctrine next received judicial consideration in 1975 with the *Distillers* case. Again, its historical authenticity remained unscrutinised. Distillers was the UK marketer of thalidomide. Sixty-two parents of children, and children themselves, harmed when women took thalidomide during pregnancy brought mass personal injury proceedings against the company. The claimants' solicitors obtained copies of around 10,000

[30] At 471.
[31] *Eagles* 300.

documents from Distillers. They passed them to one Dr Phillips, an expert adviser. Secretly, Dr Phillips agreed to sell the documents to *The Times* newspaper. After the action settled, Distillers' solicitors wrote to Dr Phillips asking him to undertake not to publish any of the documents. He agreed, but without divulging his prior arrangement. Three years later, after Dr Phillips's death, *The Times* published a series of articles criticising Distillers and the terms of settlement. Distillers sued the newspaper for contempt of court. When *The Times* sought to publish a further article, Talbot J issued an interlocutory injunction prohibiting it.

Talbot J held (inter alia) that there is an 'implied undertaking' on disclosure that documents will not be used for any collateral or ulterior purpose. It binds both litigants and 'any person into whose hands [the documents] come'. For, he held: 'Those who disclose documents on discovery are entitled to the protection of the court against *any use* of the documents otherwise than in the action in which they are disclosed'.[32] On the facts, *The Times* failed to raise any countervailing public interest that was, in Talbot J's view, sufficiently strong to outweigh 'the public's interest in the need for the proper administration of justice, to protect the confidentiality of disclosure of documents'.[33] Accordingly, injunctive relief was granted.

Talbot J did not explore the origins of the implied undertaking doctrine or discuss it at any length. He simply paraphrased, succinctly

[32] At 621 (emphasis added).
[33] At 625.

and without comment, the submissions of claimants' counsel on point. This is understandable. The case did not turn on the implied undertaking; or even on Dr Phillips's express undertaking. The documents already had been divulged improperly, through sale, to a third party. The injunction was granted to prevent further publication. As in the *Williams v Prince of Wales Life* case, the injunction was, in effect, a stand-alone remedy against a proposed improper use. Its availability was independent of whether that use resulted from breach of any undertaking (implied or express).[34] Given this fact, the reliance placed by later courts on Talbot J's over-generalised account of the scope of the implied undertaking doctrine—as embracing *any* use of disclosed documents 'not directly connected with the action in which they are produced'[35]—seems somewhat precarious.

In implicitly adopting and approving counsel's submissions concerning the implied undertaking, Talbot J referred to 'two cases and a passage in *Bray on Disclosure* (1855) [*sic*], p. 238',[36] by way of authority. Those 'two cases' were *Alterskye* and *Williams*. As noted above, neither supports the doctrine. The Bray extract similarly is problematic. As with the Seton extract relied on in the *Alterskye* case, the Bray passage is not set out in the *Distillers* judgment. It does, however, appear in abridged form in Lord Denning MR's judgment

[34] Breach of the implied undertaking formed the basis for the contempt proceedings within which Distillers' interlocutory injunction application was made. However, Distillers could have sought injunctive relief whether or not proceedings were pending, under the court's general power: Supreme Court Act 1981, s 37.
[35] At 621.
[36] At 618.

in the *Riddick* case.[37] With its case references restored, the complete passage reads as follows:[38]

> A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: *Williams v Prince of Wales, &c Co* 23 Beav. 336, p 338: nor to use them or copies of them for any collateral object: *Richardson v Hastings*, 7 Beav. 354: *Hopkinson v Burghley*, LR 2 Ch. 447: ... If necessary an undertaking to that effect will be made a condition of granting an order: see the form in Seton, p 139....

Once again, the passage affords no historical evidence for the implied undertaking doctrine. Its reference to an undertaking being made a condition of production only '[i]f necessary' could be read as suggesting that an implied undertaking already operated that might, if particular need were shown, be supplemented with an express one. What such a particular need might be is not made clear: perhaps a strong risk of collateral use in the circumstances; or special need for certainty as to what uses fell within the category of 'collateral object'. But the passage equally well can be read as saying that courts would restrict the use of disclosed documents—through requiring express undertakings—only if a positive need for judicial intervention were shown. The latter interpretation accords with two further cases cited by Bray immediately after the extract set out above: *Richardson v Hastings* (1844) 7 Beav 354, 49 ER 1102 and *Tagg v The South Devon Railway Co* (1849) 12 Beav 151, 50 ER 1017.

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[37] 38 above.
[38] *Bray* 238.

In the *Richardson* case, a club member brought a bill to account in Chancery against two club committee members. The plaintiff accused the defendants of selling club property without authority and pocketing the proceeds. The defendants objected to producing the club's documents, as the plaintiff was a solicitor and attorney for several club creditors for whom he had instituted proceedings at law against the club. The defendants feared that the plaintiff's real object was not to use the documents in his equitable suit, but to assist the club creditors in their actions at law by securing evidence of their demands against the club. (Discovery was not available in the proceedings at law.[39]) Upon the plaintiff volunteering to undertake not to use the documents for 'any such collateral object', Lord Langdale MR ordered production conditional 'on his undertaking to that effect'.[40]

The *Richardson* decision is the earliest reported case to feature any form of undertaking restricting the use of information disclosed during litigation.[41] The undertaking was both express and voluntary. Lord Langdale MR made no appeal to any pre-established rule, norm, convention or practice of requiring undertakings, either implied or express. His judgment bears all the hallmarks of a novel, equitable remedy being awarded, consensually, to redress a newly encountered procedural pitfall. This view gains support from Bray's reference

[39] 59 below.
[40] At 356.
[41] Prior to *Richardson v Hastings*, no digest of cases mentions the topic of collateral use. The first reference (to *Richardson*) appears in M Chambers (ed) *Analytical Digest of the Cases Published in the Law Journal Reports 1835–1840* (EB Ince London 1843).

in the extract quoted above to 'the form in Seton, p 139' by way of guidance for those wishing to seek undertakings.[42] That form[43] was a verbatim transcript of the undertaking required in the *Hopkinson v Lord Burghley* case, which itself closely followed the undertaking given in the *Richardson* case. The fact that both *Hopkinson* and Seton drew so heavily on the language used in *Richardson* indicates the latter's importance as the initiator of, and authoritative source for, undertakings against subsequent use of disclosed information.

The absence of any general rule against subsequent use at this time (the mid-19th century) is demonstrated further by *Tagg v South Devon Rly*, the fourth case mentioned by Bray. This was the next earliest authority after the *Richardson* case to concern subsequent use. A shareholder brought a bill to have a question decided as to the right of the defendant company's directors to create preference shares. A simultaneous action at law was pending relating to the same matter. The defendant resisted unconditional production of documents for that reason. It asked the court to prevent the plaintiff from using the documents for any collateral purposes, as in the *Richardson* case. But, in direct contrast to his ruling in *Richardson v Hastings* five years earlier, Lord Langdale MR refused. As the entirety of Beavan's report reads, he held: 'I cannot make any restriction of the sort. No case is made for it.'[44] Whether 'no case' was made because there was

[42] *Bray* 238.
[43] RH Leach, FGA Williams and HW May *Seton's Forms of Decrees, Judgments, and Orders* (4th edn Stevens & Sons London 1877). This is the first edition of Seton to incorporate any form for an 'undertaking not to use [disclosed documents] for any Collateral Purpose' (at 139). The form reappears in subsequent editions.
[44] At 151.

no concrete danger of collateral use (as Lord Langdale MR did not regard use in separate court proceedings as objectionable), or because of some other reason, cannot now be known.[45] What can be said is that, as at 1849, not even express undertakings routinely were imposed.

It is unfortunate that the *Tagg* decision was not mentioned in either the *Distillers* or *Riddick* judgments. This may be because it was unreasoned. Yet, the outcome remains significant. In particular, is important to reflect that, when *Tagg v South Devon Rly* was decided, the action at law was regarded as entirely separate from the suit at Chancery; whereas, after the Judicature Acts of 1873 and 1875, the two would have represented separate remedies within a single set of proceedings. This makes the fact that subsequent use was allowed in the *Tagg* case all the more striking. Knowledge of that case was available to both the *Distillers* and *Riddick* courts. It was cited in argument by counsel in *Distillers*. In both *Distillers* and *Riddick* the judges explicitly relied on Bray, which contains a brief but accurate summary of the *Tagg* case beginning on the very same page as the passage cited with approval in both cases.[46] *Tagg* and *Riddick* both concerned subsequent litigation use. Moreover, together with the other three 19th century authorities mentioned in Bray (the *Williams*, *Richardson* and *Hopkinson* cases), *Tagg* materially contradicts the implied undertaking doctrine. It especially undermines Talbot J's

[45] Lord Langdale was a great proponent of discovery and an opponent of any impediment to it, including privilege.
[46] *Bray* 238–9.

expansion of the doctrine in the *Distillers* case to embrace 'any use' of disclosed documents, and the *Riddick* bench's application of that expanded doctrine globally to condemn subsequent litigation use.

4 The *Riddick* case

In 1969, Mr Riddick was dismissed from his position as a shift engineer at TBM's millsite. According to TBM, the responsibilities were too much for him. Security guards escorted him from the millsite in a manner usually reserved for those guilty of serious misconduct. Riddick sued TBM for wrongful arrest and false imprisonment. The case settled, but Riddick remained deeply aggrieved. Representing himself, he sued TBM for defamation based on the manner of his dismissal. The case was struck out as being res judicata, since it covered the same matters as the original, settled action. However, in his Court of Appeal judgment affirming the striking out, Megaw LJ intimated that Riddick may have grounds to sue for defamation based on an internal TBM memorandum. That memorandum, written six weeks after Riddick's dismissal to explain the circumstances surrounding it, described Riddick as being 'not up to the job', 'highly strung, unsure of himself, and likely to be hysterical'. Unbeknown to Megaw LJ, Riddick had acquired the memorandum only through disclosure in the original action.

Spurred on by Megaw LJ's suggestion, Riddick commenced a third action against TBM. It was tried in 1976. The jury awarded

him £15,000.[47] TBM appealed, arguing (inter alia) that basing a subsequent action on a document obtained via disclosure in previous proceedings constitutes impermissible collateral use. The Court of Appeal agreed. The bench, comprising Lord Denning MR, Stephenson LJ and Waller LJ, held that Riddick's reuse of the memorandum was an abuse of process. It violated the implied undertaking given by all those who receive disclosed documents not to use them except for the purposes of the case at hand.

As well as epitomising modern judicial assumptions about the historicity of the implied undertaking doctrine, Lord Denning MR's classic *Riddick* dictum (quoted above[48]) is noteworthy in two additional respects. First, as observed above, it erroneously identifies Bray as an authority for the doctrine. Second, its sweeping claim that, '[s]ince [the time of Bray] such an undertaking has always been implied', also is incorrect. The *Alterskye* case in 1948 was the first reported case after Bray was published in 1885 to deal with undertakings against subsequent use. It was also the first case ever to enunciate the implied undertaking doctrine. It does not follow that undertakings had 'always been implied' since 1885. There is simply no record of such a practice.[49] Litigants being what they are, and the disclosure process being what it is, it seems extraordinarily improbable that, in

[47] The size of the award may have reflected a jury misconception that Riddick was entitled to damages for having been unemployed since his dismissal seven years earlier. As TBM's memorandum was written after Riddick's dismissal, such a belief would have been incorrect.

[48] 38 above.

[49] Cf *Phipson* 595, suggesting (without providing any evidence except *Alterskye*) that implied undertakings gradually became standard practice during the 20th century.

the 63 years from 1885 to 1948, not one party should have sought to question either the imposition of the implied undertaking or its scope. Such uncharacteristic restraint is belied by the wealth of cases since 1948 in which such matters have been hotly disputed—often to the Court of Appeal or beyond.[50]

Aside from his references to Bray and the *Alterskye* case, Lord Denning MR cited only one further authority for the implied undertaking doctrine in his *Riddick* judgment: the *Distillers* case. He opined that 'the modern authorities are well discussed by Talbot J in *Distillers* . . . and I would accept all he says, particularly as to the weighing of the public interests involved'.[51] Given that the authorities are neither modern nor particularly well discussed (for reasons explored above), Lord Denning MR's judgment contains—and therefore provides—no compelling foundation for the doctrine's presumed antiquity.

Both Stephenson and Waller LJJ in their *Riddick* judgments cited the *Richardson v Hastings*, *Hopkinson v Lord Burghley*, *Alterskye* and *Distillers* cases as authority for the doctrine. Again, as already shown, none of these cases in fact supports it. The final authority cited in *Riddick*, by Waller LJ alone, is *Reynolds v Godlee* (1858) 4 K&J 88, 70 ER 37. Waller LJ simply named *Reynolds v Godlee* as one of several authorities supposedly supporting his proposition that 'discovery may be refused in an action unless the opposite party gives an

[50] 15 n 31, 26 above.
[51] At 896.

undertaking that the document will not be used for any purpose other than the action then proceeding.'[52] Unfortunately, this invocation of the *Reynolds* case is inaccurate. That case concerned a three-way dispute over property ownership. The plaintiff and a third party, one Mr Head, had a common interest in contesting the defendant's claim to the property. If the plaintiff succeeded in his action against the defendant, then a further question would arise between him and Head as to who had the better title. In support of his case against Head, the plaintiff obtained production of an opinion of counsel procured by a common ancestor through whom they both claimed. Subsequently, the defendant sought production of the document from the plaintiff. Initially, in resisting the motion, the plaintiff relied solely on Head's privilege in respect of the document. However, Head was not a party and had not been served with notice of motion. When the plaintiff changed his defence to rely instead on his own privilege, Page-Wood V-C upheld his right to withhold the document on that basis.

Although the case was decided on that ground, in the course of considering Head's privilege Page-Wood V-C made important obiter dicta observations about subsequent litigation use of disclosed documents. These are considered further below.[53] For present purposes, one is apposite:[54]

> If. . . the rule be this, that, where documents have been produced in obedience to an order of this Court, the Court has a right to say to

[52] At 910.
[53] 65–67 below.
[54] *Reynolds v Godlee* (1858) 4 K&J 88, 92.

> the person who has obtained their production: 'Those documents shall never be used by you except under the authority of the Court,' then the course of proceeding would be intelligible and safe, and no inconvenience would ensue to either party. With such a rule, the course taken by the Court in *Richardson* v *Hastings* is perfectly consistent.

Not only is this formulation of the rule against improper use perfectly consistent with the *Richardson* case, it also accords with the absence of any implied obligation in the *Tagg v South Devon Rly* case. It suggests that, as at 1858, no general, implied, global duty to refrain from subsequent use existed. Instead, the courts (of equity at that time) had a 'right' to restrain subsequent use if they saw fit. Historically, judicial intervention—by way of injunctions or express undertakings—was required. Contrary to the modern authorities, nothing was implied.[55]

C THE MEANING OF 'IMPROPER' USE

1 Introduction

In the *Riddick* case, the Court of Appeal prevented reuse of a memorandum obtained through disclosure to found a subsequent defamation action. This was because, the Court held, using documents disclosed in one action to commence another action contravenes the implied undertaking doctrine. That doctrine precludes 'any use' of disclosed documents beyond the purpose of the original

[55] For a case predating *Riddick* by only a few years which indirectly implies the absence of any rule against subsequent (litigation) use, see *Hardy v Elphick* [1974] 1 Ch 65 (CA).

proceedings.[56] Subsequent litigation use falls within the all-subsuming category of 'any use'. Inexorably, then, it must be illegitimate.

At the heart of the Court's reasoning (and now CPR 31.22) is a presumption that using disclosed documents for purposes other than the original litigation intrinsically is improper. Disclosed documents should be used only for the purpose for which their disclosure was compelled; namely, prosecuting the case at hand. According to this viewpoint, there are no legally relevant distinctions between different forms of subsequent use. All uses beyond the parameters or purposes of the original case are equally objectionable, simply *because* they are beyond those parameters or purposes. Evaluating their relative virtues or vices is irrelevant. Thus, maliciously selling another's highly confidential, embarrassing personal papers as tabloid fodder, and reusing non-sensitive documents in a further action brought to vindicate legal entitlements before a court of law, are seen as equivalent.

The presumption that subsequent use generically is undesirable conflicts with 19th century authority in two key respects. First, historically, subsequent uses were not universally condemned. Only two specific forms of reuse were singled out by the courts as being 'improper': reuse flowing from abuse of the disclosure process; and (more commonly) publication purely for private gain. The courts' treatment of subsequent litigation use is especially illuminating in this context. While imposing restrictions over publication in several

[56] At 896, 901, 911, citing the *Distillers* case 621.

cases, judges took special pains to ensure that subsequent litigation use thereby would not be curtailed. This strongly suggests that courts did not regard all forms of reuse as being equally objectionable.

Second, in differentiating between proper and improper forms of reuse, judges traditionally examined the propriety of different forms of reuse on their merits, in the light of the circumstances and competing interests at stake. By contrast, under the modern rule what is deemed to be 'improper' is dictated by the courts' definitions of the scope or 'purpose of the proceedings' in which disclosure is made. Thus, the meaning of 'improper' has been recast radically. Rather than denoting forms of use seen as intrinsically objectionable, the term today encapsulates any use outside the original proceedings, whatever its potential benefits may be.

2 Subsequent uses traditionally considered 'improper'

As noted above, *Richardson v Hastings* was the first reported case in which a court restricted subsequent use of disclosed documents.[57] The plaintiff (a solicitor and attorney for creditors of the defendant club in contemporaneous proceedings at law) voluntarily undertook not to reuse documents in the common law actions. At first blush, this case seems to suggest that subsequent litigation use was frowned upon. Its outcome was to prevent such reuse. But closer inspection reveals that the true mischief which Lord Langdale MR's order sought to counteract was something quite different.

[57] 48–51 above.

The *Richardson* case was decided in 1844 before law and equity were consolidated, a process that began in earnest during the 1850s and culminated in the Judicature Acts of 1873 and 1875.[58] As at 1844, litigants generally were free to seek discovery by equitable bill in chancery in aid of common law proceedings. Indeed, it was not uncommon for litigants to combine actions at law and suits in Chancery to secure collateral advantages.[59] But in the *Richardson* litigation (which involved actions for recovery of debt) such discovery was not permitted. To require the defendant debtor to furnish his creditors with evidence of their claims would have offended against the common law maxim: 'No one is bound to arm his adversary against himself'.[60] It was this 'collateral object'—illegitimately bringing Case A solely to aid Case B by circumventing a procedural barrier within Case B—that Lord Langdale MR's order was directed against. The fact that subsequent litigation use was at issue was not of concern. What was of concern was the need to stop the plaintiff from benefiting from abusing the court's process by seeking discovery with unclean motives.

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[58] H Ayckbourn *The Jurisdiction and Practice of the Supreme Court of Judicature* (Wildy & Sons London 1874) 133–4. For detailed accounts of the history of disclosure before and after the Judicature Acts, see: WW Kerr *A Treatise on the Law of Discovery* (William Maxwell & Son London 1870); JP Taylor *A Treatise on the Law of Evidence, as Administered in England and Ireland* (7th edn A Maxwell & Son London 1878) and previous editions; WS Sichel and W Chance *The Law Relating to Interrogatories, Production, Inspection of Documents and Discovery* (Stevens & Sons London 1883).

[59] See, eg, the early history of *Wright v Doe d Tatham*, a hearsay case which began as an equitable suit and finished up as a common law claim: *Wright v Tatham* (1838) 5 Cl&F 670, 670–2; 7 ER 559, 559.

[60] SL Phipson *The Principles of the Law of Evidence by the late WM Best* (12th edn Sweet & Maxwell London 1922) 546.

Two further elements support this conclusion. The first is comparing the outcome in *Richardson* with that in the *Tagg v South Devon Rly* case,[61] the next earliest case to involve subsequent use. There, Lord Langdale MR refused to require an express undertaking to preclude reuse in contemporaneous proceedings at law. There was, he said, '[n]o case . . . for it'.[62] Had subsequent litigation use (or, indeed, subsequent use generally) been regarded as objectionable per se, the outcomes in the *Tagg* and *Richardson* cases should have been the same. That they were not demonstrates that the *Richardson* case is not authority for the proposition that subsequent litigation use per se historically was considered 'improper'. The second element is *Temperley v Willett* (1856) 6 El&Bl 380, 119 ER 907.[63] There, the plaintiff brought a spurious action against a third party purely to get disclosure of certain title deeds crucial to his real suit against the defendant. The court held that its power to order inspection of documents (by this time conferred on the superior common law courts by statute[64]) should be exercised only to assist a bona fide suit. As Lord Campbell CJ put it: 'It would be a great abuse . . . if actions might be brought merely to obtain evidence in other actions against

[61] 50 above.
[62] At 151.
[63] Strictly speaking, the case did not involve subsequent litigation use being precluded. Disclosure was stopped before the opportunity for subsequent use could arise.
[64] Act for the Amendment of the Law of Evidence (Lord Brougham's Act) 1851 (14 & 15 Vict, c 99), s 6, as enlarged by the Common Law Procedure Act 1854, s 50.

third persons'.[65] As in the *Richardson* case, the court acted to prevent abuse of its disclosure process.[66]

Such abuse is relatively uncommon.[67] In most cases where subsequent use is proposed, disclosure itself will have been obtained bona fide to help prosecute a genuine case at hand. This is true of the balance of the 19th century authorities on point. Significantly, in all of them, only one form of subsequent use ever was precluded—publication of confidential disclosed documents to strangers. In *Williams v Prince of Wales Life*,[68] the first such case, it was highly probable that the plaintiff-shareholder would make prejudicial public statements about the defendant-insurer following disclosure. So, production was made conditional upon him undertaking 'not to make public or communicate to any stranger to the suit the contents

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[65] At 381 n 101. See JP Taylor *A Treatise on the Law of Evidence, as Administered in England and Ireland* (6th edn W Maxwell & Son London 1872) vol 2, 1529. Today, greater scope is permitted for non-party disclosure. See CPR 31.17, CPR 25.1(j) and CPR 31.18, preserving the procedure established in *Norwich Pharmacal Co v Customs & Excise Comrs* [1974] AC 133 (HL) as extended in *A v Company B (P v T Ltd)* [1997] 1 WLR 1309.

[66] There is an interesting factual parallel between this case and *D v NSPCC* [1978] AC 171 (HL) (false child abuse allegation made by informant to child protection society). In both, the claimant sued someone else, hoping to obtain information through disclosure necessary to pursue the real defendant. In the *NSPCC* case, the claimant already had tried and failed to secure the information via a direct action for disclosure. The House of Lords again refused disclosure, on broad public interest immunity grounds. However, while the claimant's action was not considered abusive, it seems reasonable to suspect that disapproval of her attempt to secure disclosure by a sidewind, as it were, may have influenced the outcome. Cf *Cassidy v Hawcroft* (CA 27 July 2000) (no abuse in obtaining production of a letter referred to in an affidavit in order to found subsequent defamation proceedings: production a legal entitlement, so motive irrelevant).

[67] For modern instances of subsequent litigation use being precluded for similar reasons, see: *CBS Songs Ltd v Amstrad Consumer Electronics plc (Amendment & Disclosure)* [1987] RPC 417 (CA); *Milano Assicurazioni SpA v Walbrook Insurance Co Ltd* [1994] 1 WLR 977.

[68] (1857) 23 Beav 338. See 41 above.

of such documents, and not to make them public in any way'.[69] As the first (non-abuse) case to address disclosure subsequent use, *Williams* offered later courts an unmistakable statement of the key mischief to be prevented: litigants publishing or otherwise divulging others' confidential disclosed documents. It also left no doubt as to why such conduct was 'improper': because of the harm to document-producers' legitimate interests.[70]

Protection against publication is particularly important where documents are confidential or contain sensitive information, as in the *Williams* case and, indeed, all subsequent 19th century authorities in which subsequent use was restricted. In *Drake v Symes* (1859) John 647, 70 ER 578, Page-Wood V-C focused even more closely on preventing publication by expressly limiting his order to barring publication. Again, an insurance company was sued by its shareholders. The company sought to seal up portions of its books identifying its debtors. Page-Wood V-C declined to allow this. He ordered production, 'subject only to the restriction that the plaintiff should not be at liberty to publish the information obtained from them'.[71] Had the books revealed grounds to sue any of the company's debtors, the shareholders could have commenced litigation relying on what they found in the books without breaching the order. Indeed, in *Murray v Clayton* (1872) 15 LR Eq 115, where similar circumstances arose 13 years later, Sir James Bacon V-C refused to allow the

[69] At 338.
[70] See also *Rank Film v Video Information* [1982] AC 380 (HL) 442.
[71] At 651.

defendants to withhold customer details on the ground that disclosure might lead to litigation against them, thereby harming the defendants' business. As he observed, the risk of subsequent litigation was:[72]

> . . . a consideration to which I can in no degree attend. . . [The defendants] cannot excuse themselves, or avoid the disclosure which is asked, because of any consequences which may ensue from their wrongdoing. . . . [I]f, by reason of this suit, the Plaintiff should have any remedy against persons not parties to this suit, I cannot by anticipation interfere so as to prevent him taking any proceedings he may be advised to take.

Both authorities implicitly condone subsequent litigation use of disclosed documents; notably, in circumstances where the parties to the two proceedings would differ. A third case offers explicit support. *Saccharin Corp v Chemical & Drugs Co* [1900] 2 Ch 556 (CA) involved alleged patent infringements. The defendant was in voluntary liquidation. The plaintiff's only hope for obtaining a remedy lay in suing the defendant's customers. The defendant argued that using its disclosed customer information for that purpose amounted to an abuse of process. The Court of Appeal disagreed, favouring the plaintiff's argument that 'there is nothing oppressive in proceeding against a wrong-doer'.[73] As Lord Alverstone MR put it, the plaintiff's intention to use the information to bring subsequent proceedings was 'not . . . use . . . for an improper purpose'.[74]

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[72] At 115. See also *Tetley v Easton* (1856) 18 CB 643, 139 ER 1522. Cf *Carver v Pinto Leite* (1871) 7 LR Ch App 90 and *Heugh v Garrett* (1975) 44 LJ Ch Rep 305, where the defendants were permitted to seal up customers' names. Unlike in the *Murray* and *Tetley* cases, such information was not material to the plaintiffs' cases. They could have used it only to prejudice the defendants in their trade.

[73] At 558.

[74] At 559. See also *Prescott* 491 n 2.

These cases indicate that, historically, English law did not preclude all forms of subsequent use, and especially not subsequent litigation use. Further support derives from the *Hopkinson v Lord Burghley* and *Reynolds v Godlee* cases. In *Hopkinson*,[75] the court differentiated between publication of confidential disclosed information (improper), and use of such information in court (proper). While requiring the defendant club to produce two private letters written by a non-party, the court made the plaintiff undertake 'not to use the documents, or any copies of them, for any collateral object'.[76] As Lord Cairns LJ explicitly stated, the term 'collateral object' did not include use in litigation. According to one report of the case,[77] he put it thus:

> The receiver of a letter has a right to use it for all lawful purposes; and if there be one purpose more lawful than another, it is to produce the letter in the administration of justice. There should, however, be an undertaking on the part of the [party receiving disclosure] not to publish the letters.

Strictly speaking, *Hopkinson* does not concern disclosure subsequent use. Nevertheless, Lord Cairns LJ's analysis applies equally well to it. In another report of the case, his dictum is recorded thus:[78]

> [The receiver of a letter may use it] for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used, it is the production of it in a Court of justice for the furtherance of the ends of justice.

[75] 44 above.
[76] At 448.
[77] At 448–9.
[78] 36 LJ Ch 504, 504.

Whether disclosed documents are used in the original proceedings or in subsequent litigation, this rationale for allowing their use in court (that it furthers 'the administration of justice') applies equally well. The crux of the decision is that using documents in judicial proceedings for the purposes of doing justice is materially different to publishing them purely for private gain.

Applying this analysis to subsequent litigation use is not merely a logical extrapolation. In the *Reynolds v Godlee* case,[79] decided nine years earlier, Page-Wood V-C expressly categorised subsequent litigation use as being both legitimate and desirable. The defendant sought production of an opinion of counsel which the plaintiff had obtained by court order from a non-party (Head) with whom he shared a common interest. Before the plaintiff asserted his own right to privilege, he initially sought to resist production by relying on Head's privilege. His argument involved an ingenious extension of the ruling in *Enthoven v Cobb* (1852) 5 DeG&Sm 595, 64 ER 1259.[80] There, two plaintiffs had commenced actions based on debentures against the same defendant in respect of similar transactions. One plaintiff's attorney lent his case and opinions to the other. The Court of Chancery refused the defendant's application for production. Inter alia, it held that, where a person obtains documents 'in confidence and for [a] limited and restricted purpose', he or she cannot be compelled to divulge them except for that purpose.[81]

[79] 55 above.
[80] Affirmed on appeal: *Enthoven v Cobb* (1852) 2 DeG,M&G 632, 42 ER 1019.
[81] At 634.

The plaintiff's counsel in *Reynolds v Godlee* contended that it followed *a fortiori* from *Enthoven* that, where documents are produced not in confidence or voluntarily, but upon compulsion and under court order, the like rule must apply with even greater force. Such documents should not be susceptible to orders for production for use in court. Page-Wood V-C's rejection of this argument is illuminating. His principal objection is that such a rule would preclude subsequent litigation use:[82]

> It appeared to me that this was not only a novel doctrine, but one which would be attended with very inconvenient consequences. Information obtained in one suit would be protected in another. . . . Such a proposition is certainly not covered by authority, and I should be sorry to introduce a rule which might lead to so much inconvenience.
>
> If, on the other hand, the rule be this, that, where documents have been produced in obedience to an order of this Court, the Court has a right to say to the person who has obtained their production: 'Those documents shall never be used by you except under the authority of the Court,' then the course of proceeding would be intelligible and safe, and no inconvenience would ensue to either party. With such a rule, the course taken by the Court in *Richardson* v *Hastings* is perfectly consistent.

Two features of this extract warrant mention. The first is the observation that protecting information obtained in one suit from use in another was, as at 1858, 'certainly not covered by authority'. Page-Wood V-C deprecated the 'inconvenience' that would result from introducing a rule automatically precluding such reuse. The second notable feature is the statement that courts had a 'right' to assume

[82] At 91–2. Strictly speaking, Page-Wood V-C's comments are obiter, as ultimately the case was decided on the plaintiff's own privilege. This does not diminish the power of his defence of subsequent litigation use, or his observations about the state of the law at that time.

'authority' over subsequent use, as was exercised in the *Richardson* case. This contradicts the modern presumption against all forms of subsequent use beyond the litigation at hand. The very purpose of the 'right' was to preserve and facilitate subsequent use; subsequent litigation use in particular.

It is unclear precisely how Page-Wood V-C thought that the 'right' should operate. He may have intended that parties never should be able to reuse documents unless expressly permitted to do so. This is the interpretation taken by Bray, according to whom the effect of the *Reynolds* decision is that disclosed documents 'cannot be used [subsequently] except under the authority of the court . . . It would be very inconvenient if such an authority in the court did not exist, so as for instance to enable evidence obtained in this way to be used in any subsequent suit'.[83] Alternatively, Page-Wood V-C's dictum can be read as implying that the court's authority to supervise subsequent use was discretionary, to be exercised only when, as Lord Langdale MR put it in his *Richardson* judgment, judges 'should think it right'.[84] Under this interpretation, if a court (and existing case law) were silent, parties would be free to reuse disclosed documents. However, a court could step in where it saw fit and direct that subsequent use not be made without express permission. Rather than permission having to be obtained in every case, under the latter regime judicial supervision would arise only if a judge perceived a positive need to enter a protective order.

[83] *Bray* 239. See also the *Halcon* case 121.
[84] (1844) 7 Beav 354, 356.

Subsequent 19th century case law (especially the *Tagg v South Devon Rly* case) suggests that courts historically followed the latter interpretation.[85] Subsequent use was restricted only where concrete need was shown—in practice, a danger of publication. Interestingly, this approach approximates US federal procedure under R26(c) Fed R Civ P. There, subsequent use of discovered documents comes under judicial scrutiny only if 'good cause' warrants the entry of a protective order to preclude or limit subsequent use.[86] By contrast, in England the reverse procedure has operated since the implied undertaking doctrine was inaugurated. Two exceptions aside, subsequent use cannot be made of disclosed documents in England unless authorised by a court.[87]

Both the *Alterskye* and *Distillers* cases—the first two of the trilogy of 20th century cases that recast the rule governing subsequent use—also concerned publication. However, while they introduced the 'any use' formulation of 'improper' use, Talbot J's judgment in the *Distillers* case acknowledged that not even widespread publication in the mass media necessarily or invariably is 'improper'. As he observed, there may arise 'a public interest which is so high that it overrides the public interest which protects documents disclosed on discovery'.[88] On the facts, he did not consider the public's 'great interest' in receiving information about the thalidomide story to

[85] Modern cases in which subsequent litigation use has been placed under judicial supervision include *Tate Access Floors Inc v Boswell* [1991] Ch 512 and *Re Bank of Credit and Commerce International SA (No 9)* [1994] 1 WLR 708.
[86] 272 below.
[87] CPR 31.22(1)(a)–(c).
[88] At 621.

be of 'greater advantage to the public' than maintaining disclosure confidentiality 'for the proper administration of justice'.[89] But the possibility remained open that, in an appropriate case, the balance of public interest could justify other uses, including publication. If anything underscores the fact that, prior to the *Riddick* case, subsequent use was not universally, automatically condemned, surely this must be it.

3 The modern meaning of 'improper' use

As the introduction to this chapter observed, 19th century authorities used various terms to denote illegitimate forms of subsequent use without proffering any clear definitions. As Jenkins J lamented in the *Alterskye* case, 'there is room for considerable argument what a collateral or ulterior purpose is'.[90] Yet, while the terminology may have been vague, the court's approach was tolerably clear and consistent. Judges determined the propriety of proposed subsequent uses by evaluating them on their merits in the light of the circumstances and competing interests at stake. So, making confidential documents public for private gain could be precluded[91] while, at the same time, subsequent litigation use could be preserved.[92]

[89] At 625.
[90] At 470.
[91] eg, *Williams v Prince of Wales Life* (1857) 23 Beav 338.
[92] *Tagg v South Devon Rly* (1849) 12 Beav 151.

This approach gave the law valuable flexibility. In the *Distillers* case, for example, while authorities for over a century uniformly had prevented publication, Talbot J still was able to consider whether, on balance, publishing the disclosed documents in the circumstances of the case might be justified. He considered the merits of the use proposed, weighing up the relevant competing interests—those favouring publication (principally, the public's strong interest in receiving information about thalidomide) and those favouring maintaining confidentiality (public and private interest rationales for keeping disclosed documents secret).[93]

Extrapolating from the pre-*Riddick* case law, one can derive a plausible summary of what the courts traditionally viewed as 'improper' subsequent use.[94] The term covered self-serving use by litigants of others' disclosed documents, for purposes extraneous to the litigation at hand, in violation of the rights and interests of document-producers (or third parties[95]), and where no overriding public interest or public policy justification warranted such violation. The courts' traditional approach (of which the *Distillers* case was the final exemplar) recognised that reusing disclosed documents for purposes unconnected with the original litigation—such as publishing or disseminating them—may well be proper depending upon the competing interests at stake. After the *Riddick* case, however, the

[93] At 625.

[94] Extrapolation is necessary, as the early decisions are neither fully reported nor closely reasoned: *Gibbons* 321 n 11.

[95] eg, detriment to the interests of third parties identified in documents: *Drake v Symes* (1859) John 647, 70 ER 578; *Saccharin v Chemical & Drugs* [1900] 2 Ch 556 (CA).

approach fundamentally changed. Instead of evaluating the propriety and desirability of proposed forms of reuse given the circumstances and competing interests at stake (the traditional focus), judges tied the meaning of 'improper use' to the purpose of the proceedings in which disclosure was made. For the first time, uses serving purposes other than the original litigation became presumptively illegitimate *for that reason alone*.

The seeds for this modern shift in the test for distinguishing between proper and improper forms of subsequent use were sown in the *Alterskye* and *Distillers* cases. In *Alterskye* Jenkins J accurately summarised the 19th century cases as holding that documents may not be used 'for, in effect, any ulterior or collateral purpose'. But he then expanded the prohibition to cover 'any given use . . . [that] might be said to be ulterior or collateral in its purpose *or other than reasonably necessary for the conduct of the action*'.[96] The latter alternative marked a significant departure from previous authority. For the first time, the scope of proper use was linked to the conduct of the immediate action. The reasonable necessity standard added a further element of restrictiveness. Jenkins J cited no authority for this formulation of the test—nor could he, as none existed.

In referring to the 'purpose' of the use proposed, and 'conduct of the action', Jenkins J laid the foundations for the modern reinvention of the test. In the *Distillers* case, Talbot J built on them, stating: 'Those who disclose documents on discovery are entitled to

[96] At 470 (emphasis added).

the protection of the court against any use of the documents otherwise than in the action in which they are disclosed'; such use being 'improper'.[97] In the *Riddick* case, the Court of Appeal accepted this as an accurate statement of the subsisting law. It even backdated it, claiming (erroneously) that traditional authorities too had stipulated that disclosed documents should 'not be used for any purpose other than the action then proceeding'.[98] As Lord Denning MR put it (citing *Distillers* as authority): 'A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose'.[99]

4 The 'purpose of the proceedings' test

The modern approach to identifying 'improper' forms of use is embodied in CPR 31.22 as the 'purpose of the proceedings' test. That the test is misconceived becomes apparent when one attempts to define its content. On its face, CPR 31.22(1) appears to lay down a straightforward test—acceptable uses of disclosed documents are those falling within the 'purpose of the proceedings' in which disclosure is made. Yet, this phrase is opaque. Terms such as 'purpose' and 'the proceedings' carry a wide range of possible meanings. They

[97] At 621.

[98] At 910. See also 896, 901. Prima facie, *Williams v Prince of Wales Life, &c, Co* (1857) 3 Jurist (NS) 55 appears to support the modern notion of improper use. At 55, it reports Lord Romilly MR as saying that he 'had occasion not long since to grant an injunction . . . where a person was using [disclosed] information otherwise than for the purposes of the suit'. But this generalisation is misleading. Beavan's report ((1857) 23 Beav 338, 340) records that Lord Romilly MR specified that that injunction had been granted to prevent publication.

[99] At 896. See also 901, 910.

extend from the purely formalistic (allowing use within the formal, rigid confines of the immediate proceedings only) to the broadly purposive (allowing any use that may further the underlying object of the litigation, whether strictly within its ambit, including ancillary or related proceedings, or not). Even ascertaining what qualifies as the same proceedings is not a simple endeavour.[100] CPR 31.22 offers no guidance on the meaning of the test. So, to ascertain its correct interpretation, it is necessary to refer to the previous case law. In contrast to the apparently clear and monolithic test in CPR 31.22(1), the modern authorities display a marked divergence, both in their interpretations of the 'purpose of the proceedings' and in their simultaneous reliance upon other competing (and inconsistent) formulations.[101]

No fewer than four different tests for identifying 'proper' forms of use emerge from the post-*Riddick* cases. The first is the narrow 'use in the action' formula originally articulated by Talbot J in the *Distillers* case.[102] It appears to have fallen out of favour.[103] Given its restrictiveness this is unsurprising, as it would preclude reuse for ends to which even conservative judges may be sympathetic. A good example is reusing materials obtained under search orders to

[100] While reusing documents in appellate proceedings clearly qualifies, other uses (eg judicial review; assessment (formerly taxation) of costs) are not so clear-cut. Problems also have arisen in respect of *Norwich Pharmacal* and similar applications where (as with the old Chancery bill of discovery) the very purpose of proceedings is to secure information needed to bring other litigation. See eg *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981] FSR 398.

[101] See *Gibbons* for a full discussion.

[102] At 621. See also the *Sybron* case.

[103] *Wilden Pump & Engineering Co v Fusfield* [1985] FSR 581, 599.

commence proceedings against third party wrongdoers. To facilitate this form of use—which judges clearly did not perceive as intrinsically objectionable—some courts moved away from using the *parameters* of the original action as the determinant of 'proper' use, to looking instead to the *purpose* of the original action.[104] This is the second version of the modern test, and the one now enshrined in CPR 31.22.

This version too is problematic. Courts have been conspicuously inconsistent in interpreting the concept of 'purpose'. While there is general agreement that it is not confined to the four corners of the original action, how far it extends is unclear. According to the *Sybron* case, the 'purpose' of proceedings is not so broad as to encompass resolving the underlying cause of action (which would allow reuse of disclosed documents in separate proceedings alleging the same cause of action). But use in separate or ancillary actions, such as related contempt proceedings, may qualify.[105] Whether it does will, in turn, depend on how the *proceedings* are defined. As cases in other areas amply demonstrate—particularly concerning cause of action estoppel[106] and limited statutory withdrawals of the privilege against

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[104] eg: the *Riddick* case 896, 910; *Sony v Anand* [1981] FSR 398, 401–2; the *Halcon* case 121; *A v A; B v B* [2000] 1 FCR 577, 594, 596.

[105] *Wilden Pump v Fusfield* [1985] FSR 581; the *Crest Homes* case.

[106] For relevant authorities under the extended res judicata doctrine of *Henderson v Henderson* (1843) 3 Hare 100, 114–5; 67 ER 313, 319 see eg: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 (HCA) 610–1 and *Chamberlain v Deputy Comr of Taxation* (1981) 164 CLR 502 (HCA) 508 (imprecision of the words 'cause of action'); KR Handley *Spencer Bower, Turner & Handley: The Doctrine of Res Judicata* (3rd edn Butterworths London 1996) 232–3 (whether causes of action are merged or essentially separable such that estoppel does not apply). See generally *Cross and Tapper* 80–1; *Phipson* 1020–1.

self-incrimination[107]—courts struggle to define the parameters of proceedings accurately. In the disclosure context, 'the proceedings' has been held to refer solely to the specific set of proceedings in which documents are disclosed.[108] But in the *Crest Homes* case, the House of Lords substantially expanded it to embrace separate proceedings that are 'in substance . . . a single set of proceedings'.[109]

That case is a good illustration of how, on occasion, judges have manipulated the modern test to achieve a sensible result. This ability has come at the expense of certainty and predictability. The defendants in the *Crest Homes* litigation failed to comply fully with a search order. They concealed a number of incriminating documents. The claimant uncovered their duplicity only when it commenced a second action against them, executed another search order, and the documents came to light. The claimant wanted to use the documents in its first action, both to prosecute its main claim and to bring contempt proceedings (for failure to divulge the documents first time around). Although the proceedings were, formally speaking, quite separate, the House of Lords permitted reuse for both ends. It justified this by recasting the meaning of 'the proceedings'. According to Lord Oliver, as both sets of proceedings concerned essentially the same cause of action, 'special circumstances' warranted allowing

[107] eg the *Crest Homes* case 856, where Lord Oliver described the Supreme Court Act 1981, s 72 (which abrogates the privilege in certain intellectual property proceedings, but prohibits resulting admissions being used for any 'related' offences or penalties) 'far from easy to construe'. See generally *Cross and Tapper* 432–5; *Phipson* 561–2.

[108] *Miller v Scorey* [1996] 1 WLR 1122.

[109] At 860.

reuse. It was 'purely adventitious' that two separate actions had been commenced.[110] As subsequent litigation has shown, predicting accurately whether a court will classify multiple proceedings as being separate or as one is next to impossible.[111]

Returning to the definition of 'purpose', further confusion arises from the fact that multiple different proceedings may share a common purpose, while individual proceedings may embody multiple different purposes. Moreover, judges have disagreed over what those purposes may be. A good illustration is search order proceedings. In *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981] FSR 398 the claimants sought to use the fruits of search orders to initiate and prosecute civil and criminal proceedings worldwide against third-party wrongdoers. Browne-Wilkinson J held that search orders are 'quite a different species of action' to the norm. One of their 'main purposes', he opined, is to obtain information identifying third-party wrongdoers so that it may be used against them in separate litigation.[112] By contrast, in *Garvin v Domus Publishing Ltd* [1989] Ch 335 Walton J held that search orders are designed solely to recover or preserve evidence.[113] So, he held, using their fruits to

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[110] At 860.

[111] See especially Zuckerman's analysis of the inconsistent outcomes in the *Crest Homes* case and *Cobra Golf Inc v Rata* [1998] Ch 109 (Rimer J): AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 336, 353.

[112] At 402. See also *Levi Strauss & Co v Barclays Trading Corp Inc* [1993] FSR 179, 181 (dubbing such applications 'dual purpose' actions).

[113] This account is more in line with standard authority. See: *Andrews* 171; J O'Hare, K Browne and R Hill *Civil Litigation* (9th edn Sweet & Maxwell London 2000) 492; the *Crest Homes* case 853.

bring related contempt proceedings is not within the 'purpose' of search order proceedings.

A more fundamental problem, with which the Court of Appeal had to grapple in *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990), is that, just as reusing disclosed documents in further proceedings may constitute use for the same purpose, reusing them in the same action may not. Both realities underscore the weakness of the correlation between the scope or purpose of the original proceedings and the universe of legitimate uses for disclosed documents. The use in this case (reusing an affidavit of assets for an appeal in the same proceedings), while facially for the purpose of the original action, in fact served an ulterior aim (demonstrating to a third party that the deponent was worth suing). The Court of Appeal recognised that the 'purpose of the proceedings' test is over-inclusive, in that it would have permitted an objectionable form of reuse. But, rather than conclude from this that uses properly should be judged on their own merits, the Court of Appeal reworked the test to facilitate a sensible result. Thus, it held: 'The true test is whether the documents obtained on discovery are being used for the purpose for which the *discovery* was ordered'.[114]

This 'purpose of disclosure' version is the third variation of the modern test. Once again, it is problematic. Some judges have suggested that the 'purpose of the proceedings/disclosure'

[114] Lloyd LJ (emphasis added). See also *Rank Film v Video Information* [1982] AC 380 (HL) 447.

variants simply are different expressions of a single test. Thus, in the *Prudential* case, Hobhouse J stated that use should be limited to 'the purpose for which the order [to produce] was made, *namely*, the purposes of that litigation'.[115] But if this view is correct, the meaning of 'purpose' is even less certain. On at least one occasion the 'broad purpose' of disclosure has been held to encompass the litigation's underlying objective of obtaining redress.[116] This suggests that the term 'purpose' may extend to resolving the underlying cause of action after all. On their natural meaning, the two variants are not synonymous. Imagine proceedings in which multiple causes of action coexist, and where a disclosed document is relevant only to one of them. Strictly speaking, that document's disclosure is justified for the purpose of prosecuting that cause of action alone. Thus, the purpose of disclosure is only a subset of the wider purpose of the proceedings—which is to resolve the entire dispute.

The final modern variation of the test is the 'proper conduct/trial of the action' formula.[117] This was endorsed recently by Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL) 207, and by the Court of Appeal.[118] Its resurgence in popularity stems from new-found judicial enthusiasm for

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[115] At 765 (emphasis added), citing the *Harman* case 307–8. See also *Garvin v Domus* [1989] Ch 335. Cf the *Sybron* case; *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990).

[116] *Omar v Omar* [1995] 1 WLR 1428.

[117] eg: the *Alterskye* case 470; *Marcel v Comr of Police of the Metropolis* [1992] Ch 225, 237 (Browne-Wilkinson V-C, first instance); *Milano Assicurazioni SpA v Walbrook Insurance Co Ltd* [1994] 1 WLR 977, 984; the *Cobra* case 830.

[118] *Bourns Inc v Raychem Corp* [1999] FSR 641, 650 (Laddie J first instance), 679 (Aldous LJ, CA); *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA) 9.

Browne-Wilkinson V-C's judgment in the *Derby (No 2)* case, which rested on it. To some extent it is superior to the other three versions of the test, in that potentially it embraces a wider range of legitimate forms of subsequent use. Using disclosed documents to enforce court orders by bringing contempt proceedings, for example, fits naturally within the concept of the 'conduct' of litigation.[119] So too does reusing documents in satellite or related litigation (at least, where this would help to resolve the original case).[120] The phrase also comfortably can be read as excluding abusive forms of reuse that happen to fall within the context of the same proceedings, as in the *Savings & Investment Bank v Gray (No 1)* case.

But even the 'proper conduct' version of the test remains inherently flawed. 'Proper conduct' is not a well-defined standard. Whether including the term 'proper' achieves anything beyond facilitating circular argument is debatable. More fundamentally—and in common with all the other versions—it still fails to account for all potentially desirable forms of subsequent use. These may have nothing to do with litigation. Where, for example, disclosed documents reveal corruption within government, identify subsisting public hazards, or concern other matters of significant public concern, the weight of public interest may well favour their dissemination to the proper authorities or even general publication. Neither the scope, the purpose, nor the proper conduct of the original proceedings is capable of contemplating such concerns.

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[119] eg the *Crest Homes* case 853. Cf *Garvin v Domus* [1989] Ch 335.
[120] eg *Wilden Pump v Fusfield* [1985] FSR 581.

In *Miller v Scorey* [1996] 1 WLR 1122, 1129 Rimer J rejected counsel's suggestion that the scope of the modern rule is 'uncertain'. He asserted: 'The cases all appear to me to speak with one voice, to the effect that . . . disclosed documents will not be used otherwise than for the purposes of the action in which they are disclosed. There is nothing uncertain about that'.[121] CPR 31.22(1) appears to rest on the same assumption. Yet, this viewpoint overlooks the differences between the various tests that feature in the case law. Those variations—most notably the 'proper conduct of the action' and 'purpose of disclosure' versions—apparently still coexist alongside the now official, 'purpose of the proceedings' terminology. The differences between them are more than syntactic. If interpreted with any degree of rigour, the different versions are capable of producing materially different outcomes. Some judges have exploited this fact as a tool to bring about particular desired results.[122] Despite occasional attempts,[123] the competing versions cannot simply be elided, equated or collapsed into one. Their coexistence itself demonstrates the lack of conceptual clarity within contemporary procedural law over what 'improper use' correctly should be taken to mean.[124]

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[121] This summary of the authorities was approved in *Miller v Scorey; Miller v Forrest* (CA 12 September 1996), where leave to appeal was refused.

[122] eg: the *Riddick* case; *Rank Film v Video Information* [1982] AC 380 (HL); *Savings & Investment Bank* (CA 10 August 1990); *Omar v Omar* [1995] 1 WLR 1428.

[123] The *Prudential* case; *Miller v Scorey* [1996] 1 WLR 1122; the *Cobra* case. See also *Phipson* 599–600 and *Matthews and Malek* 355 (treating different versions as meaning the proper conduct of the litigation, despite both texts having been revised post-CPR).

[124] See further 296 below.

D CONCLUSION

The modern rule governing subsequent use of disclosed documents rests on two key departures from the original 19th century law. These departures materially undermine the view expressed by most courts and commentators[125] that the modern rule, and the 'implied undertaking' doctrine from which it emerged, derive authenticity and legitimacy from traditional authority.[126] Between them, the trilogy of cases that recast the modern rule refer (directly or indirectly) to all relevant 19th century authorities. But none of those cases affords solid foundation, either for the automatic 'implied undertaking' doctrine, or for maintaining a blanket general presumption against allowing subsequent use.

Historically speaking, subsequent use restrictions did not apply automatically whenever disclosure took place. This is the modern rule's first fundamental departure from tradition. Until the *Alterskye* case—when, as Eagles has put it, Jenkins J 'conjur[ed] the implied undertaking out of a vacuum of authority'—only the court's *express* power to limit what may be done with disclosed documents is visible

[125] eg: PStJ Langan and LDJ Henderson *Civil Procedure* (3rd edn Sweet & Maxwell London 1983) 177–8; *Andrews* 312–9; S Goulding *Odgers on Civil Court Actions* (24th edn Sweet & Maxwell London 1996) 113, 281–2, 304–5; *Matthews and Malek* 349–50.

[126] Notable exceptions are: *Prescott*; *Eagles*, especially 285–7; *Style and Hollander* ch 12; MN Howard, P Crane and DA Hochberg *Phipson on Evidence* (14th edn Sweet & Maxwell London 1990), 541–3; AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 354, 356–7, AAS Zuckerman 'Practice and Procedure' [1998] All ER Ann Rev 350–1.

in the case law.[127] Even then, express powers were not employed routinely. The 'implied undertaking' terminology was abandoned under CPR 31.22, in recognition that the modern rule embodies a legal obligation owed to the court. But CPR 31.22(1) still rests on the same presupposition that underpinned the implied undertaking doctrine—namely, that any use of disclosed documents except for the litigation in which disclosure is made presumptively should be condemned.

This presupposition leads directly to the modern rule's second fundamental departure from traditional law and practice. Originally, different forms of subsequent use were not simply aggregated and universally condemned. The court's approach was more sensitive. Although never explicitly spelled out, judges evaluated proposed forms of reuse individually on their merits, taking account of competing interests and circumstances appertaining. Prior to the *Riddick* case, only two forms of reuse were held to be 'improper': using documents tainted by abuse of process; and publishing documents 'where the consequences . . . would be mischievous'.[128] No other uses were precluded; nor was subsequent use as a generic category of conduct ever criticised. Indeed, subsequent litigation use carefully was preserved. By contrast, the modern rule arbitrarily ties the definition

[127] *Eagles* 287, 285. Interestingly, there is evidence that the doctrine's introduction in Ontario, Canada was equally abrupt: '[T]he existence of the implied undertaking rule came as news to the Ontario bar in 1985. They had never heard of it': *Goodman v Rossi* (1995) 125 DLR (4th) 613 (Ont CA) 618, quoting *Goodman v Rossi* (1995) 120 DLR (4th) 557, 563 (which it then overruled by holding that the implied undertaking did form part of Ontario law).

[128] CJ Peile *The Law and Practice of Disclosure in the Supreme Court of Justice* (Stevens & Haynes London 1883) 138.

of 'proper' use to the scope or purpose of the original action. In doing so, it precludes a wide range of uses (including subsequent litigation use) that potentially may be both legitimate and highly beneficial. As it stands, CPR 31.22(1) makes no allowance for this fact. It forecloses any meaningful consideration of countervailing interests by globally deeming reuse beyond the immediate proceedings to be, ipso facto, 'improper'. It presumes that the interests served by preventing subsequent use inevitably trump all other concerns. In reality, as Part II will demonstrate, they comprise only one facet of the public interest.

CHAPTER 3—RATIONALES: INTRODUCTION AND CANDOUR RATIONALE

A INTRODUCTION

The *Riddick* case was the first English authority to hold explicitly that reusing documents obtained through disclosure for any purpose outside the original proceedings—including to prosecute or defend subsequent litigation—constitutes 'improper' use.[1] As Chapter 2 showed, the Court of Appeal did not scrutinise the origins of the law governing subsequent use or the 'implied undertaking' doctrine in any depth. Relying on the *Alterskye* and *Distillers* cases, the *Riddick* judges simply presumed that the doctrine is historically sound, and that 'any use' of disclosed documents beyond the proceedings in which they are produced is, ipso facto, improper. The Court's decision—and the modern rule now enshrined in CPR 31.22 that it inaugurated—rest on these dual presumptions.

Crucially, while the Court of Appeal judges were content to take the supposed inveteracy and breadth of the modern rule as givens, and to rely on earlier dicta in doing so, they did not assume the rule's legitimacy. Each judge went to some lengths to formulate rationales to justify it. This was necessary because, although the broad, modern rule derived from prior first-instance decisions, it had never been rationalised clearly. Talbot J may have been its author but he was not its perfector. Twice in his *Distillers* judgment he asserted that it is in

[1] For a description of the *Riddick* case, see 52–53 above.

'the public's interest in the need for the proper administration of justice, to protect the confidentiality of disclosed documents'.[2] But he did not explain how or why such a public interest should warrant globally banning subsequent use; nor did he address subsequent litigation use specifically. At best, his judgment contained a prototype confidentiality-based rationale.

In the *Riddick* case, the Court of Appeal accordingly had to fashion rationales *ex post facto* to explain and justify what it presumed to be a pre-existing rule. The need to find a convincing rationale was pressing given the immediate impact of the decision. Riddick had no alternative way to obtain the disclosed memorandum that he believed defamed him. His defamation action therefore was completely stymied by the Court's decision—despite the fact that a jury at first instance had upheld his claim.[3] This palpable denial of procedural and substantive access to justice—both for Riddick individually, and for any future document-recipients who should find themselves in a similar predicament—required compelling justification. As Chapter 1 noted,[4] a central function of the disclosure process is to facilitate rectitude of decision, by giving courts and parties full access to the relevant evidence necessary to establish the true facts so that litigants may receive their due.

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[2] At 625, 621.

[3] The magnitude of the jury's damages award (£15,000) probably reflected a misunderstanding as to the time period over which Riddick deserved compensation (see 892, 897, 906). Interestingly, all three *Riddick* judges openly deprecated the merits of Riddick's action: 236 below.

[4] 20–24 above.

In the event, the Court of Appeal judges, and Lord Denning MR in particular, put forward a range of rationales to justify their ruling that any subsequent use of disclosed documents beyond the immediate litigation violates the implied undertaking and amounts to an abuse of process. Three separate (albeit interrelated) rationales can be distilled from the judgments, and from subsequent case law developing or refining the Court's analysis. Focusing on judicial pronouncements is necessary, as the modern rule governing subsequent use began as a judicial creation and has attracted comparatively little academic attention.[5] As a convenient shorthand, in this thesis these rationales are termed the 'candour', 'confidentiality' and 'compulsion' rationales respectively. Each rests on a differing conception of what is in the public interest. As this chapter and the following two chapters will show, this is not the only inconsistency or difficulty that they present.

At the heart of the 'candour' rationale lies a belief that allowing documents to be used outside the original action may deter parties (or non-parties) from giving full and frank disclosure. Document-producers may not be candid, this belief holds, because they may fear the adverse consequences that could result from subsequent use. Such reticence would, the rationale asserts, undermine the public interest in the proper administration of justice. Relevant documents would not be available to litigants and the courts. Judicial decisions would be made based on incomplete information,

[5] The leading scholarly critiques are *Prescott* and *Eagles*. However, close examination of the rationales was beyond their scope. CPR 31.22 is silent as to the rationales for the general rule.

reducing the probability of courts finding the true facts and increasing the risk of error and inaccuracy. The importance of safeguarding the integrity of the disclosure process from such jeopardy, the rationale asserts, therefore justifies presumptively banning subsequent use. Of the three rationales formulated in the *Riddick* case, the candour rationale is the only one to appear in all three judgments.[6]

The 'confidentiality' rationale purports to serve rather a different public interest, namely that of protecting and preserving document-producers' confidentiality interests in respect of the documents that they disclose during litigation. It is well-established that confidentiality per se is no basis upon which to withhold documents from disclosure.[7] For over five centuries, individual privacy interests have been required to give way to the more pressing public interest in administering justice by getting to the truth.[8] Yet, the disclosure process still entails a 'very serious invasion' of individual privacy and confidentiality interests.[9] Where confidentiality is a concomitant of exclusive property rights over information (such as trade secrets), valuable proprietary interests also may be at stake. Disclosure's violation of confidentiality should therefore, the rationale asserts, be kept to the minimum required to do justice in the original

[6] At 896, 902, 912.
[7] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1974] AC 405 (HL) 433–4; *D v NSPCC* [1978] AC 171 (HL) 209; *Science Research Council v Nassé* [1980] AC 1028 (HL) 1065.
[8] The Court of Chancery entertained jurisdiction to compel production of documents as early as the reign of Henry VI: G Spence *The Equitable Jurisdiction of the Court of Chancery* (V&R Stevens and GS Norton London 1846) vol 1, 678–9 (Book the Third, ch 23). See also *Bray* 4-5.
[9] The *Harman* case 308.

litigation. No subsequent use should be allowed, not even in further proceedings.

The third and final rationale formulated in the *Riddick* case, the 'compulsion' rationale, is closely aligned with the confidentiality rationale. Indeed, in Lord Denning MR's judgment[10] and several later authorities[11] the two are conflated. They are, however, conceptually distinct. For analytical purposes it is important to draw this distinction, although their interrelationship also is illuminating.[12] Unlike the confidentiality rationale, the compulsion rationale does not see the justification for the modern rule against subsequent use as deriving from its preservation of confidentiality. Rather, it posits the rule as being the *quid pro quo* for litigants enjoying power to invade others' rights by compelling disclosure.[13] At the core of the compulsion rationale lies a philosophical conviction that violating individual privacy or autonomy rights through court-sanctioned coercion inherently is objectionable. Hence, documents so obtained should not be used except for the purposes for which disclosure was compelled; namely, resolving the litigation at hand. The relevant public interest in play here is that of protecting the citizen's right to 'privacy'—in the sense that JS Mill used the term 'liberty' to denote the right to be let alone to enjoy one's private sphere of autonomy,

[10] At 896.
[11] 118 n 7 below.
[12] As discussed at 171–175 below.
[13] The *Riddick* case 896.

and to control the dissemination of one's own documents, free from unwarranted societal or governmental interference.[14]

Exceptions and discretion aside, only where document-recipients can reacquire disclosed documents through wholly independent means may they reuse them, or the information contained in them, beyond the original litigation.[15] In some cases, document-recipients who wish to reuse disclosed documents, such as to bring further proceedings, will be able to obtain them from sources independent of the earlier disclosure. For example, where documents are not particularly sensitive or are non-confidential, they may be located elsewhere within the public domain. Documents submitted to regulatory agencies under statutory reporting requirements may be obtainable via official information request channels. However, where disclosed documents are confidential, reacquiring them may be substantially more difficult. If subsequent proceedings already are on foot, or the documents in question merely supplement other, already available evidence, litigants should be able to regain them through disclosure in the second action.[16] In such cases, CPR 31.22(1) causes procedural inefficiency and inconvenience, necessitating duplicative court orders and wasteful disclosure procedures. It also forces litigants to complete the entirely artificial exercise of reacquiring documents or knowledge that they

[14] JS Mill 'On Liberty' in G Himmelfarb (ed) *On Liberty* (Penguin Books Harmondsworth 1996) ch 4. See 164 below.

[15] The *Sybron* case 322; CPR 31.22(1).

[16] Or, in such circumstances, the court may exercise discretion to allow subsequent litigation use, eg: *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708; *Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969. Cf *CBS Songs Ltd v Amstrad Consumer Electronics plc (Amendment & Discovery)* [1987] RPC 417 (CA).

already possess. But, at least, it does not deprive them of access to justice.

By contrast, in situations such as arose in the *Riddick* case,[17] would-be claimants may be unable to secure vital documents through any means except the prior disclosure. Where a disclosed document is the very foundation of the further cause of action (as in the *Riddick* case, where the disclosed memorandum itself was the allegedly defamatory communication), or where a disclosed document is crucial evidence for mounting a prima facie case, a would-be litigant will not have the option of seeking repeat disclosure after commencing further proceedings. Instituting proceedings without prima facie evidence to support the particulars of claim constitutes an abuse of process.[18] Pre-trial disclosure will not be ordered either,[19] as doing so would undermine directly the rule against subsequent use. Disclosure provisions in pre-action protocols likewise will be inapplicable, as their recommended courses of conduct are triggered only where there is some prospect that litigation will ensue.[20] In such situations, CPR 31.22 denies would-be litigants access to justice.[21] They will

[17] See also the *Cobra* case; *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA).
[18] Such proceedings are liable to be struck out under CPR 3.4(2).
[19] CPR 31.16.
[20] CPR glossary definition of 'pre-action protocols' (statements of understanding about *pre-action* practice); Practice Direction—Protocols, paras 2.1–2.3 (potential 'adverse consequences' for non-compliance arise only after proceedings have commenced). For a succinct outline of relevant provisions pertaining to pre-commencement disclosure, see IR Scott 'Pre-Action Disclosure: Legislation and Protocols' (2001) 20 CJQ 213.
[21] Assuming their newly-found causes of action cannot be incorporated into the existing proceedings. Two examples where incorporation was not possible are the *Sybron* case and *Miller v Scorey* [1996] 1 WLR 1122 (both for limitation reasons).

know—as will their opponents, and quite possibly the court in the original litigation—that they have a legitimate grievance. However, without being allowed to reuse previously disclosed documents, they will be powerless to enforce their rights. This seems a surprising consequence for a rule said to exist to further the administration of justice. The more crucial a document for bringing subsequent proceedings, the less likely the rule makes it that a party will be able to secure a usable copy of it.

As a matter of principle, it is disturbing that a rule designed to regulate disclosure—a procedural device the very *raison d'être* of which is to facilitate rectitude of decision so that litigants may receive their due—should become a tool for denying litigants justice. It is this consequence of the modern rule against subsequent use that most requires justification. Any sound rationale for the rule must be able to explain why documents obtained for the purpose of doing substantive justice in one action should not be used to do justice in another where, without them, justice will be impaired at best, and, at worst, denied. For the rule to be theoretically defensible, at least one rationale must answer this point satisfactorily. It must identify some private or public interest, or public policy consideration, sufficiently important to trump the public interest in administering justice—both in terms of ensuring proper access to justice and achieving rectitude of decision—in the subsequent litigation.

As this and the following two chapters will seek to demonstrate, none of the three rationales fashioned by the Court of Appeal in the *Riddick* case, and developed in the subsequent authorities, can satisfy

this requirement. None affords sound justification for the modern rule now enshrined in CPR 31.22, whether taken individually or in combination. In addition to resting on mutually inconsistent premises, the three rationales exhibit a range of theoretical and pragmatic shortcomings. This is not to say that the *Riddick* bench should be criticised for having chosen or designed poor rationales. The problem is altogether more fundamental: it lies with the very rule governing subsequent use of disclosed documents itself. In reality, it will be suggested, no rationale can be constructed that is capable of justifying a global general rule against subsequent use. As a matter of principle and of practice, the existing rule is undesirable and fundamentally flawed.

B THE CANDOUR RATIONALE

1 Introduction

As noted above, only the candour rationale features in all three *Riddick* judgments.[22] This may account in part for its enduring popularity. Two recent qualifications aside,[23] the candour rationale

[22] At 896 (Lord Denning MR), 902 (Stephenson LJ), 912 (Waller LJ).
[23] See text to n 94 below.

has appeared in most leading subsequent use rule authorities.[24] An oft-repeated dictum is that of Waller LJ that barring subsequent use of disclosed documents is justified because '[t]he interests of the proper administration of justice require that there should be no disincentive to full and frank discovery'.[25] The reasoning underlying Waller LJ's conclusion that allowing subsequent use would amount to a 'disincentive' is straightforward. Again, such simplicity may have fostered the rationale's popularity.

The starting point of the reasoning behind the candour rationale is the importance of disclosure within the common law adversarial system, wherein litigants are responsible for marshalling and presenting the evidence to the court.[26] Usually, the key documentary evidence already will lie in the hands of one or other of them. Because judges play no active role in locating or gathering evidence, parties are required to make full, mutual disclosure of the relevant, non-privileged documents in their possession or under their control.[27] Otherwise, courts could not get at the truth, and litigants would be

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[24] eg the *Halcon*, *Harman*, *Sybron*, *Crest Homes* and *Cobra* cases; *Mahon v Rahn* [1998] QB 424 (CA); *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA). Also *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 (CA); *EMI Records Ltd v Spillane* [1986] 1 WLR 967; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1988] 1 WLR 946; *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155; *Dory v Richard Wolf GmbH* [1990] FSR 266; *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990); *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA). See also *Matthews and Malek* 351.

[25] The *Riddick* case 912. See *Matthews and Malek* 351 n 15; the *Halcon* case 121; *Tassilo Bonzel v Intervention* [1991] RPC 43, 47.

[26] The court's proper role in civil proceedings is considered further at 318, 331–332 below.

[27] CPR 31.8.

denied fair and equal treatment because they would lack equal access to evidence. While the scope of disclosure was reduced markedly under the CPR, it remains a vitally important procedural tool for ensuring that parties have equal access to evidence, thereby promoting truth-finding and 'the proper administration of justice'.[28]

While theoretically this last statement may be true, in reality most (if not all) parties who hold sensitive, confidential documents will be extremely reluctant to divulge them, especially to their opponents. Such documents may reveal valuable trade secrets;[29] contain embarrassing personal, financial or medical information;[30] or afford grounds for further litigation such as defamation proceedings.[31] Fear of suffering adverse consequences were document-recipients free to reuse such documents for ulterior purposes might well, the candour rationale proceeds, deter document-producers from being 'full and frank' in making disclosure. Sensitive documents could 'be lost or destroyed or said never to have existed'.[32] According to Hirst J, were this to occur, 'the value of discovery, which is a fundamental feature in our trial process in the interest of securing the ends of justice, would be seriously compromised'.[33]

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[28] The *Riddick* case 912; the *Harman* case 308. On disclosure's importance for truth-finding generally, see *Bibby v Cansulex* [1989] QB 155, 160–1, and 20–24 above.

[29] *Tassilo Bonzel v Intervention* [1991] RPC 43; *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA).

[30] *Farnsworth v Procter & Gamble Co*, 758 F 2d 1545 (11th Cir 1985); *Lubrizol Corp v Esso Petroleum Co Ltd (No 2)* [1993] FSR 53; *Clibbery v Allan* [2002] 1 All ER 865 (CA).

[31] The *Riddick* case; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL).

[32] The *Riddick* case 896.

[33] *Bibby v Cansulex* [1989] QB 155, 161.

Under the candour rationale, then, the CPR 31.22(1) general rule against subsequent use is seen as being justified because it counteracts parties' natural temptation to conceal or destroy damaging documents. The importance of ensuring that there is 'no disincentive' to full disclosure is said to warrant presumptively banning *all* uses outside the action at hand. As Aldous LJ opined in *Bourns Inc v Raychem Corp* [1999] FSR 641, 681, 'the obligation to make full discovery . . . is . . . the primary reason for the implied undertaking and it would not be right . . . to take any step which would tend to deter compliance with it'.

Perhaps the most eloquent statement of the candour rationale belongs to Sir Hugh Griffiths in *Association of Licensed Aircraft Engineers v Association of Scientific, Technical and Managerial Staffs* [1973] IRLR 253 (NIRC), a union dispute heard some five years before the *Riddick* case. The case did not involve the rule against subsequent use per se.[34] It concerned breach of an express assurance by ASTMS that a nominal roll of the ALAE's members would be kept confidential. Nevertheless, Sir Hugh's justification for finding ASTMS guilty of contempt of court encapsulates the candour rationale perfectly:[35]

> It is of the utmost importance that those who produce confidential information to the Court shall rest assured that no other party will misuse it, for were it not so the information will not be forthcoming to enable the Court to adjudicate fairly upon the issues and between the parties before it. It is for this reason that the misuse of such information is a contempt of court, for it interferes with the proper

[34] Although, at 254 Sir Hugh does refer to the rule. Given the pertinence of his comments concerning candour, it is surprising that the case was not drawn to the court's attention in the *Riddick* case.

[35] At 254.

> administration of justice, not only in the case in which it occurs but also in a more general manner, by making people fearful to seek their remedy at the hand of the Court lest they suffer a greater hurt in the process.

Fittingly, given its supposed instrumentality in encouraging proper compliance with disclosure obligations, the candour rationale has been termed a 'practical reason' for the general presumption against subsequent use.[36] Yet, closer inspection reveals that the candour rationale is deeply problematic, both as a pragmatic device and in terms of principle.

2 Pragmatic shortcomings

Candour-based arguments long have featured in the common law. Historically, withholding information from disclosure in court proceedings was permitted on public interest immunity grounds to safeguard free discussion within and between governmental agencies.[37] The identity of police informants routinely is protected so that such sources do not 'dry up'.[38] Some protection has been extended to other categories of informers,[39] and to journalists' sources.[40] The absolute privilege or immunity from suit enjoyed by those involved in

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[36] The *Halcon* case 121 (Megaw LJ, treating candour as a subsidiary rationale to compulsion).

[37] *R v Lewes Justices, ex p Secretary of State for the Home Dept (aka Rogers v Home Secretary)* [1973] AC 388 (HL) 401, 405, 413; *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 1 WLR 447 (CA) 465.

[38] *D v NSPCC* [1978] AC 171 (HL) 218. See also *Marks v Beyfus* (1890) 25 QBD 494 (CA) 498.

[39] *Rogers v Home Secretary* [1973] AC 388 (HL); *D v NSPCC* [1978] AC 171 (HL) 218–9, 229, 233, 241.

[40] Contempt of Court Act 1981, s 10.

judicial or quasi-judicial proceedings also is said to rest on promoting candour;[41] as is the qualified privilege that protects those who participate in criminal investigations in good faith.[42]

Despite the prevalence of candour-based arguments for keeping information secret during court proceedings, such arguments often are roundly criticised. Most significantly, in the public interest immunity context the candour doctrine now carries little, if any, weight, except in relation to the highest level documentation such as Cabinet papers and foreign office dispatches.[43] Past overuse of the doctrine, depriving courts of important evidence, was the catalyst for increased judicial scepticism about candour-based claims.[44] Modern judges tend to be dubious that openness between civil servants is inhibited materially by the possibility that their communications might one day be revealed in the course of civil litigation. Protecting the identity of informers other than police informants also has been criticised as involving a superficial or strained analogy.[45] Members of the public who volunteer information to public watchdogs on a one-off

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[41] *Munster v Lamb* (1883) 11 QBD 588 (CA) 594–5; *Watson v M'Ewan* [1905] AC 480 (HL) 487. See *Zuckerman in Tapper* 256.

[42] *Lightbody v Gordon* (1882) 9 R 934, 19 SLR 703; *Royal Aquarium & Summer & Winter Garden Society, Ltd v Parkinson* [1892] 1 QB 431 (CA) 451; *Trapp v Mackie* [1979] 1 WLR 377 (HL) 383.

[43] *Conway v Rimmer* [1968] AC 910 (HL); *Science Research Council v Nassé* [1980] AC 1028 (HL) 1070–1, 1081; *Burmah Oil Co v Bank of England* [1980] AC 1090 (HL) 1132; *Campbell v Tameside MBC* [1982] QB 1065 (CA) 1077, 1079; *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL); *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274 (HL). See *Phipson* 619.

[44] *ex p Wiley* [1995] 1 AC 274 (HL) 281, 305, 307–8. Cf AAS Zuckerman 'Public Interest Immunity—A Matter of Prime Judicial Responsibility' (1994) 57 MLR 703.

[45] MN Howard, P Crane and DA Hochberg *Phipson on Evidence* (14th edn Sweet & Maxwell London 1990) 480, 481; *Zuckerman in Tapper* 264–6.

basis—for example, responding to a police request for sightings of a particular vehicle, or where a reward is on offer—are unlikely to depend upon secrecy in the same way as members of the criminal underworld grassing on their associates. The words 'informer' and 'informant' cover a huge range of situations, including whistleblowers of all descriptions. Again, the nub of the criticisms is that the alleged candour gains are speculative. In *Norwich Pharmacal Co v Customs & Excise Comrs* [1974] AC 133, the House of Lords similarly was unpersuaded that importers would start to concoct false documents if the information that they were required to supply to the Customs could be used in legal proceedings.[46]

Equivalent criticisms may be levelled against the candour rationale as employed in the subsequent use rule context. It too is inherently speculative,[47] despite its apparently strong intuitive resonance within the judicial mind. At first blush, it seems plausible that those who hold potentially damaging documents may be less inclined to reveal them where there is a risk of the documents being reused against them, than where there is not. For example, a pharmaceutical company may be prepared to endure the foreseeable consequences of disclosing documents in a single personal injury case brought against it by one claimant for adverse side effects. But

[46] At 175, 190, 199, 206–7. See also *Eagles* 295–6.

[47] See eg the *Riddick* case 912 ('parties *may* be deterred' by allowing subsequent use); *Dory v Richard Wolf* [1990] FSR 266, 269 ('full and frank discovery . . . *may* not happen if documents can be used for ancillary purposes') (emphases added). Interestingly, Wigmore levels precisely the same criticism against legal professional privilege: 'Its benefits are all indirect and speculative; its obstruction is plain and concrete': cited in C Tapper 'Prosecution and Privilege' (1997) 1 Intl J Evidence & Proof 5, 24.

the prospect of hundreds, perhaps thousands, of other claimants reading and reusing those documents to bring further actions—or of documents suggesting a corporate cover-up of foreknowledge of the product's side effects falling into governmental investigators' hands—may be enough to send the company to its shredder instead. All this may be true. Yet, it does not follow that the rule against subsequent use *in fact* operates on document-producers' minds in such a way as to increase aggregate candour levels; or that, without it, they would behave any less candidly.

Empirically speaking, there is no concrete evidence to support the candour rationale's hypothesis that the rule fosters more candid disclosure. This is not entirely surprising. Coupled with the regrettable lack of empirical work in the civil procedure field generally, designing a test that would produce reliable, objective proof would be highly complex. First, the rule's effect (if any) could not easily be isolated from other systemic incentives to give candid disclosure that may influence document-producers. These may include a desire on the part of document-producers to rely on damaging documents in the original litigation themselves,[48] and the fear of getting caught having withheld documents that should have been disclosed. The sanctions for failing to comply with disclosure obligations potentially are severe. They include striking out of

[48] As in the *Riddick* case, where the memorandum was key to TBM's defence in the original proceedings. Parties cannot rely on undisclosed documents unless special judicial permission is given: CPR 31.21. This rule reflects the modern policy against 'trial by ambush'. See *Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428, 431; 18–19 above.

part of all of the dishonest party's statement of case;[49] committal for contempt of court for disobeying a court order;[50] committal for contempt of court for lying in the disclosure statement in the document-producer's list of documents;[51] and orders for costs.[52] Other potentially serious consequences include an irreparable loss of credibility, and the drawing of adverse inferences at trial, when documents are found to be missing.[53] Second, what would need to be tested would be the hypothetical conduct of document-producers were the rule non-existent. This would depend on self-reporting by document-producers (or their lawyers) as to how they think they would have behaved had the law been different. From a scientific standpoint, testing such hypothesised conduct also is problematic.

These comments support Cane's criticisms of single-factor, empirically testable, consequence-based judicial reasoning[54]—of which the candour rationale is a prime illustration. As Cane noted, '[r]eliably predicting the likely impact of legal rules on human behaviour is extraordinarily complex'; not least, because of the 'high cost and methodological difficulty' of generating empirical data on point.[55] Yet, as Cane observed, unsubstantiated consequence-based arguments are a common feature of judicial reasoning. They imply estimates of

[49] CPR 3.4(2)(c); eg *Midland Bank Trust Co Ltd v Green (No 2)* [1979] 1 WLR 460.
[50] The *Crest Homes* and *Cobra* cases; *Memory Corp v Sidhu plc* [2000] Ch 645.
[51] CPR 31.10.
[52] *Zaiwalla v Elstub* (CA 21 February 1997); *Adoko v The Law Society* (EAT/219/97 22 June 1999).
[53] *Infabrics Ltd v Jaytex Ltd* [1982] AC 1 (HL). See *Style and Hollander* 6.
[54] P Cane 'Consequences in Judicial Reasoning' in J Horder (ed) *Oxford Essays in Jurisprudence* (4th series OUP Oxford 2000). See also DN MacCormick *Legal Reasoning and Legal Theory* (rev edn Clarendon Press Oxford 1994).
[55] At 42.

the probability of future events. But, in the absence of any concrete evidence enabling those probabilities to be quantified, however roughly, their foundations rest 'largely on untested speculation and intuition'.[56] All of this holds true for the candour rationale.

Given the difficulty of securing forensic proof either way, the candour rationale's central claim—that CPR 31.22 operates as a pragmatic 'inducement to a litigant to disclose documents which he might otherwise have been inclined to conceal'[57]—can be no more than conjecture. Several factors demonstrate that, contrary to first appearances, the conjecture is implausible and almost certainly wrong. First and foremost, for the rule against subsequent use to operate as an effective incentive for candour, there would need to be an absolute ban against subsequent use. Alternatively, at the very least, any exceptions would have to be strictly controlled, limited in number, tightly defined, and highly predictable in their application. Otherwise, document-producers could not rely confidently on the rule. Yet, the rule is not absolute. Three separate exceptions to it emerged from the post-*Riddick* case law. Today, they are enshrined within CPR 31.22(1)(a)–(c). They do nothing to restore document-producers' confidence in the protection afforded by the rule. The permitted exceptions are broad in scope, ill-defined, and unpredictable in their application.[58]

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[56] At 42, 59. See also D Robertson *Judicial Discretion in the House of Lords* (Clarendon Press Oxford 1998) 400.

[57] *Taylor v SFO* [1999] 2 AC 177 (HL) 210.

[58] The only exception within document-producers' own control is CPR 31.22(1)(c) (reuse permitted with document-producers' consent).

Since 1979, when the Court of Appeal decided the *Halcon* case, judges have enjoyed discretion to allow subsequent use as and when they see fit. CPR 31.22(1)(b), which permits subsequent use where 'the court gives permission', perpetuates this expansive discretion. In principle, it is not restricted to allowing particular forms of use.[59] Its breadth is epitomised by Laddie J's judgment in the *Cobra* case (at 831), where he listed some 15 indicative factors and guidelines purportedly relevant to the exercise of discretion. Inter alia, his factors include taking account of 'all the circumstances of the case'. While a degree of flexibility in the law is desirable, such flexibility necessarily undermines the central pillar of the candour rationale.

The exception for documents 'read to or by the court, or referred to, at a hearing which has been held in public' in CPR 31.22(1)(a) is even more chilling towards candour. As Lord Scarman observed in the *Harman* case, litigants typically know the risk, 'amounting in many cases to the near certainty', that, if their case proceeds to public trial, documents will enter the public domain and become freely available to all the world.[60] The modern rule against subsequent use does nothing to allay this concern. Under CPR 31.22(2), courts have power to enter special protective orders continuing the prohibition against subsequent use even after documents have been read or referred to in open court. But their use of the power is unpredictable. Rarely has it been exercised.[61]

[59] Although, in practice, only subsequent litigation use has been permitted to date. See ch 6 below.
[60] At 315–6; 312.
[61] *Plant v Plant* [1998] 1 BCLC 38.

Parties never can be confident that it will be employed in their favour. Meanwhile, the terms 'read' and 'referred to' have been interpreted expansively, in keeping with the move towards written witness evidence, judicial pre-reading of materials in chambers, and skeleton arguments. Very little need occur in order for a document to pass into the public domain.[62]

This expansive interpretation of the CPR 31.22(1)(a) public hearing exception leaves scope for clever, unscrupulous litigants to make gratuitous reference to their opponents' disclosed documents solely in order to free them up for publication or use elsewhere.[63] Under CPR 31.22(2) such abuse should constitute grounds for the court to enter a protective order continuing the prohibition against subsequent use. But such an order will be forthcoming only if the reference clearly is recognisable—and recognised—as a tactical abuse. Determining that this is the case may not be easy in practice. Again, the existence of a blanket rule against subsequent use cannot counteract document-producers' legitimate fear of such misbehaviour.

Even if the trial stage never is reached, document-producers still may fear reuse or dissemination of their confidential disclosed documents notwithstanding the rule against subsequent use. On a cost–benefit analysis, a party's potential gain from reusing or disclosing another's documents (economically speaking) may make violating the rule worthwhile. In *Coca-Cola Bottling Co of Shreveport*,

[62] 32 above, 248–252 below.
[63] The *Harman* case 308–9. For an instance of such abuse, see *Zaiwalla v Elstub* (CA 21 February 1997).

Inc v Coca-Cola Co, 107 FRD 288 (D Del 1985) the defendant settled rather than risk divulging its top-secret Coca-Cola formula, even under a stringent protective order. Its choice was entirely sensible. Both unwitting and flagrant violations of the rule against subsequent use can and do occur.[64] The rule is worthless as a means of protection in such cases. Indeed, nothing the courts may say or do ever will eradicate the possibility of misbehaviour entirely. Whitford J acknowledged as much in *Atari Inc v Philips Electronics and Associated Industries Ltd* [1988] FSR 416, when he ordered disclosure of the top-secret source code for the Pac-Man computer game:[65]

> [T]he plaintiffs may well feel some hesitation as to whether any undertaking as to confidentiality will be enforceable. Whilst I appreciate their dilemma in this regard, they have chosen to bring this proceeding . . .

The message implicit in his dictum is that, as the Coca-Cola Co apprehended in its litigation, self-help through settlement, preferably before litigation has commenced, is a litigant's only assurance of maintaining document security.

Rather than there being any concrete evidence that the rule against subsequent use increases frankness in disclosure, experience suggests that it does not. Again, hard empirical data is lacking. However, based on anecdotal evidence, leading civil proceduralists,

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[64] For knowing or flagrant violations, see the *Distillers* case; *Zaiwalla v Elstub* (CA 21 February 1997); *Adoko v The Law Society* (EAT/219/97 22 June 1999); *Bourns Inc v Raychem Corp* (CA 17 January 2000). For unwitting violations, see the *Harman* case; *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31.

[65] At 421.

including Lord Woolf MR and Zuckerman,[66] agree that dishonest litigants routinely hide or destroy damaging documents. This is despite the existence of the rule. Two obvious (and potentially strong) incentives for doing so are to avoid subsequent harm through documents being reused (legally or otherwise) beyond the litigation at hand, and to avoid losing the immediate case. The *Cobra* and *Crest Homes* cases are apposite. In both, the defendants deliberately failed to comply with search orders in the hopes of concealing the magnitude of their respective intellectual property right violations. In relation to such litigants—those determined to be dishonest—it is difficult to disagree with Laddie J's observation in the *Cobra* case that imposing the rule to encourage such parties' future co-operation 'is more or less pointless'.[67]

Ironically, in the *Crest Homes* case the defendants argued that the claimants should not be allowed to reuse documents obtained under a search order to bring contempt proceedings against the defendants for having suppressed other documents. Allowing such use would, they claimed, inhibit candour and breach the implied undertaking. As Lord Oliver of Aylmerton observed, 'in a case where . . . the absence of free and frank disclosure on a previous occasion is manifest, an appeal to it has a somewhat hollow ring'.[68] Yet, the problem is more fundamental. As counsel for Crest Homes submitted, if a party knew it could, with impunity, refuse to comply fully with disclosure

[66] *Woolf Final Report* 126; *Zuckerman in Tapper*, 256; A Jack 'Radical Surgery for Civil Procedure' (1993) 143 NLJ 891, 891.
[67] At 824.
[68] At 857.

orders—because its opponent could not use the documents actually disclosed to bring contempt proceedings for failure to disclose the rest—this would provide a substantial incentive *not* to be candid.[69] Not surprisingly, given the power of this submission, the *Crest Homes* case was the first authority in which leave was granted for the reuse of disclosed documents in ancillary contempt proceedings. The case stands as testament to the irrationality both of categorising subsequent litigation use as presumptively improper, and of invoking a candour-based rationale to justify a rule that, unless an exception is made, itself defeats that very goal.

A final factor undermining the rule's instrumentality and rationality as an incentive for candour is the fact that, with leave where required,[70] parties may amend their statements of case to include additional causes of action detected through disclosure. In the *Riddick* case, Stephenson LJ regarded Riddick's use of the memorandum to found fresh proceedings as 'improper' because, inter alia, he could have 'done justice to himself—and to the company—by amending his writ' in the original action.[71] Yet, contrary to Eagles's suggestion that none of the *Riddick* judges saw any problem with amending the original proceedings,[72] Waller LJ disagreed: 'If there be a risk that disclosures may produce new causes of action parties may be deterred from disclosing the document'.[73] Although

[69] At 849. A similar example is *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA).
[70] CPR 17.1(2), CPR 19.1, CPR 19.3.
[71] At 903.
[72] *Eagles* 298.
[73] At 912.

Waller LJ subsequently revised his view,[74] logically his initial stance must be correct. Allowing parties to add causes of action to existing proceedings must do precisely the same damage to candour (in respect of disclosure of documents) as commencing fresh proceedings would do. It is illogical, therefore, to allow amendments but prohibit subsequent litigation use, at least in proceedings between the same parties. In both cases, the impact on candour (if any) should be identical.[75]

3 Theoretical shortcomings

Compounding the many instrumental difficulties just discussed, the candour rationale also is flawed as a matter of principle and theory. Crucially, it affords no theoretical or normative justification for the general rule against subsequent use independent of the pragmatic claim that the rule fosters proper disclosure. According to the candour rationale, it is by encouraging candid disclosure that the rule promotes such values as rectitude of decision and procedural equality of arms. Yet, as has just been seen, this pragmatic claim is at best implausible and more likely false. Once it is removed from the equation, the candour rationale is left offering no independent theoretical justification for maintaining the existing rule against subsequent use.

[74] The *Halcon* case 124.
[75] The only difference will be one of procedural efficiency.

When they arise, disclosure obligations are compulsory. They continue until proceedings conclude.[76] Full disclosure accordingly is non-negotiable, at least as a matter of procedural principle. Thus, the rule against subsequent use—insofar as it is justified as encouraging candour—theoretically speaking is superfluous. It simply grafts onto the disclosure obligations a further (and arguably spurious) inducement to do that which the rules already demand. Once the systemic procedural choice has been made to make disclosure mutual and compulsory, procedural fairness does not require that document-producers be given any additional inducement to comply with their disclosure obligations. Ends such as rectitude of decision and equality of arms are, as a matter of principle, adequately served already by disclosure being compulsory.

If anything, one might say that procedural fairness is undermined by having a presumptive rule against subsequent use. Absent its pragmatic claim, the candour rationale provides no justification for imposing an additional burden on document-recipients (namely, a blanket denial of subsequent use, particularly use in further proceedings) in exchange merely for encouraging document-producers to do that which they already are required to do (make full and frank disclosure). Both Prescott and Zuckerman forcefully have noted the unattractiveness of foisting such an injustice on a litigant in Case B, simply because that litigant might otherwise suffer an injustice in Case A through his or her opponent

[76] CPR 31.11; *Vernon v Bosley (No 2)* [1999] QB 18 (CA).

concealing relevant documents.[77] Two concerns integral to their arguments warrant closer consideration.

First, in cases such as the *Riddick* case, where the effect of barring subsequent use is to deprive a litigant of Case B altogether (because the subsequent action cannot be brought without reusing the disclosed document in question), Prescott and Zuckerman's view that the rule operates as a tool for injustice becomes even more compelling. Interestingly, in relation to informants who are under a duty to disclose information, Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL) 211 could see 'no reason why the law should not encourage their assistance by offering them the assurance that . . . their privacy and confidentiality will be respected' by having their identities kept secret. In the disclosure context, by contrast, there is a substantial reason not to confer analogous protection over disclosed documents. That reason is the enormous potential cost to parties for whom such documents reveal further causes of action, but who, for whatever reason, cannot amend their statements of case to include those causes of action in their original proceedings.[78] Unless such parties can obtain the documents by wholly independent means or persuade the court to exercise its discretion, their claims will be stifled. As noted in the introduction to this chapter, this consequence of the rule especially cries out for justification. The candour rationale affords none.

[77] *Prescott* 489; *Zuckerman in Tapper* 257.

[78] Possible reasons include limitation issues (n 21 above) and procedural inconvenience (eg if continuing disclosure is given too late in proceedings for amendment to be efficient).

Second, it is commonly said that, by fostering candid disclosure which, in turn, promotes truth-finding, the general rule against subsequent use furthers the public interest in 'the proper administration of justice'.[79] This claim is undermined by the fact that the rule denies many litigants justice. Some cannot pursue their causes of action at all. Those who can, but who cannot use relevant documents (and cannot reacquire them through repeat disclosure), risk distorted, and therefore unjust and unfair, outcomes.[80] For the purposes of the rule against subsequent use, the term 'justice' is given an attenuated and somewhat artificial meaning. It does not mean justice in its holistic sense, encompassing substantive and procedural justice for litigants in respect of all matters in dispute arising between them. Instead, it refers solely to rectitude of decision within the confines of the original proceedings. The candour rationale's claim that the rule is justified because it promotes the 'administration of justice' accordingly is disingenuous. All that the rule does is arbitrarily to favour one subset of overall justice (the dispute which happens to be brought before the courts first in time) at the expense of all others.

Before modern courts converted the traditional rule against 'improper' use of disclosed documents into a presumptive prohibition against 'any use' of them beyond the purposes of the original action, judges historically conceptualised the term 'justice' quite differently. For example, as Chapter 2 showed,[81] they distinguished subsequent

[79] The *Riddick* case 912; the *Halcon* case 121; the *Harman* case 308; *EMI Records v Spillane* [1986] 1 WLR 967, 977; *Tassilo Bonzel v Intervention* [1991] RPC 43, 47.
[80] *Zuckerman in Tapper* 253–5.
[81] 62–67 above.

litigation use from 'improper' collateral uses (such as publication for purely private ends) specifically because they recognised that allowing the former advances 'the ends of justice'.[82] It is a pity that their richer understanding of the meaning of justice has been lost, especially on so weak a foundation as the candour rationale.

C CONCLUDING REMARKS

Despite judicial enthusiasm for the candour rationale, pragmatically speaking the modern rule against subsequent use does not have any obvious, positive impact on disclosure practice. Broad exceptions render the rule unpredictable—and therefore unreliable—as a guarantee of protection for document-producers against their documents being reused. The CPR 31.22(1) exceptions for documents read or referred to in open court, and expansive judicial discretion to authorise subsequent use, particularly undermine the rule as a source of comfort for document-producers who may be evaluating the relative risks and benefits of being candid or of stonewalling. Strong incentives exist both for document-producers to withhold documents, and for document-recipients to abuse or violate the rule. As Eagles has observed, parties cannot make a 'nice calculation of the odds'[83] as the candour rationale implicitly presumes they can. Without its pragmatic claim, the candour rationale affords no independent theoretical or normative justification for the rule.

[82] *Hopkinson v Lord Burghley* (1867) 36 LJ Ch 504, 504.
[83] *Eagles* 296.

Given all of this, it may seem odd that judges repeatedly have endorsed the candour rationale, despite its palpable shortcomings. Yet, policing disclosure compliance is notoriously difficult.[84] Herein lies a profound quandary for the law. Disclosure is crucial to the administration of justice in our imperfect procedural justice system.[85] In the absence of any 'super-test' for identifying correct decisions, the legitimacy of judicial decisions depends upon parties and the public having confidence that such decisions come tolerably close to achieving rectitude of decision. Proper disclosure substantially bolsters that confidence. But the rules cannot guarantee that, in practice, proper disclosure ever will be made. Even sanctions, the primary tool under the CPR for encouraging proper procedural conduct, ultimately depend upon detection for their deterrent effect.

When viewed in this light, the modern rule against subsequent use begins to look very much like a judicial stop-gap measure; a pragmatic attempt by judges to ameliorate this fundamental tension. The notion that the rule enhances candour may appeal to judges who, implicitly if not consciously, realise the contingent nature of the legitimacy of their decisions. If so, then one explanation for the rationale's survival may be that judges embrace the rule, not because it benefits litigants (for, when probed, clearly it does not), but because it buttresses the apparent legitimacy of the civil litigation process.

[84] *Woolf Final Report* 126.
[85] J Rawls *A Theory of Justice* (rev edn OUP Oxford 1999) 74–5; *Zuckerman in Tapper* 253.

Cane posited a similar (although differently focused) hypothesis in his analysis of single-factor, consequence-based judicial reasoning. He questioned the extent to which appeals to consequences 'are designed to lend a spurious air of objectivity to subjective value-judgments'.[86] Given that English judges enjoy expansive discretion to permit subsequent use under CPR 31.22(1)(b), Cane's question equally well may be asked in relation to judicial interpretation and application of the candour rationale. Meanwhile, the fact that judges routinely have accepted the candour rationale without question lends weight to the supposition that they perceive it to be a legitimising tool. So too does the existence of expansive judicial discretion to allow subsequent use. It is ironic that such discretion is needed only because the general rule produces injustice; and that, by ignoring 'justice' in an holistic sense, the rule undermines the legitimacy of the civil justice system as a whole.

In certain specific contexts, candour-based arguments for precluding subsequent use may carry greater force. Patent revocation proceedings are a possible example. These typically involve highly secret documents and parallel worldwide applications, often before *fora* with no power to order disclosure. Jenkins has argued that, if subsequent litigation use were to be allowed in such cases, there would be a real risk of prejudicing candour.[87] He refers to *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43, where

[86] P Cane 'Consequences in Judicial Reasoning' in J Horder (ed) *Oxford Essays in Jurisprudence* (4th series OUP Oxford 2000) 43.

[87] N Jenkins 'Patent Actions in the United Kingdom: Release from Implied Undertaking on Discovery' [1992] EIPR 434, 437.

Aldous J similarly observed: 'Discovery in patent actions is a heavy burden and requires disclosure of documents which in the normal course of business would be considered as highly sensitive. To make the order in this case [releasing the implied undertaking] would be a real disincentive to full discovery by litigants'.[88] Family financial proceedings may be another example.[89] Attaching a narrow privilege to defamatory disclosed documents also has been suggested.[90] It may be that, in certain specific contexts such as these, the danger to candour is genuine and therefore more compelling. But, as Zuckerman has argued,[91] procedural rules should not be used to confer preferential treatment on certain categories of disclosed documents. The substantive law should address this. Special class-wide exceptions aside, it would be preferable simply to have a presumption in favour of allowing subsequent use, subject to the court having a well-defined and predictable discretion to enter protective orders to preclude or condition such use in appropriate cases.[92]

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[88] At 50. Cf *SmithKline Beecham v Connaught* [2000] FSR 1, where the Court of Appeal saw no reason to preclude use abroad of such documents read in open court.

[89] See *Clibbery v Allan* [2002] 1 All ER 865 (CA) and 290 below.

[90] *Prescott* 491; *Zuckerman in Tapper* 256–7; AAS Zuckerman 'Practice and Procedure' [1998] All ER Ann Rev 330, 351. See also the *Riddick* case 896; *Taylor v SFO* [1999] 2 AC 177 (HL).

[91] AAS Zuckerman 'Practice and Procedure' [1998] All ER Ann Rev 330, 351.

[92] This argument is developed in Part II below.

As a purported justification for the rule against subsequent use, then, the candour rationale cannot withstand rigorous scrutiny.[93] Interestingly, in recent years the move away from candour-based rationales in other legal contexts, such as public interest immunity, has begun to touch subsequent use jurisprudence. In the *Taylor v SFO* case, for example, Lord Hoffmann observed:[94]

> I am not sure that it is right to treat the implied undertaking in civil proceedings merely as an inducement to a litigant to disclose documents which he might otherwise have been inclined to conceal. I think that it is more a matter of justice and fairness, to ensure that his privacy and confidentiality are not invaded more than is absolutely necessary for the purposes of justice.

Such dicta may be the first indicia that the candour rationale is falling from favour. If so, it is a welcome development. However, having ascertained that the candour rationale is a blind alley, it is necessary to consider whether either of Lord Hoffmann's alternative factors—namely, confidentiality and invasion of privacy—affords compelling justification for the rule against subsequent use. As the next two chapters will seek to show, the short answer, once again, is no.

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[93] For additional arguments, see *Prescott* and *Zuckerman in Tapper* 256–8. The candour rationale also features in American discovery case law, although not prominently: *Martindell v IT&T Corp*, 594 F 2d 291, 295 (2nd Cir 1979); *HL Hayden Co of New York, Inc v Siemens Medical Systems, Inc*, 106 FRD 551 (SDNY 1985) aff'd in part 797 F 2d 85 (2nd Cir 1986). See *Marcus (1983)* 22. Criticism has been voiced there too: EF Sherman & SO Kinnard 'Federal Court Discovery in the 80s—Making the Rules Work' (1983) 95 FRD 245, 286.

[94] [1999] 2 AC 177 (HL) 210, followed in *A v A; B v B* [2000] 1 FCR 577, 605.

CHAPTER 4—THE CONFIDENTIALITY RATIONALE

A INTRODUCTION

In civil proceedings parties often are required to divulge confidential documents. Unless those documents are privileged, or otherwise immune from production,[1] the law requires that they be disclosed. Confidentiality alone is not sufficient reason to withhold relevant material.[2] This long-standing rule (which underpins CPR 31) violates the normal right recognised under English law to 'keep one's documents to oneself'.[3] Whether conceptualised as an adjunct to property rights or as a privacy-related matter, document confidentiality is a vitally important concern. But so too is the right to a fair trial. Civil litigation entails a direct clash between, on the one hand, public and private interests in preserving confidentiality and, on the other hand, the public interest in administering justice by getting to the truth (and so achieving rectitude of decision).[4] As a general rule, the law prioritises the fair and proper determination of disputes. Thus, 'confidentiality must yield to the general public interest that in the administration of justice truth will out, unless . . . a

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[1] eg, under the public interest immunity doctrine.

[2] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1974] AC 405 (HL) 433–4; *D v NSPCC* [1978] AC 171 (HL) 219–20; *Science Research Council v Nassé* [1980] AC 1028 (HL) 1065; *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskin & Sells (a firm)* [1997] 1 WLR 257 (CA) 267, 272. In America, see *Federal Open Market Committee v Merrill*, 443 US 340, 99 S Ct 2800 (1979).

[3] The *Riddick* case 896; the *Harman* case 300, 312, 323.

[4] 20–24 above.

more important public interest is served by protecting the information . . . from disclosure in a court of law'.[5]

According to the confidentiality rationale, the rule against subsequent use is justified because it confines the damage done to confidentiality through compulsory disclosure (both moral and instrumental) to the minimum level consonant with doing 'justice'. As Lord Keith put it in the *Harman* case (at 308), 'a certain degree of publicity being given to private documents . . . has to be accepted as part of the price of achieving justice'. But disclosure still entails a 'very serious invasion of the privacy and confidentiality of a litigant's affairs'. So, the 'burden' placed on litigants should be no 'harsher or more oppressive' than that which is required to secure justice in the immediate case.[6]

Like the candour rationale (considered in Chapter 3 above), the confidentiality rationale is inherently problematic. The court's desire to mitigate disclosure's invasion of confidentiality and to champion civil liberties is laudable. But as a justification for the modern rule against subsequent use, the confidentiality rationale is deeply flawed, in principle and in practice. Certainly, document confidentiality should be protected to the fullest extent possible in the absence of any countervailing public interest requiring that the information be made known. But, as this chapter will seek to show, this imperative cannot

[5] *D v NSPCC* [1978] AC 171 (HL) 218.

[6] See also the *Riddick* case 896; the *Harman* case 300; *Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428 (CA) 432, 445; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (CA) 197–8 (upheld by the House of Lords on different grounds).

justify maintaining an automatic, global rule against subsequent use, which shrouds disclosed documents of every description.

B CONFIDENTIALITY VS COMPULSION

Before examining the confidentiality rationale in detail, it is helpful to distinguish it from the compulsion rationale (examined in Chapter 5 below). The two sometimes are conflated.[7] This is understandable. They share common characteristics and, to an extent, overlap. Both rationales conceptualise the rule against subsequent use as a tool for ameliorating the detrimental consequences of producing private papers in litigation. Both claim to strike a fair balance between facilitating rectitude of decision on the one hand, and safeguarding individual privacy-related interests on the other. Philosophically, both evince a classical libertarian distaste for state-sanctioned intrusion into the individual sphere and interference with citizens' freedom of choice. Nevertheless, properly construed, they are distinct.

The confidentiality rationale is concerned with the *content* of disclosed documents—whether or not they contain confidential information. Where they do, it holds, subsequent use should not be permitted. Otherwise, confidentiality would be further diminished without justification. By contrast, the compulsion rationale is

[7] The *Riddick* case 896; *Medway v Doublelock Ltd* [1978] 1 WLR 710, 713–4; the *Sybron* case 315, 322; the *Derby (No 2)* case; *Marcel v Comr of Police of the Metropolis* [1992] Ch 225, 237 (Browne-Wilkinson V-C, first instance); *Mahon v Rahn* [1998] QB 424 (CA) 434–6; *Clibbery v Allan* [2001] 2 FLR 819, 857–8 (first instance); *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA) 885–7. See also *Matthews and Malek* 351.

concerned with the *provenance* of disclosed documents—whether or not they were obtained through the courts' coercive powers to compel production. The fact that they may (or may not) contain confidential information is irrelevant. If their production was compelled, the compulsion rationale asserts, use should be restricted to the immediate case. Further use unjustifiably would violate document-producers' privacy and autonomy.

Interestingly, a similar distinction (often overlooked) arises in the public interest immunity sphere. There, most documents attract immunity because revelation of their secrets substantially would harm the public interest (*content*). However, some documents are excluded even where the information they contain is well known, purely because their source warrants immunity from disclosure (*provenance*).[8] Correctly differentiating between the two grounds can be important, particularly for determining whether or not secondary evidence may be led.[9]

In the disclosure context, a simple example illustrates the content–provenance dichotomy. Suppose that two pharmaceutical companies, X and Y, are involved in a patent dispute. During disclosure, X produces two research files. One is an old file about a related product. Nothing in it is secret anymore. The other is X's

[8] See *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL) especially 440, where (inter alia) immunity was upheld in respect of ministerial documents because evidence of the governmental policy at issue already was freely available in the public domain. See also *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274 (HL).

[9] *Cross and Tapper* 474.

current file. Its entire contents are highly confidential. From the dates and other indicia in the files, Y realises that X misappropriated from Y much of the information in both files. Should Y be able to reuse the files to bring separate proceedings? Judicial discretion aside,[10] the confidentiality and compulsion rationales deliver rather different answers. Properly construed, the confidentiality rationale would allow Y to use the old file to bring fresh proceedings but not the current one, as only the current one is confidential. Under the compulsion rationale Y could use neither, as X equally was obliged to disclose both. Had X disclosed its confidential file not through compulsory disclosure but by annexing it to an expert report, the outcomes would differ again. The confidentiality rationale would continue to prohibit subsequent use, as X divulged the information solely for use in the immediate dispute.[11] Under the compulsion rationale, however, X most likely would be classified as having volunteered the information.[12] Accordingly, Y would not be constrained under CPR 31.22(1).

These differing outcomes reflect a deeper teleological divide. The confidentiality rationale purports to serve the public interest by protecting private confidences. It presupposes that all documents covered by CPR 31.22 'have the necessary quality of confidence'

[10] CPR 31.22(1)(b). In practice, outcomes rarely are so easy to predict, due to judicial discretion and admixture of the two rationales.

[11] Use for a 'limited purpose' is a factor derived from the equitable doctrine of protection of confidence: *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 (CA) 506; *Davies v Eli Lilly* [1987] 1 WLR 428 (CA) 432; *Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969, 987; the *Cobra* case 824. See 123–126 below.

[12] The *Derby (No 2)* case; the *Prudential* case 769, 773.

about them.[13] By contrast, the compulsion rationale purports to serve a wider privacy-based right;[14] the right to choose if and when to show one's documents to others. A disclosed document thus may be 'private'—because a party would not have chosen to admit to possessing it or to produce it—without it being 'confidential' *stricto sensu*.

In recent years confusion and interpolation of the two rationales has abated. Judges more commonly express explicit preference for one or the other. The compulsion rationale is in the ascendancy at present. For example, in the *Prudential* case Hobhouse J favoured the 'compulsion principle', observing that it operates independently of any question of confidentiality.[15] In *Mahon v Rahn* [1998] QB 424 (CA) Otton LJ followed *Prudential*, asserting that '[c]onfidentiality is irrelevant'.[16] Although the *Mahon* decision was disapproved in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL), Lord Hoffmann there agreed that the prohibition against subsequent use 'is generated by the circumstances in which the documents have been disclosed, irrespective of their contents'.[17]

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[13] *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 (CA) 215; *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47. This phrase derives from the equitable doctrine of protection of confidence: 128 below.

[14] *Gurry* 13; *Marcel v Comr of Police of the Metropolis* [1992] Ch 225, 237.

[15] At 765. For Hobhouse J, confidentiality should be relevant only to privilege.

[16] At 436. See also *Twigg Farnell (formerly Alan Farnell & Co) v Wildblood (No 5)* (CA 26 September 1997), Mummery LJ; *Tejendrasingh v Metsons* [1997] EMLR 597 (CA).

[17] At 208.

Yet, the confidentiality rationale also has its proponents. In the *Cobra* case, Laddie J preferred it to compulsion-based arguments.[18] He opined (inter alia) that disputes over subsequent use typically arise only in relation to private material. Making confidentiality the key is desirable, he reasoned, as the rule against subsequent use then applies with 'equal force' whether documents are 'volunteered' (under ordinary disclosure) or 'squeezed out' (under search orders).[19] Similarly, in his dissent in the *Harman* case, Lord Scarman suggested that the rule against subsequent use generates a duty of confidence, which sensibly can exist only for so long as there is something confidential to protect.[20]

In the light of recent steps towards the recognition of a right to privacy under English law, conceptual entanglement of the two rationales may be set to intensify once again. This possibility is explored in Chapter 5 below, where the foundations of the proposed right to privacy are considered in detail.[21]

[18] Albeit a watered-down version of confidentiality, embracing all 'private' documents whether or not 'strictly confidential' in the *Coco v AN Clark* [1969] RPC 41 sense.

[19] At 824. Laddie J's definitions of what is voluntary and compelled are questionable. He also propounded a property-based rationale. See 189–193, 202–203 below.

[20] The *Harman* case 311–3.

[21] 167–175 below.

C EQUITABLE DOCTRINE OF PROTECTION OF CONFIDENCE

As Lord Scarman's *Harman* dictum indicates, the confidentiality rationale owes much to the equitable doctrine of protection of confidence. In the *Distillers* case Talbot J described the rule against subsequent use as being an extension of that doctrine.[22] Courts now regard the rule as the doctrine's functional equivalent, superseding private law duties of confidence whenever confidential information is disclosed in judicial proceedings.[23] Because the doctrine feeds into the confidentiality rationale in several areas, and appears to be on the brink of being reinvented as a fully-fledged privacy right (which carries implications for the compulsion rationale), it is worth briefly tracing its origins and salient features.

Broadly, the doctrine prevents confidants from disclosing or misusing information confided in them by others for a limited purpose. Until the early 19th century, violations of private confidentiality interests could be restrained only where breaches of property, contract or other rights recognised at law were involved.[24] In *Prince Albert v Strange* (1849) 1 Mac&G 25, 41 ER 1171 the Court of Chancery removed this restriction by propounding an equitable

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[22] See also the *Harman* case 313–4; *Marcel v Comr of Police* [1992] Ch 225, 236–7; MN Howard, P Crane and DA Hochberg *Phipson on Evidence* (14th edn Sweet & Maxwell London 1990) 5 (omitted from 15th edn).

[23] The *Derby (No 2)* case; the *Prudential* case 767; *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 987. Cf *Mainwaring v Goldtech Investments Ltd* The Times, 19 February 1991 (CA). See RG Toulson and CM Phipps *Confidentiality* (Sweet & Maxwell London 1996) 243 ff.

[24] *Gurry* 25–6; Toulson and Phipps (n 23 above) ch 1.

doctrine of protection of confidence.[25] That doctrine enables individuals or corporations (inter alia) to obtain injunctions to restrain publication of 'information imparted in confidence which ought not to be divulged',[26] or further information derived from it. The doctrine developed significantly in the 20th century following its renaissance in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 (CA). All manner of confidences have become subject to it.[27] Publication of a catalogue describing private etchings made by the royal family has been banned,[28] as has a subcontractor's exploitation of another's commercial drawings and tools[29] and revelation of secrets told by a wife to her husband about her personal affairs, attitudes and aspirations.[30]

Ensuring that those under 'the duty to be of good faith'[31] do not divulge or propagate private confidences is a public interest in its own right.[32] But not all confidences come under the doctrine. There is 'no confidence as to the disclosure of iniquity' or serious

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[25] For a fuller account of the facts of the case, see AT Denning *What Next in the Law* (Butterworths London 1982) 221–2. In *Coco v AN Clark* [1969] RPC 41, 46 Megarry J traced the origins of the 'ancient' doctrine to the Statute of Uses 1535. He described the *Prince Albert v Strange* case merely as having 'reasserted' it.

[26] *Lord Ashburton v Pape* [1913] 2 Ch 469 (CA) 475.

[27] *Style and Hollander* 288; *Gurry* ch 5; Toulson and Phipps (n 23 above) ch 2.

[28] *Prince Albert v Strange* (1849) 1 Mac&G 25, 41 ER 1171.

[29] *Saltman Engineering v Campbell* (1948) 65 RPC 203 (CA).

[30] *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302.

[31] *Fraser v Evans* [1969] 1 QB 349 (CA) 361.

[32] *D v NSPCC* [1978] AC 171 (HL) 219, 230. For alternative theoretical accounts of the right to bring actions for breach of confidence, see eg: G Jones 'Restitution of Benefits Obtained in Breach of Another's Confidentiality' (1970) 86 LQR 463; S Ricketson 'Confidential Information—A New Proprietary Interest? Pt I' (1977) 11 Melbourne UL Rev 223 and 'Pt II' (1978) 11 Melbourne UL Rev 289.

misdeeds.[33] Hence, a laundry could not prevent a former employee revealing evidence of price-fixing.[34] Nor, crucially, does the doctrine apply to anything 'required to be disclosed in the public interest'.[35] Thus, the Church of Scientology could not suppress a book describing potentially dangerous 'medical quackeries' practised by its members behind closed doors.[36] As Lord Goff observed in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) (the *Spycatcher* case), private rights in the protection of confidence are not sacrosanct. In a proper case they must be subjugated to a 'countervailing public interest which favours disclosure'.[37] Such disclosure may be to the public at large, or to an appropriate authority or other recipient.[38]

Having said this, Lord Goff also noted in the *Spycatcher* case (obiter) that a transaction or pre-existing confidential relationship between the parties need not be essential to sustain a breach of confidence suit. The equitable doctrine, he opined, also should cover 'obviously confidential' documents that come into the possession of strangers.[39] Despite potential difficulties in imposing obligations

[33] *Gartside v Outram* (1856) 26 LJ Ch 113, 114; *Weld-Blundell v Stephens* [1919] 1 KB 520 (aff'd [1920] AC 956 (HL)); *Beloff v Pressdram Ltd* [1973] 1 All ER 241; *British Steel Corp v Granada Television Ltd* [1981] AC 1096 (HL) 1169, 1201.
[34] *Initial Services Ltd v Putterill* [1968] 1 QB 396 (CA).
[35] *Fraser v Evans* [1969] 1 QB 349 (CA) 362; *Church of Scientology of California v Kaufman* [1973] RPC 635; *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA); *R v Licensing Authority ex p SmithKline & French Laboratories Ltd* [1988] CMLR 883.
[36] *Hubbard v Vosper* [1972] 2 QB 84 (CA) 95.
[37] At 282. See also *Butler v Board of Trade* [1971] Ch 680, 691; *ex p SmithKline & French Laboratories Ltd* [1988] CMLR 883, 903–4; *Webster v James Chapman & Co (a firm)* [1989] 3 All ER 939, 945.
[38] *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 (CA).
[39] At 281.

on innocent or unwitting third parties,[40] subsequent courts have welcomed this significant expansion of the doctrine—embracing as it does otherwise legally unprotected materials, such as private diaries, letters, state secrets and unauthorised intrusive photographs, that fall into strangers' hands through misadventure or misconduct.[41] As Chapter 5 will explore in the context of the privacy-based compulsion rationale, together with the HRA this development soon may provide a platform for the recognition of a qualified right to personal privacy under English law.[42]

D SHORTCOMINGS OF THE CONFIDENTIALITY RATIONALE

1 Over-inclusiveness of CPR 31.22

As noted above, the confidentiality rationale conceptualises the rule against subsequent use as being a tool for preserving confidentiality after documents have been disclosed in litigation. As Sir John Donaldson MR memorably stated in *Davies (Joy Rosalie) v Eli Lilly & Co* [1987] 1 WLR 428 (CA) 431–2, litigation in England is conducted 'cards face up on the table'. But as a 'safeguard' document-producers are entitled to say: 'Some of these cards are highly confidential. You may see them for the purpose of this litigation, but unless their

[40] C Tapper *Computer Law* (4th edn Longman London 1989) 103–5.
[41] *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807; *Douglas v Hello! Ltd* [2001] QB 967 (CA) 998–9; *A v B plc* [2001] 1 WLR 2341.
[42] 167–175 below.

contents are disclosed to all the world as part of the evidence given in open court, those contents must be used for no other purpose'.

By definition, the confidentiality rationale has two inherent limitations. First, it applies only to disclosed documents that are 'confidential'—and then, only where their confidentiality survives the litigation at least partially intact. Second, at most, it justifies precluding only those subsequent uses that further would diminish confidentiality. By contrast, CPR 31.22(1) is confined neither to confidential material, nor to precluding only harmful forms of reuse. Exceptions aside, it covers *all* disclosed documents (confidential or otherwise), and precludes *all* forms of subsequent use (confidentiality-diminishing or otherwise). At best, then, the confidentiality rationale affords merely a partial justification for the rule.[43] This can be seen by defining document confidentiality, and by evaluating the impact of subsequent use upon it.

(a) The meaning of 'confidential'

As Hobhouse J noted in the *Prudential* case, 'documents on discovery may or may not be confidential in character'.[44] The mere fact that they are disclosed in a judicial forum cannot imbue them with confidentiality if their contents are common knowledge.[45] So,

[43] It is argued below that it offers no sound justification at all.
[44] At 765.
[45] *John Zink Co Ltd v Lloyds Bank Ltd & Airoil Burner Co (GB) Ltd* [1975] RPC 385, 389; *Gurry* 5, 78–9. Although, sometimes confidentiality can be conferred by the creation or association of information within a special context, such as under the public interest immunity doctrine (n 8 above) or in private arbitrations in England: 30 n 89 above. See *Gurry* 78–9.

'confidentiality' must be narrower in scope than embracing the entire universe of disclosed documents. Given the interrelationship between the rule against subsequent use and the equitable doctrine of protection of confidence, not surprisingly most subsequent use authorities adopt that doctrine's definition of confidentiality.[46]

Its classic formulation appeared in the *Saltman Engineering* case, where Lord Greene MR opined that, for information to be confidential (apart from contract), it must 'have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge'.[47] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47–8 Megarry J added two further components. First, such information 'must have been imparted in circumstances importing an obligation of confidence'. There can be no binding obligation of confidence if information is 'blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential'. Second, there 'must be an unauthorised use of that information to the detriment of the party communicating it'.

In the *Spycatcher* case, the House of Lords accepted *Coco* as having summarised correctly the essential ingredients for an action for breach of confidence. Where the interests of private individuals are concerned, Lord Keith questioned whether actual detriment (above

[46] See eg the *Harman* case 300, 312–4; the *Sybron* case 322–3; *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155, 165.

[47] (1948) 65 RPC 203 (CA) 215. See also *Coco v AN Clark* [1969] RPC 41, 47–8; *John Zink v Lloyds Bank* [1975] RPC 385, 389; *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 282; *Gurry* 4, 70 ff.

and beyond damage to the public interest in preserving private confidences) should have to be shown.[48] Lord Goff preferred to leave the issue open,[49] while Lord Griffiths considered detriment to be essential.[50] The issue remains unclear.[51] However, Lord Griffith's view accords with the *Coco* case, where Megarry J emphasised that the circumstances must be 'of sufficient gravity' to warrant intervention. Furthermore, he observed, 'trivial tittle-tattle, however confidential' does not deserve protection. Taken together, these dicta indicate that, for Megarry J, detriment is a product of the value of maintaining the secrecy of the information at stake. Actions should not be brought unless objectively valuable information (sufficient to warrant judicial intervention) is involved. Detriment suffered is simply the evidence of that value. Recently, in *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), Lord Woolf CJ appeared to confirm this view. In articulating guidelines to assist courts in deciding whether or not to issue interim injunctions to prevent the press from publishing information pending breach of confidence suits, he identified as a central issue 'whether there exists a private interest worthy of protection'.[52]

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[48] [1990] 1 AC 109 (HL) 255–6.

[49] At 281–2.

[50] At 269–70. Lords Jauncey and Brightman were silent on point. See further H Fenwick and G Phillipson 'Confidence and Privacy: A Re-examination' (1996) 55 CLJ 447, 453.

[51] WR Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th edn Sweet & Maxwell London 1999) 325–6. Cf R Wacks *Personal Information: Privacy and the Law* (Clarendon Press Oxford 1993) 56.

[52] At para 11(vii); followed in *Campbell (Naomi) v Mirror Group Newspapers* [2002] EWHC 499 (QB) para 40.1.

Returning to the disclosure context, these three components—inaccessibility to the public (at least in the relevant locale[53]), communication in private, and significant secrecy value—appear to be the three essential attributes of confidentiality. Many disclosed documents do not satisfy these criteria. In relation to the first, some disclosed documents already are common knowledge. In relation to the second, scholars diverge sharply over whether disclosure is a private component of litigation, or whether the public should have a right of access to disclosed materials, even those unused at trial.[54] In England, the prevailing (and perhaps preferable) view is that disclosure occurs in private. So, like the equitable doctrine, unless a countervailing public interest militates in favour of allowing reuse, CPR 31.22(1) should preclude document-recipients from using disclosed documents except for the 'limited purpose' for which they acquired them—namely, to facilitate the proper administration

[53] On this location-dependent concept of 'relative secrecy', see *Franchi v Franchi* [1967] RPC 149, 152–3; *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 260; RG Toulson and CM Phipps *Confidentiality* (Sweet & Maxwell London 1996) 44 ff.

[54] American legal scholars especially disagree fiercely. Debate turns on the importance of administering justice in public, and the US doctrine of public access to 'judicial records': *Nixon v Warner Communications, Inc*, 435 US 589, 98 S Ct 1306 (1978); *In re Halkin*, 598 F 2d 176, 186 (DC Cir 1979). This thesis assumes that English pre-trial disclosure is private. Generally, it proceeds with minimal court involvement. Disclosed documents need not be admissible or, if they are, be used at trial. On this view, see *Marcus (1983)* 11, 15; *Marcus (1991)* 471–2; AR Miller 'Private Lives or Public Access?' (1991) 77 American Bar Association J 64, 66; *Seattle Times Co v Rhinehart*, 467 US 20, 33; 104 S Ct 2199, 2207 (1984); *Anderson v Cryovac, Inc*, 805 F 2d 1 (1st Cir 1986). Contrast AE Cohen 'Access to Pretrial Documents Under the First Amendment' (1984) 84 Columbia L Rev 1813, 1845; *Wilk v American Medical Association*, 635 F 2d 1295 (7th Cir 1980) 1299; *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559 (EDNY 1985) 567 aff'd 821 F 2d 139 (2nd Cir 1987) cert denied *sub nom Dow Chemical Co v Ryan*, 484 US 522, 108 S Ct 344 (1987).

of justice. Since the *Riddick* case, subsequent use rule authorities have taken this 'limited purpose' simply to mean doing justice in the immediate case.[55] For reasons canvassed below,[56] a better interpretation would be to secure justice in any proceedings to which the documents are relevant and material.

In respect of the third criterion (significant secrecy value), the secrets contained in many disclosed documents may not be sufficiently valuable to warrant judicial protection—especially protection backed by civil contempt powers. Protecting confidential information from harmful, unwarranted dissemination or misuse is a key public interest component. But the net of protection should not be cast so widely as to catch more flotsam than fish. Thus, in several subsequent use cases concerning intellectual property, adducing evidence that alleged trade secrets possess significant commercial or technical value has been considered important.[57] Similarly, in America the widely

[55] eg *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA) (confidential documents supplied for the limited purpose of taxation of costs hearing could not be reused in parallel US proceedings).

[56] 145–147, 148–151 below.

[57] The *Halcon* case 102 (Whitford J, first instance); *Apple Corps v Apple Computer* [1992] 1 CMLR 969; *Lubrizol Corp v Esso Petroleum Co Ltd (No 2)* [1993] FSR 53; *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA). As Tapper has observed, conceptual confusion dogs this branch of the law: C Tapper *Computer Law* (4th edn Longman London 1989) 76–8. Courts seem to be eroding the distinction between protecting trade secrets (where the secrecy value of information should be determinative, and proprietary remedies apply) and the law of confidence (where, traditionally at least, the nature of the parties' relationship was more important, and personal remedies applied). Recent authorities tend to treat the same range of remedies as being available irrespective of the nature of the information at stake. This could suggest that objective secrecy value (under the law as it stands) is more relevant to choice of remedy than to whether information should be eligible for protection. See further 283 below.

accepted definition of 'confidential information' is information that, if disclosed, would cause a 'clearly defined and very serious injury' to the disclosing party.[58] As under the equitable doctrine, then, it should not be sufficient that a document-owner may not wish to divulge a given document. The general right to keep one's documents to oneself, while relevant to the compulsion rationale, is not an adequate foundation upon which to classify disclosed documents as being 'confidential'.

This interpretation of 'confidential' may seem somewhat restrictive. But one must recall the competing interests at stake—as Lord Goff emphasised in the *Spycatcher* case.[59] CPR 31.22(1) suppresses freedom of expression; both document-recipients' right to impart information, and the right of others to receive it.[60] It also can frustrate access to justice rights.[61] Confidentiality should prevail only where the benefits outweigh the very real detriment to these large, competing interests.[62] Tellingly, in the USA, where the scope of discovery is most liberal, and the need to safeguard confidential information therefore most pressing—and where privacy has not only common law and statutory but probably constitutional right

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[58] *US v IBM, Corp*, 67 FRD 40 (SDNY 1975) 46. See RP Campbell 'The Protective Order in Products Liability Litigation: Safeguard or Misnomer?' (1990) 31 British Columbia L Rev 771, 781.

[59] 125 above.

[60] ECHR, Art 10(1).

[61] ECHR, Art 6(1). See eg the *Riddick* case (85, 90 above).

[62] This interpretation has parallels in the Data Protection Act 1998, which defines protected 'personal data' expansively. Wide exemptions allow the holding, use and dissemination of personal data in connection with legal proceedings, or where necessary to establish, exercise or defend legal rights (s 35). See further 294 below.

status[63]—'confidentiality' is judicially recognised only in a narrow range of discoverable documents. In essence, the accepted categories are: intimate personal information (eg, medical or taxation records); trade secrets (eg, secret processes or formulae); and 'other confidential research, development, or commercial information' (eg, contractual terms; customer, supplier and employee details; financial information about salaries, investments, income, future capital expenditure, etc).[64]

At most, then, the confidentiality rationale embraces merely a subset of the full universe of disclosed documents. Yet, CPR 31.22 applies universally to all. In doing so, it contradicts traditional 19th century authority. As Eagles has noted, 'rather than smother the whole discovery process in secrecy', historically English judges carefully confined subsequent use restrictions 'to particularly confidential or sensitive documents'.[65] Moreover, at best, the rationale justifies preventing only those forms of reuse that would further diminish the confidentiality still attaching to disclosed documents following litigation. Here too problems arise.

(b) The impact of subsequent use on confidentiality

Where disclosed documents are read or referred to in open court, their confidentiality usually is utterly lost. They enter the

[63] Fourth Amendment, US Constitution: 170 n 36 below.
[64] R26(c)(7) Fed R Civ P. See *WM&M* §2043, 554 ff; *Doré* 308; FH Hare Jr, JL Gilbert and SA Ollanik *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press Washington DC 1994) 158; GM Thompson 'Protective Orders: Sword and Shield in the War of Discovery' (1989) 12 American J Trial Advocacy 483, 495. See further 272, 281–283 below.
[65] *Eagles* 286.

public domain.[66] Where documents are not so used, most of their confidentiality survives the litigation intact. They may have been divulged to other parties, legal advisers, experts, witnesses, judges and so forth. But they will not have become common knowledge. Contrary to the confidentiality rationale, it does not follow that precluding *all* subsequent uses is necessary to preserve this residual secrecy. In principle, if a given form of reuse would not cause any material, additional diminution of confidentiality, there should be no objection to it.

Subsequent litigation use is just such a use. Where the parties to the original and subsequent proceedings are identical, each already has full knowledge (if not copies) of the confidential information disclosed.[67] Once documents are produced in litigation, as between the parties any confidentiality in them is destroyed. The situation is analogous to that where A shows privileged documents to B. Privilege is not thereby lost as against all the world. But, because confidentiality is a prerequisite for privilege,[68] A no longer can assert privilege against B. To adopt Ferris J's phraseology from *Killick v PricewaterhouseCoopers* (ChD 11 October 2000), if document-recipients and their legal advisers 'already know of the documents and their contents in a different context', there is no reason to keep them

[66] CPR 31.22(1)(a); although subject to CPR 31.22(2).
[67] eg the *Riddick* case; *Bayer AG v Winter (No 2)* [1986] FSR 357; the *Crest Homes* case.
[68] *Ventouris v Mountain* [1991] 1 WLR 607 (CA) 611. See *Phipson* 567–8, 577.

'behind an artificial curtain'.[69] Any further revelation—such as to fresh legal advisers, experts, witnesses or judges involved in the second proceedings—still will be within the narrow confines of litigation, and therefore able to be made subject to appropriate restrictions against unjustified dissemination or misuse.[70]

Where fresh parties are involved in subsequent proceedings in addition to one or more of the original parties,[71] revealing previously disclosed documents to them need not diminish confidentiality materially either. Again, the documents still should be used only within the context of private litigation (unless a countervailing public interest requires otherwise). The documents will not thereby become public property, or susceptible to use willy-nilly for extraneous, unjustifiable ends. Moreover, subsequent litigation use will be appropriate only where documents are relevant to the second proceedings. Normally, disclosure would be available in any event.[72] Hence, the additional parties will receive only such confidential information as they would have obtained—after laborious repetition of the disclosure process—in any case. This point is especially cogent where, as in the *Sybron* case, fresh proceedings are brought against

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[69] Strictly speaking, *Killick* involved use in related proceedings against a third party. However, the documents were well known to all three parties, as all were involved in the underlying transaction.

[70] *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 992. In *Dory v Richard Wolf GmbH* [1990] FSR 266 subsequent litigation use was permitted despite the claimants having different legal advisers in the second proceedings.

[71] eg *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981] FSR 398; *Levi Strauss & Co v Barclays Trading Corp Inc* [1993] FSR 179; *Omar v Omar* [1995] 1 WLR 1428.

[72] Either from a repeat original party or under the non-party disclosure rules (CPR 31.17; CPR 25.1(1)(j)).

third parties purely because it is procedurally preferable to joining them to the original litigation.

The same arguments apply where subsequent proceedings involve entirely different parties to the original case;[73] whether they be engaged in traditional adversarial model litigation between a small number of opponents, or in mass or group litigation. Confidentiality need not be undermined unduly by allowing previously disclosed documents to be disseminated for reuse in either situation. So long as reasonable cause exists, reusing confidential documents is not improper.[74] As Chapter 2 showed, CPR 31.22 contradicts 19th century authorities expressly endorsing subsequent litigation use of confidential information, even where proceedings would involve third parties.[75] A modern parallel is *ex p Coventry Newspapers Ltd* [1993] QB 278, where the Court of Appeal allowed reuse of confidential disclosed documents in subsequent proceedings between entirely different parties. On the facts, the imperative of administering justice (by properly testing serious allegations in court) was held to override both the rule against subsequent use and public interest immunity claims.[76]

In some cases, subsequent litigation use may pose a genuine threat to subsisting document confidentiality. In the *Halcon* case, for

[73] eg *Bibby v Cansulex* [1989] QB 155.
[74] As the authors of *Phipson* have contended ever since the modern rule against subsequent came into being: JH Buzzard *et al Phipson on Evidence* (13th edn, 1982) 323 and subsequent editions. See also Sir Rupert Cross *Evidence* (5th edn Butterworths London 1979) 315.
[75] 62–63 above.
[76] For the facts of the case, see 238 below.

example, allowing secret documents disclosed in England to be reused in parallel Netherlands Patent Office appeal proceedings would have rendered the documents irrevocably publicly accessible (due to the rules governing that forum). Such a situation is exceptional. It could be avoided easily through an express protective order preventing such use. There is no need to ban subsequent use outright. A second threat is that widening the scope of dissemination—particularly amongst a large pool of similarly-situated claimants involved in mass litigation—inevitably would increase the risk of unauthorised 'leaks'. To compensate for this, courts long have had power to make special orders limiting the classes of persons entitled to see disclosed information, specifically to minimise this sort of risk.[77] Besides, where documents would be subject to disclosure in the subsequent proceedings in any event, any loss of confidentiality that may occur (authorised or not) is, in a sense, inevitable. Subsequent litigation use per se does not produce any greater prejudice.

A final threat to confidentiality posed by allowing subsequent litigation use is that the documents may be read or referred to at a public hearing during the second proceedings. By virtue of CPR 31.22(1)(a) they would enter the public domain. Any confidentiality that survived the original litigation would be annihilated. According to the confidentiality rationale, while this

[77] eg, US-style 'attorneys' eyes only' orders: *WM&M* §2043, 566. So-called party 'confidentiality clubs' also are common: *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 334 (CA); *Church of Scientology of California v DHSS* [1979] 1 WLR 723 (CA); *Format Communications Manufacturing Ltd v ITT (UK) Ltd* [1983] FSR 473 (CA) 481.

risk must be tolerated in the original proceedings—as part of the 'price' of doing justice—the rule against subsequent use is an essential 'safeguard' to obviate such a further threat in later proceedings.[78] This reasoning is flawed in three key respects.

First, by so justifying the rule against subsequent use, the confidentiality rationale falls into the trap of confining 'justice' to the formal parameters of a single dispute. It overlooks the importance of facilitating correct outcomes in other cases—especially those in which previously disclosed confidential documents are highly pertinent but otherwise unattainable.[79] Second, the rationale elevates confidentiality above getting to the truth in circumstances where nothing warrants reversing their normal priority. This shortcoming is examined in detail below.[80] For now, the key point is that the potential 'price' of documents entering the public domain is, in procedural theory terms, equally worth paying in subsequent as in original proceedings. It is a by-product of administering justice in public; itself a fundamental procedural principle.[81] Third, in practical terms, it is not necessary to prohibit subsequent litigation use to avoid this threat to confidentiality. Other, more proportionate mechanisms

[78] The *Harman* case 308.
[79] 149 below.
[80] At 145–147.
[81] *Scott v Scott* [1913] AC 417 (HL) 437, 477; the *Harman* case 303, 316; JIH Jacob *The Fabric of English Civil Justice* (Stevens & Sons London 1987) 23. For the public hearing guarantee under Art 6(1) ECHR, see *Pretto v Italy* Series A No 71, (1984) 6 EHRR 182, para 21; *Axen v FRG* Series A No 72, (1984) 6 EHRR 195, para 25. Under CPR, PD 39, 1.4A judges must have regard to Art 6(1) when deciding whether to hold private hearings under CPR 39.2.

are available.[82] Under CPR 31.22(2) judges may prohibit reuse of disclosed information even after it has come up in open court. Although hearings normally are held in public,[83] courts may proceed *in camera* to protect especially sensitive information.[84]

2 Over-duration of CPR 31.22

A related shortcoming of the confidentiality rationale stems from the fact that CPR 31.22 continues to apply to disclosed documents even after their confidentiality has lapsed or expired. This may occur either through the effluxion of time (secrets routinely become stale and are no longer worth protecting) or following revelation of the information through means other than reference in open court.

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[82] Proportionality to the legitimate aim pursued (the proportionality principle) is the central mechanism for assessing whether or not restrictions placed over qualified ECHR rights (including Art 10 freedom of expression and Art 8 privacy) are acceptable. The proportionality concept is key to balancing competing ECHR rights under the HRA by virtue of HRA, s 2(1). See: *Soering v UK* Series A No 161, (1989) 11 EHRR 439; *Douglas v Hello!* [2001] QB 967 (CA) 1004–5; *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491 (CA) para 57. See also *Dudgeon v UK* Series A No 45, (1981) 4 EHRR 149; *Silver v UK* Series A No 61, (1983) 5 EHRR 347. For arguments that the European Court has failed to generate a theoretically defensible method for reconciling competing ECHR rights, see A McHarg 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671. On the proportionality concept generally, see: E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing Oxford 1999); R Clayton and H Tomlinson *The Law of Human Rights* (OUP Oxford 2000) vol 1, 278–88, 297–300.

[83] CPR 39.2(1).

[84] CPR 39.2(3)(c) (hearing may be held in private if it 'involves confidential information and publicity would damage that confidentiality'). See *Scott v Scott* [1913] AC 417 (HL) 437, 446; *Science Research Council v Nassé* [1980] AC 1028 (HL) 1066; *R v Chief Registrar of Friendly Societies ex p New Cross Building Society* [1984] QB 227 (CA); *Clibbery v Allan* [2002] 1 All ER 865 (CA).

As already noted, if confidential disclosed documents are mentioned in open court they become 'public property and public knowledge'.[85] They may be used or disseminated freely by all the world for any lawful purpose. This makes perfect sense under the confidentiality rationale—the documents' confidentiality has gone. Yet, if the same documents are *not* referred to in open court, but instead enter the public domain via some other route,[86] unlike the rest of the world those who received them through disclosure still will be bound by CPR 31.22. They will not be able to use or distribute the information unless and until the court grants permission or the document-producer consents.[87] This being so, the practical explanation for the rule's continued operation cannot be to preserve confidentiality: confidentiality has long gone.

This anomaly lay at the heart of the *Harman* litigation, which led to the CPR 31.22(1)(a) public hearing exception.[88] In the *Harman* case, a 3:2 majority of the House of Lords upheld a solicitor's conviction for civil contempt of court for violating the rule against subsequent use. She had shown confidential Home Office disclosed documents (concerning an experimental prison 'control unit' in which her client had been detained) to a *Guardian* journalist after the

[85] *Saltman Engineering v Campbell* (1948) 65 RPC 203 (CA) 215; the *Harman* case 310.
[86] Such as through publication following a FOIA application.
[87] CPR 31.22(1)(b) or (c). See RG Toulson and CM Phipps *Confidentiality* (Sweet & Maxwell London 1996) 243.
[88] *Williams v Home Office* [1981] 1 All ER 1151; *Secretary of State for the Home Dept v Harman* [1981] QB 534 (QBD, CA); the *Harman* case (HL). See 243–246 below.

documents had been read out in open court.[89] The journalist had attended portions of the hearing, and sought access to the documents to ensure accurate reporting. He later wrote a feature article highly critical of the prison system. The House of Lords majority rejected the solicitor's argument that duties of confidence under the rule governing subsequent use should cease once documents are deployed in open court. This ruling subsequently was overturned when Parliament enacted RSC Ord 24, r 14A (the precursor to CPR 31.22(1)(a) and (2)), after the European Commission of Human Rights held admissible Harman's application challenging the decision under various ECHR provisions.[90]

In his powerful dissent in the House of Lords (which Lord Simon joined), Lord Scarman found no justification for continued application of the prohibition against subsequent use once documents have come up in open court. It could not, he said, be 'good law' that litigants and their solicitors 'are alone excluded from the right to make that use of the documents which everyone else may now make, namely, to treat them as matters of public knowledge'. Such an exception, he opined, could not be 'decently or rationally permit[ted]'.[91] These sentiments apply equally well where confidential disclosed documents

[89] While the actual extent was disputed, the courts assumed that all 800 pages were read aloud in full.

[90] *Harman v UK* (1985) 7 EHRR 146. For criticism of the *Harman* majority's attempt to differentiate the supposedly 'procedural' implied undertaking from 'substantive' breach of confidence law, see *Eagles* 288.

[91] At 312.

become public through means other than reference in open court.[92] There too, there is no rational basis to preclude their use by litigants alone on spurious confidentiality grounds.

3 Misunderstanding of procedural fairness

The first two shortcomings identified above show that the confidentiality rationale cannot support the full extent of CPR 31.22.[93] At best, it may explain limiting certain (confidentiality-diminishing) forms of reuse, of certain (confidential) disclosed documents. But it may not even do that.

A core assumption underpinning the confidentiality rationale is that globally to ban subsequent use is necessary to ensure procedural fairness. The rationale posits CPR 31.22 as an essential counterbalance against disclosure's invasion of confidence, required to restore fairness in the original proceedings. To invade private confidentiality rights is justified, the reasoning goes, because getting to the truth in litigation is a more important public interest than to preserve confidentiality. However, once one has got to that truth, the latter interest revives. Disclosure's invasion of confidentiality would be unfair if documents so uncovered could be reused: confidentiality is subjugated to truth for the purposes of doing justice only in the case

[92] Were a document-recipient found responsible for such an unauthorised 'leak', this could be addressed through a special protective order (analogous to those issued where disclosure is obtained abusively: 59–62 above), coupled with appropriate sanctions.

[93] While space precludes further analysis here, other forms of reuse (eg, passing documents showing wrongdoing to the proper authorities) also need not diminish confidentiality significantly. For detailed discussion, see ch 8 below.

at hand. Hence, not even pursuing rectitude of decision in further proceedings can justify allowing reuse.

This reasoning appears in many guises in the authorities. Lord Denning MR's judgment in the *Riddick* case is a classic exposition. Believing his approach to accord with dicta in *D v NSPCC* [1978] AC 171 (HL), he opined: 'The thing to do in every case is to weigh the competing public interests and see which way the scales come down'. If (as he thought usually would be the case) the balance favours truth-finding, disclosure of confidential documents must be made. But the public interest in preserving confidentiality requires that use of the documents 'not be pressed further than the course of justice requires'.[94] In *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 (CA) 506 May LJ paraphrased this as saying that 'the public interest in the privacy and confidence that a person should have in his own documents outweigh[s] the public interest in the full disclosure of documents in litigation, once this has taken place'.[95] This statement captures perfectly the shifting priority of interests integral to the confidentiality rationale. That shift, however, is both contrary to principle and illogical.

The first error of principle is the confidentiality rationale's misconception that fairness *in the original proceedings* necessitates precluding subsequent use. This neglects the fact that the 'balance' already has been struck between competing interests in the original

[94] At 895–6.
[95] See also the *Harman* case 308; *Davies v Eli Lilly* [1987] 1 WLR 428 (CA) 432. May LJ dissented from the majority's decision, although not on this point.

proceedings. The long-standing general rule is that all relevant documents must be disclosed. In procedural theory terms, rectitude of decision and procedural equality of arms already conclusively have been accorded priority over preserving private confidences. Disclosure of confidential documents does not upset this balance of fairness. The very existence of the well established, general rule demanding such disclosure presupposes that a just balance between the various competing interests already has been struck.

Analogous authorities concerning orders for production under RSC Ord 24, r 13 illustrate the point. Thereunder, parties could obtain orders for production where 'necessary either for disposing fairly of the cause or matter or for saving costs'.[96] In *Science Research Council v Nassé* [1980] AC 1028 (HL) 1065–6 Lord Wilberforce observed that, if ordering production would involve a breach of confidence, courts could take this into account by attempting to secure justice through other means (such as obtaining the information from another source). Crucially, however, were disclosure necessary it had to be ordered, confidentiality notwithstanding. Lord Wilberforce's speech recognises that disclosure itself facilitates 'disposing fairly' of litigation. No further measures are needed where confidential information is concerned.

In *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskin & Sells (a firm)* [1997] 1 WLR 257 (CA) the claimant's liquidators, suing its

[96] Under the RSC (unlike CPR 31), discovery usually proceeded automatically without formal court orders: 14 n 27 above.

auditors in tort and contract, sought to gain access to records of interviews with the auditors conducted by the Serious Fraud Office. Simon Brown LJ rejected counsel's submission that a document's confidentiality should be weighed against its likely utility at trial to determine whether production should be ordered. The threshold test under RSC Ord 24, r 13 was whether relevant information otherwise was unavailable and disclosure not oppressive. Once that test was 'made out', he opined, the court could not refuse to order disclosure: 'Confidentiality at this point is frankly immaterial'. As was held in the *Nassé* case, there is 'no balancing exercise to be performed'. Such an exercise would be 'wholly unnecessary and inappropriate'.[97] Contrary to Lord Denning MR's dictum in the *Riddick* case, no weighing of interests is required in individual cases. Confidentiality already has been put in the scales and the procedural balance struck, once and for all, in favour of rectitude of decision. This accords with a correct interpretation of the speeches in the *D v NSPCC* case.[98]

The second error of principle lies in the rationale's reversal of the priority between confidentiality and rectitude of decision once confidential documents have been disclosed. This error specifically concerns subsequent litigation use. Vis-à-vis other forms of use, there is no problem in principle with courts preserving and enforcing private confidentiality interests as vigorously as possible (insofar as

[97] At 273–4. The only exception was if the prejudicial effect outweighed the probative value: *Science Research Council v Nassé* [1980] AC 1028 (HL) 1076. See also *British & Commonwealth Holdings plc (in admin) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86, 96.

[98] MN Howard, P Crane and DA Hochberg *Phipson on Evidence* (14th edn Sweet & Maxwell London 1990) 542–3 (omitted from 15th edn).

they remain intact following the litigation). Sometimes, this may conflict with other public interests—freedom of expression, freedom of the press, proper public scrutiny of the operations of government, avoiding public hazards and so on.[99] Where it does, there is no difficulty with a court undertaking a balancing exercise to determine whether maintaining confidentiality or allowing dissemination or reuse better would serve the public interest.[100] With subsequent *litigation* use, the situation is quite different.

Disclosure rules are predicated on the basis that accurate judicial decision-making—serving the proper administration of justice—is a more important public interest than preserving confidentiality per se.[101] This is a universal, foundational principle of English civil procedure. Yet, in effect, CPR 31.22 disapplies this principle in relation to proceedings brought using confidential documents previously obtained through disclosure. According to the confidentiality rationale, while getting to the truth in the first proceedings warrants disclosure and use of confidential documents, getting to the truth in the second proceedings inexplicably does not—unless a would-be claimant can secure the same through wasteful repeat disclosure or from a wholly independent source.

The confidentiality rationale identifies no additional public policy factor to justify this inversion of the normal priority of rectitude

[99] See ch 8 below.
[100] As in the *Distillers* case.
[101] Assuming no overriding public policy factor (such as national security) requires immunity from disclosure.

of decision over confidentiality. It simply postulates a revival of the very confidentiality interest that, in earlier proceedings, was deemed less important than finding the truth. Why confidentiality suddenly should assume greater significance than truth-finding in subsequent litigation is a mystery. Overriding it in the first case was fully justified. It is regrettable that a private confidence had to be diminished. But that is the accepted 'price' of securing accurate judicial decisions.[102] The calculus is no different in subsequent proceedings. There too, using confidential documents must be justified in order to facilitate rectitude of decision. In principle, it is irrelevant that a claimant may be reusing documents obtained through an earlier incursion into confidentiality (via disclosure). Such incursion was fully justified in the first case; reuse equally must be justified (for identical reasons) in the second.

Gurry, in his monograph on breach of confidence,[103] offers an alternative confidentiality-based rationale for the rule against subsequent use. He considers the rule justified by dual underlying policies of protecting confidence *and* ensuring candid disclosure. According to Gurry, the rule's object is not the preservation of confidentiality per se, but rather the advancement of the proper administration of justice. This happens to coincide with preserving private confidences, because such preservation fosters candid disclosure which, in turn, advances justice. The need to encourage candour is, accordingly, the essential, additional public policy factor

[102] The *Harman* case 308.
[103] *Gurry* 169 ff.

which, Gurry believes, warrants limiting disclosure to the immediate case and precluding all subsequent use. As Chapter 3 demonstrated, the supposed public interest in encouraging candid disclosure is, in reality, an empty concept, devoid of sound empirical or theoretical support. This being so, Gurry's confidence in a combined confidentiality–candour rationale seems to be misplaced.

Principle aside, it is also illogical that truth-finding should trump confidentiality in some cases but not in others. Nothing about the disclosure of confidential documents changes the respective values of achieving rectitude of decision and preserving confidences. Either rectitude of decision takes precedence over private confidentiality interests or it does not. If it does, then, *mutatis mutandis*, it must do so in every case. Under the confidentiality rationale, the value of truth-finding alters depending upon the order in which two disputes (to which the same confidential document is relevant) happen to come before the court. Logically, such a haphazard result is indefensible.

4 Impoverished conception of 'justice'

As the foregoing analysis demonstrates, the confidentiality rationale (like the candour rationale) rests on an impoverished definition of justice; one focussing exclusively on the immediate case in which disclosure is given. The rationale arbitrarily construes 'doing justice' simply to mean achieving an accurate result in that case. It overlooks wider, holistic justice concerns—including securing a just outcome of the underlying cause of action or dispute (which may not be embodied fully in the original proceedings); and facilitating justice

in other proceedings. This strangulated conception of justice lies at the heart of Lord Denning MR's original *Riddick* case formulation of the confidentiality rationale, where he stated that disclosure's intrusion into private confidences 'should not be pressed further than the course of justice requires'.[104] That he meant solely the 'course of justice' in the immediate case is apparent from the outcome. Riddick was left powerless to pursue his defamation action, in circumstances where reusing the defendant's memorandum need not have involved any further incursion into confidentiality whatsoever.

In *Davies v Eli Lilly* [1987] 1 WLR 428 (CA) 431–2, Sir John Donaldson MR explained that English civil proceedings are conducted 'cards face up on the table' because 'litigation is not a war or even a game. It is designed to do real justice between opposing parties, and, if the court does not have *all* the relevant information, it cannot achieve this object'. Yet, he continued, 'there have to be safeguards' where 'cards are highly confidential'. Restricting their use to the litigation at hand 'is only fair'. Unfortunately, the two halves of his dictum are contradictory. If it is impossible to do 'real justice' without the court having access to '*all* the relevant information',[105] then banning subsequent litigation use must produce unfairness. If pertinent, previously disclosed confidential documents cannot be sourced from elsewhere, subsequent proceedings either will be stymied or have to proceed on incomplete information. In either

[104] At 896.
[105] Assuming neither privilege nor any other exclusionary doctrine justifies withholding information.

case—particularly given the absence of material harm caused to confidentiality by subsequent litigation use—'real justice' will be denied, not done.[106]

Where subsequent proceedings involve the original parties, 'real justice' will be denied in circumstances where all parties have full knowledge. All will know that the document-producer has violated a document-recipient's legal rights. All will know even that they all know. As Hoffmann J observed in *Bayer AG v Winter (No 2)* [1986] FSR 357, 363, the only real 'prejudice' to the document-producer of allowing subsequent litigation use is that the subsequent proceedings against it may be successful. Potter LJ's observation in *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA) 329 accordingly is astute that, rather than any confidentiality concern, 'the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker'. Protecting private confidences from becoming public property without just cause is a pressing public interest concern; shielding parties from the proper legal consequences of their actions is not.[107] Under the equitable doctrine of protection of confidence, where documents reveal serious additional wrongdoing the 'iniquity' exception applies. As Prescott has observed, nothing in the law of confidence prevents an aggrieved party from seeking

[106] The fact that litigants may use information reacquired from independent sources (including illegally) undermines the claim that the rule exists to preserve confidentiality. It is a good illustration of the content–provenance dichotomy; the rule here not protecting actual secrets per se, but merely disclosed documents that happen to contain them.

[107] AAS Zuckerman 'Practice and Procedure' [1999] All ER Ann Rev 273, 285.

redress or defending an action in a court of law.[108] It is deeply disturbing that a rule of court should have this effect.

E RESERVATION OF CONFIDENTIALITY

For completeness, one final matter needs addressing. The previous section asserted that confidentiality automatically is destroyed as between litigants once documents are disclosed. Accordingly, it argued, allowing subsequent litigation use entails no additional harm to confidentiality. While factually this may be correct, theoretically speaking there is a contrary argument. It was put forward in the *Prudential* case, where Hobhouse J could see 'no conceptual difficulty' with a party reserving all rights of confidence as against an opponent notwithstanding disclosure of confidential information.[109] Reasoning by analogy, he cited three examples where the law recognises such reservations: disclosure for a limited purpose under the private law of breach of confidence; notice to admit facts;[110] and the privilege attaching to 'without prejudice' communications. None of these examples truly is comparable to subsequent litigation use, as examination of their underlying policies reveals.

The public policy underpinning the equitable doctrine of protection of confidence is to safeguard the social and economic benefits that flow from enabling disclosure of secrets for a limited

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[108] *Prescott* 490, citing *Alfred Crompton v Customs & Excise Comrs (No 2)* [1974] AC 405 (HL).
[109] At 770.
[110] Under RSC Ord 27, r 2.

purpose. These include encouraging technological and artistic advancements and fostering co-operative relationships within communities.[111] Legally recognising the sharing of private confidences only for a 'limited purpose' makes perfect sense. The designer of the world's first CO_2 powered car must be able to share the specifications with a prototype-builder without fear that an employee or subcontractor will sell them to BMW and retire to Monaco on the profits. By contrast, where disclosure of documents in litigation is concerned, using them in the original and in subsequent proceedings seems to serve the same 'limited purpose'—facilitating the proper administration of justice. Hence, nothing is gained by importing wider 'reservation of confidentiality' notions into the disclosure process than are built into it already.

Under the formal admissions procedure in RSC Ord 27, r 2 (Hobhouse J's second example) a litigant could serve notice on another requiring it to admit certain facts. A similar procedure now is contained in CPR 14.[112] Such formal admissions may not be used against their makers in any other proceedings. The policy underlying this device is to reduce procedural cost and delay by obviating the need for evidence to be adduced on certain points.[113] Two factors make equating it with the rule against subsequent use inapt. First, parties who make formal admissions waive the right to put their opponents to proof. Barring further use of admissions offers them a

[111] *Gurry* 5, 7–9.
[112] Although, the new procedure derives from CCR Ord 9 rather than RSC Ord 27.
[113] May LJ (gen ed) *Civil Procedure 2001* (Sweet & Maxwell London Autumn 2001) vol 1, 251, para 14.1.1.

vital incentive to do this.[114] No equivalent incentive is necessary in relation to disclosure. Documents subject to disclosure already exist, and production already is legally required. Second, not every formal admission need acknowledge the irrefutable or be entirely accurate. Some may be made purely for tactical reasons, or to focus attention on the really contentious issues.[115] A good illustration is *Bird v Birds Eye Walls Ltd* The Times, 24 July 1987 (CA), where five cake-makers sued their employer for repetitive strain injuries. The defendant's insurers admitted liability 'even though they knew that they might be able to contest it successfully'.[116] They took a commercial decision that it would be more cost-effective to dispute quantum alone. Thus, disallowing reuse of formal admissions in subsequent proceedings does not impair truth-finding. Evidence can always be adduced, or fresh admissions obtained. Disclosed documents, by contrast, have abiding, objective, truth-finding value. Precluding their use in subsequent litigation can have profoundly deleterious consequences.

Hobhouse J's final example is 'without prejudice' privilege. Such communications generally cannot be put in evidence unless all parties consent.[117] The privilege rests on the public policy of encouraging settlement. It removes the fear of litigants being embarrassed by

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[114] As did the risk of cost-liability for refusing to admit the uncontestable: RSC Ord 62, r 6(7).

[115] The fact that parties sometimes could resile from formal admissions further indicates that they were not considered generically reliable items of evidence. See eg *Bird v Birds Eye Walls* The Times, 24 July 1987 (CA); *Gale v Superdrug Stores Ltd* [1996] 1 WLR 1089 (CA).

[116] *Gale v Superdrug* [1996] 1 WLR 1089 (CA) 1100.

[117] *Cross and Tapper* 468 ff; *Phipson* 556 ff; D Vaver '"Without Prejudice" Communications—Their Admissibility and Effect' (1974) 9 U British Columbia L Rev 85.

concessions made solely in the hopes of reaching a consensus.[118] As with formal admissions, the privilege does not directly conflict with the courts' truth-finding mission. Thus, it is not analogous to the rule against subsequent use. 'Without prejudice' statements need not be objectively true or accurately record parties' actual beliefs about the facts or merits of their case.[119] Concessions may be made purely to achieve quick and economical (albeit less accurate) settlements.

None of Hobhouse J's three examples, then, truly is comparable to CPR 31.22. Maintaining the fiction of confidentiality in each of them fulfils a useful social function. Sound policy reasons exist, which have no counterpart in the subsequent litigation use context. Also, reserving confidentiality in each of his examples normally does not interfere with litigants' access to justice or rectitude of decision. Precluding subsequent litigation use of disclosed documents, by contrast, frequently does. Tellingly, on those rare occasions when reserving confidentiality in Hobhouse J's examples would frustrate the courts' truth-finding function, the fiction is displaced and litigation use is allowed. Thus, the 'iniquity' exception negatives equitable duties of confidence so that serious wrongdoing may come to light. Similarly, 'without prejudice' privilege may be overridden, and a

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[118] *Cutts v Head* [1984] Ch 290 (CA) 306; *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 (HL) 1299; *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436 (CA); Vaver (n 117 above), 94.

[119] This reality underpins Wigmore's 'conditional statement theory'. Wigmore postulated that the very foundation of the privilege is the irrelevance of hypothetical or conditional statements and concessions as items of evidence: JH Chadbourn (rev ed) *Evidence in Trials at Common Law by John Henry Wigmore* (Little, Brown & Co Boston 1972) vol 4, §1061, 36. The theory gained some acceptance in North America, but not in England: Vaver (n 117 above) 101–2.

settlement communication admitted into evidence, if it contains an 'unambiguous admission of impropriety' by its maker (such as conspiracy or fraud) and excluding it would result in a dishonest case being prosecuted.[120] Such statements, being so utterly against the interest of their makers, are assumed to be factually reliable.

F CONCLUDING REMARKS

In his *Harman* dissent, Lord Scarman valiantly sought to confine the rule against subsequent use to genuinely confidential documents. His attempt to infuse some rationality into this area of law is commendable. Yet, confidentiality-based justifications for the rule still exhibit a range of theoretical and practical shortcomings. At best, the confidentiality rationale affords a partial justification for the rule against subsequent use. But even this status is precarious, for the reasons given above. In short, the confidentiality rationale does not appear to afford sound justification for the modern general rule in CPR 31.22.

This is not to say that confidential disclosed documents (as defined by the *Coco* test) should be devoid of legal protection against unwarranted dissemination or misuse. On the contrary, their proper protection is a crucial aspect of the public interest. Courts should be vigilant to ensure that their processes do not become instruments

[120] eg *Forster v Friedland* (CA 10 November 1992); *Independent Research Services Ltd v Catterall* [1993] ICR 1 (EAT); *Fazil-Alizadeh v Nikbin* The Times, 19 March 1993 (CA).

for unjustified invasion of document-producers' civil liberties and privacy-related rights. But CPR 31.22, as it stands, is not an appropriate or proportionate tool for striking the correct balance between the competing interests at stake.

The traditional balance of priority between achieving rectitude of decision and protecting private confidences admittedly is not set in stone. These two public interests could be revalued and their balance shifted. As James, Hazard and Leubsdorf have observed,[121] civil procedures are a matter of choice. Different procedures express different political and social values, which may vary between states and across time. In recent years the value of truth-finding within English civil procedure may have declined. In place of the traditional, 'justice on the merits' procedural philosophy that was dominant during the past century (under which reaching substantively correct decisions was the court's paramount concern),[122] today decision-accuracy is considered one, relativistic, hallmark or dimension of a just procedure.[123] Under the CPR 1.1(2)(c) proportionality principle, for

[121] F James, GC Hazard and J Leubsdorf *Civil Procedure* (4th edn Little, Brown & Co Boston 1992) 2.

[122] *Clarapede v Commercial Union Association* (1883) 32 WR 262, 263; *Cropper v Smith* (1884) 26 ChD 700 (CA) 710–1. See AAS Zuckerman 'Dismissal for Delay—The Emergence of a New Philosophy of Procedure' (1998) 17 CJQ 223. Some judges still adhere to this view: eg *Gale v Superdrug* [1996] 1 WLR 1089 (CA) (Millett LJ).

[123] J Frank *Courts on Trial: Myth and Reality in American Justice* (Antheneum New York 1963) 80 ff; ME Frankel 'The Search for Truth: An Umpireal View' (1975) 123 U Pennsylvania L Rev 1031; MP Golding 'On the Adversary System and Justice' in R Bronaugh *Philosophical Law: Authority, Equality, Adjudication, Privacy* (1978) 95, 106–12; AAS Zuckerman 'A Reform of Civil Procedure—Rationing Procedure Rather than Access to Justice' (1995) 22 J Law and Society 155; *Woolf Interim Report* chs 3 and 25. See 20–24 above.

example, courts and parties now are expected to trade-off accuracy (as appropriate) to achieve efficiency and economy gains.

Concurrently, various measures, either introduced or proposed, signal a distinct thawing of law-makers' attitudes towards privacy-related rights. Recent statutes conferring greater legal protection over confidential information include the Data Protection Act 1998 and aspects of the Protection from Harassment Act 1997. Within the common law, the HRA, coupled with Article 8(1) of the ECHR, looks set to provide the final impetus for judicial creation of a qualified right to privacy, which would embrace confidential documents produced during litigation.[124] Article 10(2) of the ECHR—which allows expression rights to be restricted (inter alia) 'for the protection of the reputation or rights of others' and 'for preventing the disclosure of information received in confidence'—is another potential avenue (as yet untapped) for courts to increase the value placed on preserving document confidentiality at the expense of decision-accuracy.

Conceivably, this trend towards recognising a right to 'information privacy'[125] could translate into litigants being permitted unilaterally to withhold sensitive documents from disclosure. Such a development might appeal to those who already regard legal

[124] 167–175 below.

[125] AF Westin *Privacy and Freedom* (Bodley Head London 1967) 7; J Michael 'Privacy' in C McCrudden and G Chambers *Individual Rights and the Law in Britain* (Clarendon Press Oxford 1995).

professional privilege as a 'fundamental human right'.[126] But, even if the relative values of truth-finding and confidentiality were to be reassessed in the civil litigation context, it is unthinkable that their balance could be shifted so far as to be inverted. The impact on access to justice and other fundamental procedural principles would be too profound. Allowing litigants to withhold confidential documents from disclosure would make administering justice impossible. Procedural equality of arms and the principle of equal, unimpeded access to evidence would be trounced. Litigants would be denied their due. No faith could be placed in the accuracy of judicial decisions. Systemic legitimacy would be severely—perhaps fatally—undermined. Such an outcome also would conflict with Article 8(2) of the ECHR, which permits interference with privacy rights where necessary in a democratic society (inter alia) 'to protect the rights and freedoms of others'. In *Chappell v UK* Series A No 152, (1990) 12 EHRR 1, the European Court of Human Rights upheld search orders in principle under Article 8, so long as adequate safeguards are observed. If search orders are acceptable under

[126] *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487 (HL) 507, affirmed in relation to solicitor–client privilege in *In re L (a minor) (police investigation: privilege)* [1997] AC 16 (HL). See also: *R v Uljee* [1982] 1 NZLR 561 (NZCA); *Sorby v Commonwealth* (1983) 152 CLR 281 (HCA) 314 (Brennan J); *Baker v Campbell* (1983) 153 CLR 52 (HCA) (especially Murphy and Deane JJ); *Campbell & Fell v UK* Series A No 80, (1985) 7 EHRR 165; AW Alschuler 'The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel' (1982) 54 U Colorado L Rev 67. The point is hotly contested. Compare *Waugh v British Railways Board* [1980] AC 521 (HL) 536–7; ME Frankel 'The Search for Truth Continued: More Disclosure, Less Privilege' (1982) 54 U Colorado L Rev 51; AAS Zuckerman 'Legal Professional Privilege and the Ascertainment of Truth' (1990) 53 MLR 381; AAS Zuckerman 'Legal Professional Privilege—The Cost of Absolutism' (1996) 112 LQR 535; C Tapper 'Prosecution and Privilege' (1997) 1 Intl J Evidence & Proof 1, 5; *Cross and Tapper* 439–40.

Article 8, disclosure of confidential documents likewise must be acceptable too.

Nevertheless, considering the theoretical possibility of such a reappraisal is a worthwhile exercise. For, by showing how unworkable it would be to reverse the normal priority of administering justice (through getting to the truth) over preserving confidentiality, it underscores the irrationality of the confidentiality rationale—which does just this in relation to subsequent litigation use. It also raises the issue of the relevance of state-sanctioned coercion. Both disclosure and search orders are aspects of compulsory process. Whether this fact should affect the permitted use of documents so obtained is a central concern of the compulsion rationale. That rationale is addressed in the next chapter.

CHAPTER 5—COMPULSION RATIONALE AND CONCLUSION TO RATIONALES

A INTRODUCTION

Of the three rationales put forward to justify the modern rule governing subsequent use of disclosed documents, the compulsion rationale perhaps is the most challenging. As Chapters 3 and 4 showed, the candour and confidentiality rationales each rest on demonstrably dubious grounds. The candour rationale is a product of untested assumptions about the rule's impact on document-producers' frankness in giving disclosure. The confidentiality rationale purports to shut confidentiality's stable door after the horse has bolted—even in circumstances where allowing the horse out both is warranted and unlikely to result in appreciable harm. By contrast, the compulsion rationale's foundations are philosophical in nature. Its core precept is that violating individual privacy through court-sanctioned coercion is morally objectionable. Accordingly, the use of information so obtained should be limited strictly to the purpose that justified the intrusion.

The earliest statement of the compulsion rationale appears in the *Riddick* case, where Lord Denning MR observed that disclosed documents are 'obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires'.[1] A more

[1] At 896.

detailed account appears in the *Derby (No 2)* case. It is surprising that this case has never been reported. It is a key authority often cited and reaffirmed; on numerous occasions by the Court of Appeal.[2] In it, Browne-Wilkinson V-C, a staunch proponent of safeguarding individual privacy against state-sanctioned intrusion,[3] justified the rule against subsequent use on the basis that disclosure

> is an interference with the right of privacy which an individual would otherwise enjoy in relation to his own documents. As a result of the public interest in ensuring that all relevant information is before the Court in adjudicating on the claim in the action, that right of privacy is invaded and the litigant is forced, under compulsion by the process of discovery, to disclose his private documents. But, such invasion of privacy being only for the purpose of enabling a proper trial of the action in which the discovery is given, the Court is astute to prevent a document so obtained from being used for any other purpose.

In the *Prudential* case (at 765), Hobhouse J expressed a similar statement, identifying it as '[t]he rational basis for the rule' against subsequent use. The rule also has been conceptualised as the *quid pro quo* for disclosure's intrusiveness. Thus, Rimer J has referred to it 'as, in a sense, the consideration given to a litigant for the invasion of privacy which is imposed upon him by requiring him to give discovery'.[4]

As such dicta show, the compulsion rationale has three interrelated, core characteristics. First, it is predicated on the

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[2] The *Prudential* case; *Mahon v Rahn* [1998] QB 424 (CA) (disapproved on a different point in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL)); *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA); *Cassidy v Hawcroft* (CA 27 July 2000); *Bingham v Martin* [2001] EWCA Civ 1453 (CA) para 13.

[3] *EMI Records Ltd v Spillane* [1986] 1 WLR 967, 973 (describing broad statutory powers to invade privacy as 'distasteful to those trained in the law').

[4] *Miller v Scorey* [1996] 1 WLR 1122, 1130 (first instance decision upheld by the Court of Appeal).

notion that citizens possess a right to privacy—specifically, an autonomy-based right to choose if, when, and how to reveal private papers to others. Second (and flowing directly on from this), the rationale presumes that, once documents have been extracted forcibly from document-producers during litigation and used to facilitate justice in the immediate case, no further use of them possibly can be justified. The public interest in the proper administration of justice, it accepts, overrides privacy rights in the context of the proceedings at hand. But both 'justice and fairness'[5] demand that documents obtained under compulsion of court proceedings be used for that purpose alone and no other. No 'harsher or more oppressive burden' is permitted.[6] Indeed, CPR 31.22 is seen as recompense for the fact that litigants may invoke the courts' coercive powers at all to compel others to divulge information against their will. Third, the rationale presumes that CPR 31.22 should protect only those materials that are produced involuntarily. Further, it embraces all such materials irrespective of their content. Thus, the fact that information divulged during litigation may be highly confidential is irrelevant if its producer had an option about whether to deploy it or not. The only pertinent question is one of provenance—whether the information was produced under compulsion or volunteered.[7]

[5] *Taylor v SFO* [1999] 2 AC 177 (HL) 210.
[6] The *Harman* case 308. See also the *Riddick* case 896; *Taylor v SFO* [1999] 2 AC 177 (HL) 210.
[7] The *Prudential* case 765; *Taylor v SFO* [1999] 2 AC 177 (HL) 208. On the content–provenance distinction, see 118–121 above.

This chapter will unpack these three core components and, in doing so, identify a range of theoretical and practical difficulties presented by the compulsion rationale. It will suggest that, even if one fully accepts the rationale's philosophical premise—that public authorities' powers to invade individual privacy and self-determination violate important civil liberties and should be tightly controlled—the rationale still fails to provide sound justification for the general rule against subsequent use. Most courts and commentators today regard compulsion as the 'primary rationale' for that rule.[8] Yet, the status of privacy-related rights is not so clear cut as the rationale portrays. Its definitions of 'justice' and 'fairness' are misconceived. It fails to account for significant competing public and private interests. Its scope of application is uncertain. The compulsion–volition dichotomy is problematic. After examining the compulsion rationale, the chapter will conclude this section of the thesis concerning the modern rule's rationales.

B SHORTCOMINGS OF THE COMPULSION RATIONALE

1 The 'right to privacy'

As noted above, unlike the instrumental, consequence-based reasoning that underpins the candour and confidentiality rationales, the

[8] *Matthews and Malek* 351. See also: *Andrews* 313; *Style and Hollander* 275; *Phipson* 596–7; the *Prudential* case; *Mahon v Rahn* [1998] QB 424 (CA); *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA); *Taylor v SFO* [1999] 2 AC 177 (HL); *Bourns v Raychem* [1999] FSR 641 (CA); *Bourns Inc v Raychem Corp* (CA 17 January 2000); *Bingham v Martin* [2001] EWCA Civ 1453 (CA); *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA).

compulsion rationale's theoretical foundations lie more in moral philosophy. Its starting point is the 'right to privacy'[9]—specifically, the citizen's 'right to keep his own documents to himself'.[10] As Browne-Wilkinson V-C put it in his first instance judgment in *Marcel v Comr of Police of the Metropolis* [1992] Ch 225,[11] disclosure under compulsion 'involves a gross interference with the right to privacy' of the person giving it. In the *Harman* case (at 323), Lord Roskill claimed that disclosure 'involves invasion of an otherwise absolute right to privacy'. Lord Scarman in his dissenting speech there referred to 'the general right of the citizen to privacy, which includes a right to keep his own documents to himself'.[12] These are strong affirmations of the so-called 'right to privacy' which lies at the heart of the compulsion rationale. Yet, such rhetoric conceals the difficulty of locating such a right within English law.

In each of the cases just mentioned (and in other compulsion rationale authorities) the term 'privacy' is accorded the same meaning as JS Mill conveyed through the term 'liberty'. Both terms denote the general right of the individual 'to be let alone'[13] to enjoy a private sphere of autonomy and personal choice free from unjustified societal

[9] The *Harman* case 312, 323; the *Derby (No 2)* case.
[10] The *Riddick* case 896.
[11] At 237. (The Court of Appeal allowed an appeal on the limited ground that the police may produce seized documents under a subpoena duces tecum if document-owners would have had to do so were the documents still in their possession.)
[12] At 312.
[13] TM Cooley *A Treatise on the Law of Torts* (2nd edn Callaghan & Co Chicago 1888) 29, cited by SD Warren and LD Brandeis 'The Right to Privacy' (1890) 4 Harvard L Rev 193, 205.

or governmental interference.[14] The same idea is captured in Rivero's definition of 'private life', which reflects the interpretation given to the guarantee of respect for private and family life under Article 8(1) of the ECHR:[15]

> Private life is the sphere of each individual life into which no one can intrude without having been asked. Freedom of private life is the recognition, to everyone's benefit, of a zone of activity which is one's own and whose entry one is free to prohibit to anyone.

According to the compulsion rationale authorities, the 'right to privacy' is rooted in classical libertarian notions of personhood and the proper limits of state power. In particular, privacy intimately is linked with a Kantian form of autonomy, predicated on the citizen's inherent dignity and capacity for self-determination. Thus, in the *Prudential* case (at 764), Hobhouse J held that disclosure violates privacy rights because it forces a party to divulge documents 'whether he wishes to or not'. Many legal philosophers see privacy and autonomy as being closely connected.[16] But, as Feldman and others have suggested, the very breadth of the idea of a 'right to

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[14] JS Mill 'On Liberty' in G Himmelfarb (ed) *On Liberty* (Penguin Books Harmondsworth 1996) ch 4. See also *Olmstead v US*, 277 US 438, 478; 48 S Ct 564, 572 (1928) (Brandeis J dissenting); D Feldman 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41, 42 n 4.

[15] J Rivero *Les Libertés Publiques* (4th edn Presses Universitaires de France Paris 1989) vol 2, 76, cited (in translation) by RStJ Macdonald, F Matscher and H Petzold (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers Dordrecht 1993) 406.

[16] J Raz *The Morality of Freedom* (Clarendon Press Oxford 1986) ch 14, especially 369–70, 390–5; RJ Krotoszynski Jr 'Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law' [1990] Duke LJ 1398, 1402; T Hill *Autonomy and Self-respect* (CUP Cambridge 1991) 169; P Roberts 'Privacy, Autonomy and Criminal Justice Rights' in P Alldridge and CH Brants (eds) *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Hart Publishing Oxford 2001).

privacy'—coupled with its tendency to merge with broad liberty and personal autonomy rights—produces a lack of clear definition that substantially weakens its force.[17] Some scholars deny that a coherent, viable right to privacy can be constructed at all.[18] As Marshall wryly has observed, even its pronunciation is uncertain.[19] Engaging further with this lively debate is beyond present parameters. The key point to note here is that, while the existence and meaning of the 'right to privacy' have been presupposed in the compulsion rationale literature, philosophically speaking, locating and defining such a right is not nearly so straightforward.

Locating and defining such a right as a pragmatic exercise is similarly problematic. The disclosure process—governed by rules of court or express orders, and backed by the threat of contempt and other penalties—is clearly a mechanism for state-sanctioned intrusion by litigants into others' affairs. Even where documents or data are not confidential *stricto sensu*, document-producers still may prefer not to have to admit to possessing them, or not to incur the cost,

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[17] Feldman (n 14 above) 49, 54; E Barendt 'Freedom of Speech in an Era of Mass Communication' in PBH Birks (ed) *Pressing Problems in the Law Volume 1: Criminal Justice and Human Rights* (OUP Oxford 1995) 2. Feldman argues that privacy rights should be legally recognised, justified not on autonomy grounds but on the social ends they serve: D Feldman 'Privacy-related Rights and their Social Value' in P Birks (ed) *Privacy and Loyalty* (Clarendon Press Oxford 1997).

[18] See especially R Wacks 'The Poverty of "Privacy" ' (1980) 96 LQR 73 and R Wacks *Personal Information: Privacy and the Law* (Clarendon Press Oxford 1993), arguing that the concept of 'privacy' is too unwieldy, having become entangled with autonomy, confidentiality, secrecy, defamation, property and storage of information; C Tapper *Computer Law* (4th edn Longman London 1989) 318, 324–6.

[19] G Marshall 'The Right to Privacy: A Sceptical View' (1975) 21 McGill LJ 243, 243.

inconvenience and indignity of having to open their files for scrutiny by their opponents. Similar considerations apply where documents are seized or information compulsorily extracted by public authorities under statutory powers.[20] Indeed, in the *Marcel* case (which concerned reuse of documents seized by Serious Fraud Office investigators under statutory power) Browne-Wilkinson V-C opined that the need to restrict the use of compulsorily acquired data is 'immensely increased' where public authorities themselves do the acquiring: 'The dossier of private information is the badge of the totalitarian state'.[21]

In principle, one may agree wholeheartedly that enforced invasions of parties' documentary or informational privacy should be controlled rigorously, and that the use of the fruits of such invasions should be confined strictly to prevent unfairness, oppression, overreaching and abuse. Nevertheless, to claim (as many compulsion rationale cases do) that this imperative flows from a pre-existing 'right to privacy' seems somewhat incongruous, given the dearth of evidence that such a right subsists within English law.[22] As Chapter 4 observed,[23] historically, English law-makers' attitudes towards giving privacy-related rights legal recognition—whether under the common law, statute, regulations or otherwise—have been resoundingly negative.

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[20] eg examinations by company liquidators under the Insolvency Act 1986, s 236.
[21] *Marcel v Comr of Police of the Metropolis* [1992] Ch 225, 240.
[22] Barendt (n 17 above) 1; *R v Khan* [1997] AC 558 (HL) (although at 571 Lord Browne-Wilkinson preferred to leave the question open); B Neill 'Privacy: A Challenge for the Next Century' in BS Markesinis (ed) *Protecting Privacy* Clifford Chance Lectures vol 4 (OUP Oxford 1999) 17.
[23] 157 above.

Yet, English judges now appear poised to recognise a qualified right to privacy—either grounded in judicial development of the equitable doctrine of protection of confidence,[24] or under Article 8(1) of the ECHR combined with the HRA. This was signalled by strong obiter dicta in *Douglas v Hello! Ltd* [2001] QB 967 (CA). There, Sedley LJ asserted that 'it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy'.[25] Such 'privacy', he claimed, is 'a legal principle drawn from the fundamental value of personal autonomy'.[26] In Sedley LJ's view, the tort of breach of confidence already 'contains all that is necessary for the fair protection of personal privacy'. To articulate it as a right to privacy is 'a relatively small step' involving 'little, save by way of a [change of] label'.[27] Alternatively, he opined, 'if the step from confidentiality to privacy is not simply a modern restatement' of the equitable doctrine, but instead 'a legal innovation', then it should derive from the court's obligations under the HRA.[28]

Briefly, under s 6(1) of the HRA, English courts (as public authorities[29]) have a duty not to act in a way that is incompatible with ECHR rights. Under s 2(1)(a), courts also are required to take into

[24] 123–126 above.
[25] At 997.
[26] At 1001.
[27] At 998–9, 1001. See also 1012 (Keene LJ). By contrast, in 1981 (writing before *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) had expanded the equitable doctrine beyond confidential relationships) the Law Commission drew a clear conceptual distinction between 'privacy' (seen as arising from the nature of information) and 'confidence' (arising from the nature of the parties' relationship): Law Commission *Breach of Confidence* (Law Com No 110, Cmnd 8388, 1981) 5–7. See n 57 above.
[28] At 1002.
[29] HRA, s 6(3)(a).

account any relevant decisions of the European Court of Human Rights when determining questions that arise in connection with Convention rights. Article 8(1) of the ECHR guarantees the right to respect for private and family life, home and correspondence. The concept of 'private life' has been interpreted expansively by the Strasbourg authorities.[30] Strictly speaking, the object of Article 8 is to protect citizens from arbitrary interference by public authorities (vertical effect)—not from privacy invasions by other individuals or non-state bodies (horizontal effect). But in *X v The Netherlands* Series A No 91, (1985) 8 EHRR 235, para 23 the European Court read Article 8(1) as imposing positive obligations on states to adopt measures 'designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.[31] Taken together, Sedley LJ asserted in the *Douglas* case, these factors confer horizontal impact upon Convention rights under the HRA. By virtue of the courts' positive duties as public authorities, they must uphold litigants' privacy rights under Article 8, even in proceedings solely between private parties.[32]

This view—that Convention rights should be accorded a measured degree of horizontal impact under the HRA, thereby

[30] *X v Iceland* (No 6825/74) 5 DR 86 (1976); *Niemietz v Germany* Series A No 251-B, (1992) 16 EHRR 97, para 29; DJ Harris, M O'Boyle and C Warbrick *Law of the European Convention on Human Rights* (1995) 303 ff.

[31] See also *Marckx v Belgium* Series A No 31 (1979); Harris, O'Boyle and Warbrick (n 30 above) 302–3; P van Dijk and GJH van Hoof *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer Law International The Hague 1998) 534; *Spencer (Earl) v UK* (1998) 25 EHRR CD 105, 112.

[32] At 1002. See also 991 (Keene LJ) and *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491 (CA) para 58 (Sedley LJ describing the horizontal impact of ECHR rights under the HRA as 'the cascade effect').

affecting the rights of citizens *inter se*—is gaining support. Even before the *Douglas* case, Neill described it as 'inevitable' that 'a general right of privacy with horizontal effect will gradually evolve'.[33] Others remain less convinced.[34] Elsewhere in the world, privacy (including the right of personality[35]) is recognised as a free-standing, affirmative right. In some liberal democracies privacy even enjoys constitutional right status. Germany and the USA are good examples.[36] However, in both jurisdictions the right remains controversial. In large part, this is because it is exclusively a product of judicial imputation into the constitutional documents, rather than being articulated explicitly in

[33] Neill (n 22 above) 21. See also: M Hunt 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423; N Bamforth 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 CLJ 159; HWR Wade 'Horizons of Horizontality' (2000) 116 LQR 217; G Phillipson and H Fenwick 'Breach of Confidence as a Privacy Remedy in the Human Rights Era' (2000) 63 MLR 660; M Elliott 'Privacy, Confidentiality and Horizontality: The Case of the Celebrity Wedding Photos' (2001) 60 CLJ 231.

[34] E Barendt 'Privacy as a Constitutional Right and Value' and other essays in P Birks (ed) *Privacy and Loyalty* (Clarendon Press Oxford 1997); R Buxton 'The Human Rights Act and Private Law' (2000) 116 LQR 48; C Gearty 'Tort Law and the Human Rights Act' in T Campbell, KD Ewing and A Tompkins *Sceptical Essays on Human Rights* (OUP Oxford 2001) 245, 251. See also the references in M Zander *The State of Justice* (Sweet & Maxwell London 2000) 84 n 28.

[35] German courts have interpreted Arts 1(1) and 2(1) of the Basic Law 1949 (*Grundgesetz*) as safeguarding *Persönlichkeitsrecht*: HD Krause 'The Right to Privacy in Germany' [1965] Duke L Rev 481; H Stoll 'The General Right to Personality in German Law: An Outline of its Development and Present Significance' in BS Markesinis (ed) *Protecting Privacy* Clifford Chance Lectures vol 4 (OUP Oxford 1999).

[36] Germany: n 35 above. USA: Fourth Amendment, US Constitution, since the landmark cases of *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (1965) and *Roe v Wade* 410 US 113, 93 S Ct 705 (1973). Seminal American articles on privacy rights include: SD Warren and LD Brandeis 'The Right to Privacy' (1890) 4 Harvard L Rev 193 (the catalyst for recognition of privacy rights in the USA); W Prosser 'Privacy' (1960) 48 California L Rev 383 (privacy as a tort); R Gavison 'Privacy and the Limits of Law' (1980) 89 Yale LJ 421 (criticising constitutional privacy). These and related articles are reproduced in R Wacks (ed) *Privacy* (Dartmouth Aldershot 1993) vols 1 and 2.

the text. The same could be said of the European Court's expansive interpretation of Article 8(1) to found a broad-based privacy right.

Very recently, in *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA), the Court of Appeal had to address personal privacy protection in the context of a footballer's attempts to prevent a newspaper from publishing details of his marital infidelities. Delivering the judgment of the Court, Lord Woolf CJ conspicuously refrained from citing Sedley LJ's dicta in the *Douglas* case. Instead, he described the 'long-established action for breach of confidence' as being able to fulfil the court's obligation under s 6 of the HRA, by 'absorbing the rights which articles 8 and 10 protect'. By so giving the equitable action 'new strength and breadth', he held, it 'accommodates their requirements'.[37] This suggests that the emergence of a fully-fledged 'right' to privacy will follow a more conservative path than that mapped out in the *Douglas* case.

Even as Sedley LJ's *Douglas* dicta gradually come to fruition, and English judges formally inaugurate a right to privacy (however labelled), many tricky issues will remain outstanding.[38] Formulating the right in a conceptually coherent manner is likely to prove difficult, for the reasons outlined above. In particular, in the context of the subsequent use of disclosed documents, the confidentiality and compulsion rationales may become even more entangled—as their treatment in the recent post-HRA case of *Clibbery v Allan* [2002]

[37] At para 4.
[38] N Moreham 'Douglas and Others v Hello! Ltd—The Protection of Privacy in English Law' (2001) 64 MLR 767, 770–1 outlines some of the work required.

EWCA Civ 45, [2002] 1 All ER 865 (CA) illustrates. At first instance, Munby J interpolated confidentiality and compulsion considerations by suggesting that not everything contained in affidavits sworn under compulsion in matrimonial ancillary relief proceedings necessarily falls within the prohibition against subsequent use. If it is 'a matter of choice, not compulsion' to include certain information, he suggested, those portions should not be covered by the rule—especially if the details are not 'confidential' per se.[39] On appeal, Dame Elizabeth Butler-Sloss P took a different tack, and managed to combine aspects of all three rationales. Rather than focusing on whether production of particular information is compelled or not, she saw the especially coercive nature of ancillary relief proceedings as erecting an umbrella of protection that covers anything and everything disclosed therein. All such information is 'secret', because of the 'considerable degree of compulsion' placed on parties by the requirement of 'full and frank disclosure'.[40] Accordingly, she held (in this context at least), the rule 'extends . . . to voluntary disclosure'.[41]

Such confusion is linked to use of the equitable doctrine—which is concerned with preserving confidentiality—to found a right to privacy—which, as Sedley LJ observed in the *Douglas* case, is concerned with safeguarding privacy or autonomy; specifically the freedom to choose if and when to reveal one's papers to others.[42]

[39] *Clibbery v Allan* [2001] 2 FLR 819, 857–8.
[40] At 885.
[41] At 887. See also 895.
[42] At 1001. See also 1011 (Keene LJ, claiming that 'there is no watertight division' between the concepts of privacy and confidence), followed in *Campbell (Naomi) v Mirror Group Newspapers* [2002] EWHC 499 (QB) para 40.1.

Further questions may persist over the propriety of according horizontal impact to Convention rights under the HRA. Whether the right to privacy is erected on the platform of the equitable doctrine or Article 8 or both, defining its contours also may present problems. As Phillipson and Fenwick have observed, an 'enormous amount of judicial labour will be required' to flesh out the new right and to give it definition.[43]

Under both the equitable doctrine and Article 8(2), a right to privacy would be subject to various limitations—including public interest based exceptions. In the context of CPR 31.22, this point is important. Rather than CPR 31.22 inuring to support privacy as a fully-fledged right (as several subsequent use rule cases suggest), a more accurate (and theoretically and historically consistent) explanation for the compulsion rationale may be that, like private confidences under the confidentiality rationale, privacy has been protected as a facet of the public interest. Certainly, this would explain why judges have never hesitated to conclude that the public interest in the proper administration of justice outweighs public and private interests in maintaining privacy. In *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 (CA) 497, for example, Sir John Donaldson MR described Lord Denning MR's decision in the *Riddick* case as being based 'upon a balancing of competing public interests in (a) privacy and confidence and (b) the administration of

[43] n 33 above at 662.

justice' undertaken in light of the fact that the allegedly defamatory memorandum was obtained via compulsion.[44]

Unfortunately, once again, such dicta tend to blur the boundary between the compulsion and confidentiality rationales.[45] In *Twigg Farnell (formerly Alan Farnell & Co) v Wildblood (No 5)* (CA 26 September 1997) Mummery LJ criticised an attempt to equate privacy (against compulsion) with protection of confidence. The appellant had suggested that subsequent litigation use should be permitted where compulsorily acquired documents reveal 'mala fides, wrongdoing, dishonesty or possible perjury'. The issue did not have to be determined in the appeal. Nonetheless, Mummery LJ observed: 'We are not dealing with confidential information, which is disclosable if the public interest so requires. We are dealing with specific documents . . . [obtained] as a result of the processes of discovery'. Apparently, he believed, a more pressing imperative lies behind the protection of such documents than the safeguarding of confidentiality.

Given ongoing divergence in judicial and academic opinion—some speaking of a 'right' to privacy, others merely of a 'public interest' in protecting it—and the need to await further developments following the *Douglas* and *A v B (a company)* cases, the precise status of privacy-related concerns under CPR 31.22 cannot be stated conclusively. But, for the reasons given above, regarding privacy as one (important) facet of the public interest would seem to be the

[44] See also the *Riddick* case 896; *Medway v Doublelock Ltd* [1978] 1 WLR 710, 713.
[45] See also the *Harman* case 308 (Lord Keith).

more theoretically, historically and logically consistent approach—at least, until such a time as a clear, formal right to privacy, having definite application in the disclosure context, has been articulated.

2 Inadequate conceptualisations of 'justice' and competing interests

Whether the preservation of privacy is seen as a right or as an important private and public interest, the disclosure process thrusts it into direct conflict with strong private and public interests in the proper administration of justice—including the fair hearing guarantee under Article 6(1) of the ECHR. Yet, like the candour and confidentiality rationales, the compulsion rationale rests on an unduly narrow definition of what securing 'justice' entails. As a consequence, it fails to give due recognition to countervailing rights and interests.

The rationale's understanding of how 'justice' is satisfied is evident from the *Derby (No 2)* case, where Browne-Wilkinson V-C held that disclosure's 'invasion of privacy' is 'only for the purpose of enabling a proper trial of the action in which the discovery is given'. As a result, 'the Court is astute to prevent a document so obtained from being used for any other purpose'. Similarly, in the *Prudential* case, Hobhouse J held that, because a document-producer's rights have to 'give way to the need to do justice . . . in the pending litigation', use of compulsorily acquired information should be limited to 'the purposes of that litigation then before the court'.[46]

[46] At 765.

The need so to limit the scope of use is driven, according to Browne-Wilkinson V-C's first instance judgment in the *Marcel* case, by the 'underlying principle . . . that private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred'.[47]

In situations where public authorities wield broad statutory powers and force individuals to disgorge potentially self-incriminating information (as in the *Marcel* case) the importance of safeguarding civil liberties against overweening state interference and misuse is palpable. The modern state has vast resources for surveillance, storage and exploitation of personal data at its disposal. Yet, even in this context—arguably the most serious and troubling category of lawful privacy violation through compelled production—protection against subsequent use is not absolute. Over the past decade reuse has been permitted on numerous occasions where—crucially—some countervailing interest has been held to outweigh the need to safeguard privacy or autonomy by confining use to the original purpose. Thus, accused persons have been allowed to compel company liquidators to produce relevant and admissible confidential interview transcripts to enable them to defend serious criminal charges effectively.[48] On the other side of the fence, the Serious

[47] *Marcel v Comr of Police* [1992] Ch 225, 237.
[48] *R v Clowes* [1992] 3 All ER 440 (CCC).

Fraud Office has been permitted to obtain such transcripts in order to facilitate criminal prosecutions.[49]

By contrast, in the context of civil litigation, the compulsion rationale presupposes that no further use of disclosed information ever can be justified.[50] Whatever uses may be proposed, whatever benefits they could deliver, the rationale presumes that the value of safeguarding privacy and autonomy always will trump them. Three difficulties undermine this contention. First, in relation to subsequent litigation use, the rationale provides no explanation for why the calculus suddenly should change as between the original and subsequent proceedings. It accepts that overriding privacy and autonomy is warranted to achieve justice in the original case by facilitating accurate decision-making (rectitude of decision).[51] But surely the same is true where disclosed documents are relevant to other proceedings. As Zuckerman has put it: 'If the interests of justice require that privacy should be invaded in the first instance, they must, by the same token, demand the use of material already obtained in subsequent proceedings where a court of law is called upon to determine the truth'.[52] 'Justice' need not be confined to the formal parameters of individual cases; nor is it satisfied where parties are denied proper access to a court simply because they cannot reuse

[49] *Re Arrows Ltd (No 4)* [1995] 2 AC 75 (HL). The House of Lords held that the transcripts were prima facie admissible, leaving it to the criminal court to decide whether to exclude them. For related examples where duties of confidentiality have been overridden, see *Camelot Group plc v Centaur Communications Ltd* [1999] QB 124 (CA); *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 (CA).

[50] Chapter 6 below examines the role of judicial discretion.

[51] 20–24 above.

[52] AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 336, 355.

previously disclosed information. These points have been developed fully elsewhere.[53]

Second, as the previous section demonstrated, 'privacy' in this context essentially is autonomy-based. According to the compulsion rationale, information may be covered by CPR 31.22 whether or not it is confidential. Protection 'is independent of the actual character of the document or information'.[54] What matters is that document-producers are deprived of the freedom to choose whether or not to keep documents to themselves. In comparison to such fundamental rights and pressing public concerns as ensuring access to justice, freedom of information, public safety, and proper scrutiny of official and governmental conduct, this autonomy-based privacy interest seems a decidedly poor cousin.

One must bear in mind that the sanctity of individual privacy itself is not really at stake when the question of subsequent use of disclosed material arises. Privacy already has been violated through the disclosure process. According to the compulsion rationale, the rule against subsequent use simply is the consideration, remedy, or *quid pro quo* for this having happened. Moreover, the invasion of privacy was justified (to secure an accurate outcome in the original proceedings) and reuse need not be allowed willy-nilly. Thus, the real issue is not whether allowing a given form of reuse—for example,

[53] 109–111 and 148–151 above.

[54] The *Prudential* case 765. See also: the *Cobra* case 824; *Twigg Farnell v Wildblood (No 5)* (CA 26 September 1997) Mummery LJ; *Mahon v Rahn* [1998] QB 424 (CA) 436; *Taylor v SFO* [1999] 2 AC 177 (HL) 208.

submitting evidence of a design fault that causes vehicle fuel tanks to explode to Department of Trade and Industry inspectors—is sufficiently important to warrant invading someone's privacy to get to it. The information already has been extracted; that extraction was fully justified. The true question is whether the fact that a past (fully justified) violation of autonomy has occurred is sufficient reason to prevent information thereby obtained from being reused for a specific further purpose—potentially, as in the example given, to save lives.[55] Since such information need not even be confidential, the cost of reusing it seems relatively minor compared with the price that otherwise might be paid. Not even confidentiality affords a shield against publication or reuse where documents reveal wrongdoing or the public interest otherwise is implicated.[56] It is difficult to see why a mere historical incursion into autonomy should stand in the way.

Third, this logic is strengthened by the range of document-producers covered by CPR 31.22. Prima facie, the rule covers every conceivable entity that is capable of possessing and being compelled to produce information. Not all entities' privacy and autonomy interests cry out equally loudly for protection. One readily can imagine a spectrum. At one end are individuals who are compelled to produce private materials in litigation. Civil liberty

[55] The point may be even stronger. If a balancing of interests approach is taken (as Part II of this thesis recommends) then, in a sense, disclosed documents should be more eligible to be used in the second case than in the first case (assuming the interests of justice to be the same in both). In the first case, the balance will have to take into account whether disclosure of the documents ever should be ordered. Thereafter, once disclosure has been ordered, there is less to balance against the interests of justice in the second case.

[56] 124, 150 above.

concerns arguably are strongest here—especially if their opponents are large institutions or agents of the state. Mid-range on the spectrum are corporations and other private organisations. Their privacy and autonomy interests arguably do not engage civil liberty concerns to such an extent. Even in the USA, this is widely accepted.[57] Theorists who regard privacy and autonomy as being rooted in Kantian notions of human dignity presumably would concur. At the far end of the spectrum are public authorities, quasi-public institutions (such as large corporations or multinationals that carry out public functions or operate privatised industries), government officials and organs of the state. Public policy may tell against disclosure of their information in certain instances.[58] But privacy and autonomy claims should not. On the contrary, principles of open government, official accountability and public scrutiny all militate in favour of open access to official information where it touches upon matters of legitimate public concern.

Interestingly, in *Taylor v SFO* [1999] 2 AC 177 the House of Lords extended the rule against subsequent use to cover prosecution

[57] American lawyers debate whether any corporate right to privacy exists. Corporations have no personal privacy rights. Attempts to preclude subsequent use by citing financial damage (eg, injury to competitive standing; stock price fluctuations) or reputational harm (eg, harm to public image or goodwill) usually fail: L Doggett and MJ Mucchetti 'Public Access to Public Courts: Discouraging Secrecy in the Public Interest' (1991) 69 Texas L Rev 643, 669; *Marcus (1991)* 492; *Miller* 435; FH Hare Jr, JL Gilbert and SA Ollanik *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press Washington DC 1994) 180; *Doré* 330. There is a similar jurisdictional split over whether corporations can assert the privilege against self-incrimination. In the USA they cannot; in England they can. See *Cross and Tapper* 427.

[58] eg, to safeguard national security under the public interest immunity doctrine: *Cross and Tapper* 475–90.

materials disclosed but unused during criminal proceedings.[59] In doing so, it prevented witnesses for an acquitted defendant from bringing defamation proceedings based on documents prepared by the prosecution during its investigation. The House of Lords disapproved of *Mahon v Rahn* [1998] QB 424, where the Court of Appeal had confined the rule against subsequent use to civil disputes. One of Staughton LJ's reasons in the *Mahon* case for concluding that the rule should not apply in criminal cases was that a prosecutor's obligation to disclose witness statements and other evidence to the defence cannot sensibly be characterised as an invasion of privacy.[60] His logic is compelling, and it underscores the compulsion rationale's over-inclusiveness in covering material from the whole spectrum of potential document-producers.

Seeking to explain how the compulsion rationale sensibly can be applied in criminal cases, Lord Hoffmann in *Taylor v SFO* (at 210–11) pointed not to Crown privacy, but to the privacy interests of those who supply information to the police (whether under compulsion or voluntarily). He could see 'no reason why the law should not encourage their assistance by offering them the assurance that, subject to . . . overriding requirements, their privacy and

[59] In *ex p Coventry Newspapers Ltd* [1993] QB 278 the Court of Appeal simply had assumed that the rule applied in criminal proceedings. Strictly speaking, CPR 31.22 covers civil proceedings alone. However, pre-April 1999 the rule had a wider ambit (eg criminal proceedings; arbitrations). It is unlikely that CPR 31.22 has altered this.

[60] At 457. Prosecutors have a common law (*R v Keane* [1994] 1 WLR 746 (CA)) and a statutory (Criminal Procedure and Investigations Act 1996, Pt I) duty of disclosure. However, the Crown's position is not analogous to private parties. The Crown also has duties to protect the innocent and ensure a fair trial.

confidentiality will be respected'. This reasoning distorts the true foundation of the rationale. As noted above, the rationale justifies CPR 31.22 as recompense for document-producers who must divulge information for litigation purposes under compulsion. By contrast, Lord Hoffmann's reasoning would extend protection back through time, based on how document-producers originally obtained their information. Such anterior privacy considerations, while perhaps relevant under the public interest immunity doctrine, do not fit comfortably within the compulsion rationale. That rationale focuses exclusively on the autonomy of document-producers—whether or not they are the ones who would suffer as a result of subsequent use. Moreover, as Zuckerman has argued, whether original sources of information (such as police informants) should be shielded from liability properly is a matter for the substantive law of defamation to address, not a procedural rule of court.[61]

3 Misunderstanding of 'fairness' demands

As well as reflecting a crabbed idea of 'justice' and over-valuing document-producers' privacy and autonomy at the expense of competing considerations, the compulsion rationale also rests on a misconception that subsequent use of disclosed information is unfair as a matter of principle. This view is implicit in Lord Hoffmann's dictum in the *Taylor v SFO* case (at 210), where he described the rule against subsequent use as 'a matter of justice and fairness, to

[61] AAS Zuckerman 'Practice and Procedure' [1998] All ER Ann Rev 330, 351. See 114 above.

ensure that . . . privacy and confidentiality are not invaded more than is absolutely necessary' to do justice in the case at hand. It also underpins various dicta positing the rule as the *quid pro quo* for disclosure's intrusiveness. As noted above, in *Miller v Scorey* [1996] 1 WLR 1122, 1130 (first instance) Rimer J dubbed the rule as 'in a sense, the consideration given to a litigant for the invasion of privacy'; and again in *Cobra Golf Inc v Rata* [1998] Ch 109, 166 he described it as 'in a sense . . . the price for such invasion'. Likewise, in *Mahon v Rahn* [1998] QB 424 (CA) 453 Staughton LJ called the rule 'carefully tailored as a remedy for the intrusion on a litigant's privacy'.

The crux of these statements is that CPR 31.22 is necessary to restore a fair procedural balance by making amends for disclosure's violation of privacy. It is similar to the argument from fairness under the confidentiality rationale.[62] Yet, in principle, no amends are required. Disclosure is a compulsory process. Such compulsion is justified fully by the need to ensure that the court can reach a tolerably accurate decision.[63] The balance of procedural fairness already has been struck. Generally speaking, no further recompense is required. On occasions when it is necessary to curb subsequent use—for example, where significant prejudice would result[64]—the justification for curbing it is not to rectify any subsisting fairness deficit in the original proceedings. It is simply that the interests

[62] 142 ff above.
[63] Zuckerman (n 61 above) 350.
[64] The *Halcon* case.

served by preventing subsequent use outweigh the interests that would be served by allowing it.

It is worth recalling Lord Langdale MR's observations in *Flight v Robinson* (1844) 8 Beav 22, 33–34, 50 ER 9, 13–14, a seminal case on legal professional privilege but with broader relevance to the legitimacy of compelled disclosure generally. In his judgment, delivered on the same day as his decision in *Richardson v Hastings* (1844) 7 Beav 354, 49 ER 1102,[65] Lord Langdale MR firmly rejected the defendants' claim that a party should not have to produce confidential documents. 'However disagreeable' such production may be, it is 'compelled . . . for the discovery of all relevant truth'.[66] Only rarely, 'for predominant reasons', should parties be permitted to withhold information. If anything, as these dicta intimate, it is the rule against subsequent use that engenders unfairness for document-recipients. This is clearly apparent when subsequent litigation use is prevented without 'predominant reasons' arising (that is, something more than simply the historical fact that disclosure was compelled). In such cases, the rule potentially deprives document-recipients and similarly-situated parties of access to justice,

[65] 48–51, 58 above. The contemporaneity of these decisions underscores the modern rule's deviation from the traditional rule. As *Flight* shows, when *Richardson* was decided (thereby inaugurating express undertakings against subsequent use) even privilege was regarded with suspicion. The notion that all disclosed documents (whether confidential or not) automatically should be immune from subsequent use—including subsequent litigation use—surely was unthinkable at that time. On historical policy clashes between common law and Chancery judges over privilege, see further NH Andrews 'The Influence of Equity upon the Doctrine of Legal Professional Privilege' (1989) 105 LQR 608; C Tapper 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217, 218–24.

[66] The full quotation appears at 21 above.

the opportunity to be heard and access to evidence—all key principles embedded within the right to a 'fair and public hearing' under Article 6(1) of the ECHR.

4 The compulsion–volition dichotomy

Finally, problematic issues surround the compulsion rationale's core distinction between material produced during litigation under compulsion (which, according to the rationale, is covered by CPR 31.22) and material divulged voluntarily (which is not). Accurately determining into which category information falls is crucial for deciding whether it can be reused freely or is subject to the rule against subsequent use. Yet, the distinction is not clear-cut.

The accepted definition of 'compelled' or 'involuntary' disclosure is reasonably well settled. Consistent with the rationale's orientation around privacy and autonomy, the essential element usually identified is that a document-producer has no choice about whether, when, or to what extent to divulge information in litigation. That lack of choice constitutes the invasion of privacy. As the *Derby (No 2)* case expressed it: 'In relation to documents voluntarily disclosed the Court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the Plaintiff or the Court'.[67] Similarly,

[67] See also the *Crest Homes* case 858; *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 1 WLR 872, 877; *Eagle Star Insurance Co Ltd v Arab Bank plc* (QBD 25 February 1991).

in Hobhouse J's words: 'Where a party has a right to chose [*sic*] the extent to which he will adduce evidence or deploy other material, then there is no compulsion'.[68] While the definition is relatively easy to state, applying it in practice is not so straightforward.

One problem is that it is unclear whether compulsion need be manifest or merely potential. For example, must an order for disclosure actually be issued, so that a document-producer faces the direct threat of sanctions? Or is the possibility that a court order could be obtained sufficient? Although disclosure no longer proceeds automatically, and court orders typically are required,[69] this question remains important where parties divulge information informally—such as following a request for specific disclosure, or under a pre-action protocol (PAP). Disclosure under PAPs is a particularly thorny issue. PAPs set out codes of good pre-action conduct for specific disputes (for example, defamation and clinical negligence). They promote the early exchange of information to clarify issues, facilitate settlement and avoid litigation wherever possible.[70] Courts are entitled to view the standards laid down in PAPs as being 'the normal reasonable approach to pre-action conduct'.[71] While in theory parties are not duty-bound to comply with PAPs, any significant non-compliance will be likely to 'merit adverse consequences' if proceedings

[68] The *Prudential* case 769. See generally *Phipson* ch 23. Cf *Clibbery v Allan* [2002] 1 All ER 865 (CA).
[69] 14 n 27 above.
[70] Practice Direction—Protocols 1.4; *Woolf Final Report* ch 10.
[71] Pre-Action Protocols for Personal Injury Claims 1.4; Pre-Action Protocols for the Resolution of Clinical Disputes 1.12.

ensue, including cost sanctions.[72] Moves are afoot to render PAPs applicable to all litigation. Already, paragraph 4 of the Practice Direction—Protocols states: 'In cases not covered by any approved protocol, the court will expect the parties . . . to act reasonably in exchanging information and documents relevant to the claim'.[73] The Lord Chancellor's Department is drafting a general PAP to apply where no specific PAP exists.[74]

It is not at all certain whether CPR 31.22 applies to information exchanged under PAPs. It appears not.[75] In *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708, 718 Millett J held that the rule against subsequent use applies to information obtained 'by the use of the court's compulsive powers . . . or under the threat of such use'. According to the accepted definition of 'compulsion', the mere possibility of adverse orders downstream (should litigation ensue), and judicial expectations that parties will 'act reasonably' (however this may be interpreted), seem inadequate to render pre-action exchanges of information involuntary. PAPs do not create peremptory disclosure duties. Thus, disputants appear to be quite within their rights to choose not to divulge information, and instead to run the risk of potential consequences should proceedings follow. In the *Prudential* case, Hobhouse J drew a 'distinction between orders the breach of which is a contempt of court and those orders or rules which merely

[72] Practice Direction—Protocols 2.1 (and CPR provisions referred to therein).
[73] See also Pre-Action Protocols for Personal Injury Claims 2.4.
[74] Lord Chancellor's Department *Emerging Findings—An Early Evaluation of the Civil Justice Reforms: A Report* (HMSO London 2001) 10.6.
[75] For fuller analysis, see SMC Gibbons 'Protecting Documents Disclosed under Pre-action Protocols against Subsequent Use' (2002) 21 CJQ 254.

give rise to a default'. 'The principle of compulsion', he held, 'applies to the former category only'.[76] If so, then presumably CPR 31.22 cannot be applied to informal disclosures, including under PAPs—no matter how inevitable litigation may be, or how confidential, valuable or sensitive the information at stake.

This conclusion highlights a key shortcoming of the compulsion rationale—namely, that by focusing exclusively on provenance and ignoring content, it applies CPR 31.22 to disclosed materials that may not warrant judicial protection, while leaving litigants who co-operatively exchange sensitive information informally seemingly devoid of such protection. This contradicts a central object of the CPR—to encourage party co-operation and early, voluntary exchanges of information. Once the general PAP takes effect, the pre-action stage presumably will be when most key documentation gets divulged. It would be deeply unfortunate if protection against subsequent use were deemed globally unavailable here, as the compulsion rationale apparently dictates. Potentially, litigants could exploit this lacuna to circumvent CPR 31.22, by obtaining copies of documents that they wish to exploit for other purposes via specific, pre-action disclosure requests. Many parties—assuming they can afford the additional expense—could be well advised to negotiate private confidentiality

[76] At 765. For discussion of this distinction in another context, see AAS Zuckerman 'Dismissal for Disobedience of Peremptory Orders—An Imperative of Fair Trial' (2001) 20 CJQ 12, 13.

agreements before divulging valuable, confidential or sensitive data in these circumstances.[77]

Informal disclosure is not the only area in which applying the compulsion rationale presents problems. Even in respect of many ordinary disclosure mechanisms confusion arises. Some situations are non-controversial. Enforced extractions of documents and answers to questions under statutory powers of examination or investigation, for example, invariably are found to be compelled.[78] Doubtless this is correct. In relation to other disclosure devices, however, considerable doubts emerge.

First, in relation to documentary disclosure under CPR 31, most cases have held or implicitly assumed that it is compelled.[79] But in the *Cobra* case Laddie J characterised documentary disclosure as provided 'voluntarily' (albeit under an obligation to give it).[80] Such a view certainly accords with the pragmatic assumption underpinning the candour rationale that document-producers have, in reality, power to choose how candid to be. One could argue that, like those who choose not to comply with PAPs, parties who withhold

[77] See further Gibbons (n 75 above). A veritable satellite industry for such agreements has developed in the USA: 270 below.

[78] The *Sybron* case (Bankers' Books Evidence Act 1879); *EMI Records v Spillane* [1986] 1 WLR 967 (Value Added Tax Act 1983 (now 1994)); *Marcel v Comr of Police* [1992] Ch 225 (Police and Criminal Evidence Act 1984); *British & Commonwealth Holdings plc (in admin) v Barclays de Zoete Wedd Ltd* [1999] 1 BCLC 86 (Companies Act 1985).

[79] The *Riddick*, *Halcon* and *Harman* cases; *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43; *Killick v PricewaterhouseCoopers* (ChD 11 October 2000).

[80] At 824. Since then, his view apparently has shifted: *Bourns v Raychem* [1999] FSR 641 (CA) (first instance judgment) discussed at 192 below.

documents under CPR 31 simply opt to take their chances and run the risk of getting caught out. On this view, in contrast to the *Prudential* case,[81] the nature of the order for disclosure and its potential consequences—whether costs sanctions, striking out, adverse inferences at trial, contempt of court penalties or otherwise—are irrelevant. Another difficulty identified in *Phipson* is the 'anomalous' fact that documents disclosed under CPR 31 are protected from subsequent use, but those referred to in statements of case, witness statements and summaries, affidavits and expert reports are not.[82] Suppose a party annexes one of its disclosed documents to an affidavit sworn in support of an interlocutory application. According to the authorities, 'the right of privacy that previously existed' in that document thereby apparently is 'waived'.[83] This is indeed anomalous, particularly if the affidavit is not used in open court. The dubiousness of classing documentary disclosure as 'involuntary' where prosecutors furnish information to the defence in criminal proceedings has been canvassed already.

Second, notable discrepancies exist in relation to information divulged under search orders. Generally, such information is considered compelled.[84] As Lord Oliver put it in the *Crest Homes* case (at 858), the 'whole purpose' of orders authorising 'seizure of documents and materials . . . is to gain possession of material evidence without giving the defendant the opportunity of considering whether

[81] See text to n 76 above.
[82] CPR 31.14; *Phipson* 597–8.
[83] *Eagle Star v Arab Bank* (QBD 25 February 1991). See also the *Derby (No 2)* case.
[84] *EMI Records v Spillane* [1986] 1 WLR 967; the *Crest Homes* case.

or not he shall make any disclosure at all'. Yet, in the *Cobra* case, Laddie J characterised information 'squeezed out' under search orders as given 'somewhat less voluntarily' than normal disclosure, but 'voluntarily' nonetheless. Defendants' co-operation is sought. No compulsion (in the strong sense) therefore need be applied. Laddie J acknowledged that, as co-operation is encouraged by the threat of immediate imprisonment for contempt, '[o]rdinary members of the public might quarrel with the suggestion' that such disclosure is '"voluntary"'.[85] Indeed, in circumstances where solicitors, party representatives, supervising solicitors, expert advisers, security personnel and potentially the police[86] descend *en masse* upon a defendant's premises, without warning and with an ex parte order in hand requiring the defendant to comply now and argue later, it is difficult to see that compliance is anything but coerced. Having said this, defendants do still manage to evade full disclosure even under search orders. The *Cobra* and *Crest Homes* cases are apposite. Once again, the dividing line between compulsion and volition is conspicuously blurred.

Third, inconsistencies surround the treatment of affidavits. The courts purport to distinguish between affidavits sworn under compulsion (such as court-ordered affidavits of assets pursuant to

[85] At 824, n 2.

[86] To prevent breaches of the peace. Execution of search orders should not coincide with police raids: *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431. See generally RN Ough and W Flenley *The Mareva Injunction and Anton Piller Order: Practice and Precedents* (2nd edn Butterworths London 1993) 7.6; S Gee *Mareva Injunctions and Anton Piller Relief* (Sweet & Maxwell London 1998) 275–6.

maintenance applications[87] or freezing injunctions[88]) and those put in voluntarily. However, their definition of 'voluntary' is troubling. It has been held to include affidavits and exhibits sworn in opposition to injunction applications;[89] in support of an application to strike out a search order;[90] and generally in support of interlocutory relief.[91] But as Toulson and Phipps have commented,[92] deciding what is 'voluntary' is tricky where a party's disclosure is prompted by a step taken by their opponent. On occasion, this factor appears to have tipped the balance. In *Lubrizol Corp v Esso Petroleum Co Ltd (No 2)* [1993] FSR 53, for example, the third defendants put in extensive affidavit evidence, exhibiting a large number of confidential internal documents, in opposition to an application to join them as parties to patent proceedings already on foot. Laddie J held that the third defendants could not 'in any real sense be called volunteers'. Once the claimants had 'started [the] ball rolling' by serving evidence referring to disclosed documents, it was 'inevitable' that the third defendants would have to rely on internal documents if they wished to apply to set aside service.[93]

Similar reasoning underpins *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA), where documents disclosed for the purposes of inter

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[87] *Medway v Doublelock* [1978] 1 WLR 710, 713.
[88] The *Derby (No 2)* case; *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA) 1003.
[89] The *Derby (No 2)* case; *Cassidy v Hawcroft* (CA 27 July 2000). See *Style and Hollander* 276.
[90] *Esterhuysen v Lonrho plc* The Times, 29 May 1989 (CA).
[91] *Allied Colloids Ltd v Imdex NL* (ChD 17 December 1996); *Bourns v Raychem* (CA 17 January 2000). See *Matthews and Malek* 353.
[92] RG Toulson and CM Phipps *Confidentiality* (Sweet & Maxwell London 1996) 241.
[93] At 57.

partes assessment of costs (formerly called taxation) were held to be disclosed under compulsion. Again, Laddie J (in a first instance judgment affirmed on appeal) opined that it would be 'misconceived' to say that disclosure was 'voluntary'.[94] For, he held, if the payer calls on the payee to produce relevant documents and the taxing master endorses that request, the payee 'must elect between complying with the request or withdrawing reliance on [the documents]. In effect the master makes the payee an offer he cannot refuse'. To say that production is 'voluntary', he continued, would be tantamount to saying that normal disclosure of documents is voluntary because a claimant 'could always avoid the necessity of [disclosure] . . . by abandoning his claims'.[95]

The fact that most taxation documents are privileged may have influenced the outcome. Likewise, the outcome in the *Lubrizol* case may have been affected by the fact that the parties there had formed a 'confidentiality club' explicitly recognising the sensitive nature of the documents produced in the litigation. Nevertheless, both cases highlight a crucial point—namely, that the limited options open to a party may render disclosure, in effect, constructively compelled. Just as the alternative for the winning party in the *Bourns* case (to forego recovering costs) was considered no genuine choice at all, arguably the same can be said in many other situations—including where parties swear affidavits opposing search orders or injunction applications. Frequently, interim injunctions effectively dispose of the whole case.

[94] At 651. See also 680 (Aldous LJ, CA).
[95] At 651.

The supposedly interim relief ordered, if erroneous, cannot always be undone.[96] Undertakings in damages capable of recompensing for the losses incurred are not always available.[97] In such circumstances, parties have no sensible option but to oppose such applications as vigorously as they can. Disclosure under such conditions is not 'voluntary' in any normal sense of the word.

This point has particular relevance to a fourth category of disclosure, that of witness statements, witness summaries and expert reports. Courts consistently have held that such documents are divulged voluntarily.[98] Even though the CPR require that they be exchanged pre-trial (and bar their use at trial otherwise, unless the court specially permits[99]) this is not seen as compulsion. For, '[a]nything which [a party] does not wish to disclose he may still keep to himself. It is only if he *wants* to disclose the information by way of evidence at the trial that he . . . [is] required as a pre-condition to

[96] *Woodford v Smith* [1970] 1 WLR 806 (right to vote in impending election); *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 (CA) (need to broadcast topical television programme immediately or not at all). See AAS Zuckerman 'Interlocutory Remedies in Quest of Procedural Fairness' (1993) 56 MLR 325, 327–9; AAS Zuckerman 'The Undertaking in Damages—Substantive and Procedural Dimensions' (1994) 53 CLJ 546, 568–71. See generally D Bean *Injunctions* (6th edn Longman London 1994) 26–8.

[97] For three reasons: (1) under CPR, PD 25, 5.1(1) courts have discretion to dispense with cross-undertakings; (2) applicants may lack sufficient means to give or honour undertakings (*Allen v Jambo Holdings Ltd* [1980] 1 WLR 1252 (CA); *Oxy Electric Ltd v Zainuddin* [1991] 1 WLR 115); (3) not all harms can be compensated in damages (see references in n 96 above).

[98] Although, under CPR 32.12, a witness statement may be used only for the purpose of the proceedings in which it is served, unless the witness or the court gives permission or the statement is put in evidence at a hearing held in public. A witness statement that stands as evidence-in-chief is open to inspection unless the court directs otherwise during the trial: CPR 32.13.

[99] CPR 32.10; CPR 35.13.

disclose it in written form in advance'. The rules of court simply 'advance the moment' when parties must decide what evidence they will use or withhold.[100] Technically speaking, this may be so. But if the logic underpinning the *Bourns* and *Lubrizol* cases is correct—that disclosure is compelled when parties have no other viable option—why is the same not also true when they produce crucial evidence? If their alternatives are either to divulge sensitive information and win, or withhold it and lose, surely their choice is just as circumscribed. Arguably, the compulsion rationale overlooks the intrinsic coerciveness of the litigation process, especially for defendants. Once joined, their only options are to settle (if possible) or to seek to protect their interests as best they can using the available procedures.[101] Such resigned utilisation of stipulated processes cannot be equated with volition. As noted above, in the *Clibbery v Allan* case, Butler-Sloss P recently categorised all disclosure during family financial proceedings—including 'voluntary disclosure'—as compelled, by virtue of the unusually coercive nature of those proceedings.[102]

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[100] *Comfort Hotels v Wembley* [1988] 1 WLR 872, 877. See also the *Prudential* case 764; *Derby & Co v Weldon (No 9)* [1991] 1 WLR 652.

[101] F James, GC Hazard and J Leubsdorf *Civil Procedure* (4th edn Little, Brown & Co Boston 1992) 281–5. For claimants, volition-based arguments have greater plausibility as those with damaging documents may opt not to proceed. But, once they do, they are equally as susceptible to litigation's exigencies and coerciveness as defendants. That they may discontinue need not alleviate this fact, given the potentially prohibitive cost implications (CPR 38.6(1)).

[102] At 887. See 171–172 above.

Whether or not one accepts this argument,[103] it at least demonstrates a deep conceptual inconsistency within the compulsion rationale. It also casts doubt on the meaningfulness and value of using 'compulsion' as a criterion for identifying disclosed materials that warrant protection against subsequent use. Further support can be gleaned from considering party evidence more broadly. Almost certainly, were parties permitted to testify in private, many (if not most) would opt to do so. But parties are not given this choice. Generally speaking, they are compelled to testify in public. Thus, in a sense, all evidence in litigation can be said to be produced under compulsion. Once again, this demonstrates that the line that separates voluntary from compelled revelations is a blurred one.

Additional proof that the compulsion–volition dichotomy is suspect derives from a fifth category of disclosure to which the rationale has been applied: disclosure in private arbitrations. Initially, it was held, there is no basis upon which to preclude subsequent use of arbitration materials. Private arbitration is a consensual process. Information is produced voluntarily. There is no compulsion (nor any danger of deterring candour on the part of future disputants).[104] Clearly, this holding left arbitrating parties in an extremely vulnerable position. Information disclosed during

[103] For judicial rejections of similar arguments, see the *Derby (No 2)* case ('It is true . . . that apart from litigation the Defendants would not have disclosed the documents. They had the unhappy choice . . . [of preserving privacy or defending the proceedings]. But it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks that such evidence becomes available to others'); the *Prudential* case 765.

[104] *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1988] 1 WLR 946.

arbitrations often is highly confidential. Many disputants arbitrate rather than litigate precisely to avoid publicity.[105] By focusing on provenance alone, the compulsion rationale completely misses this crucial point, and leaves parties open to potentially devastating harm. Not surprisingly, subsequent courts were swift to construct an alternative foundation for importing protection against subsequent use into arbitrations—albeit one straddling an awkward boundary between confidentiality and compulsion. They held that there is an implied obligation of confidentiality in arbitration agreements. It is a corollary to 'the essentially private nature of an arbitration', even though such proceedings are 'wholly voluntary'.[106] But the implied obligation does not 'depend upon any inherent confidentiality in the material protected', although it is 'broadly similar in effect'.[107] Anyone searching for evidence that the compulsion rationale leads to obfuscation and confusion within the law need look no further than this.

C COMPULSION RATIONALE—CONCLUDING REMARKS

Disclosure is not the only context in which the law has grappled with the conceptually problematic task of differentiating between voluntary

[105] DStJ Sutton, J Kendall and J Gill (eds) *Russell on Arbitration* (21st edn Sweet & Maxwell London 1997) 1–004; EA Marshall (ed) *Gill: The Law of Arbitration* (4th edn Sweet & Maxwell London 2001) 3. Again, this ties in with the fact that parties are not given the option of testifying in private in litigation.

[106] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA) 1213. See also: *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243; *Russell on Arbitration* (n 105 above) 2–150, 5–195; *Phipson* 598.

[107] *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA) 326.

and involuntary disclosures. Privilege against self-incrimination is an illuminating parallel. Two aspects are worth touching upon. One is the difficulty of defining satisfactorily the borderlines of the privilege; what counts as a 'voluntary' disclosure and what does not. The right to silence is a prime example. English courts long have permitted inferences to be drawn from an accused person's silence across a range of circumstances.[108] If an accused chooses not to testify, or fails to answer questions about matters clearly calling for explanation (such as why incriminating objects were found in his or her possession), the court may take this into account in determining guilt.[109] This is not generally regarded as contravening the privilege against self-incrimination. For, the privilege 'aims to protect all citizens against being compelled to condemn themselves. But the law has never set out to protect a subject who condemns himself whilst acting of his own free will'.[110] Where accused persons rely on the right to silence they can be said to act of their 'own free will'. If, as a consequence, negative inferences are drawn, technically speaking they have been hoist by their own petard. Construed in this way, whether they give evidence or not their decision appears to be voluntary. Yet, in effect, the law imposes a de facto requirement on accused persons

[108] *R v Voisin* [1918] 1 KB 531 (CCA). The Criminal Justice and Public Order Act 1994, ss 34–37 broadened the power and placed it on a statutory footing. In civil cases, drawing negative inferences from party silences has never been restricted: *Secretary of State for Trade and Industry v Crane (No 2) (aka Re Priority Stainless (UK) Ltd)* The Times, 4 June 2001 ('The so-called right of silence which (now subject to certain qualifications) is afforded to a person facing a criminal charge does not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings').

[109] *Murray v UK* Reports 1996-I No 1, (1996) 22 EHRR 29, para 47.

[110] *Re Director of the Serious Fraud Office, ex p Smith* [1993] AC 1 (HL) 47.

to testify. The pressure is indirect but just as coercive. Where adverse inferences are permitted, accused persons—those who would like to be acquitted, at least—have no realistic option but to take the stand, whether they would have chosen to do so otherwise or not. Construed in this way, their choice is constrained by the same constructive compulsion as was recognised implicitly in the *Lubrizol* and *Bourns* cases. Yet, in this context, it is not thought to count.

The other aspect worth mentioning is the fact that the privilege against self-incrimination has been subject to significant statutory abrogation in recent years.[111] Many provisions now remove it in certain civil contexts (for example, intellectual property litigation) while preventing incriminating admissions or material thereby obtained from being used subsequently for criminal prosecutions.[112] This practice of abrogation coupled with abstention (as Tapper conveniently describes it) is remarkably similar to the reasoning underpinning the compulsion rationale—that precluding subsequent use is the *quid pro quo* for disclosure's enforced invasion of privacy. Both procedures rest on an implicit presumption that

[111] O Davies 'Self-incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing' in B Markesinis (ed) *The Impact of the Human Rights Bill in English Law* (OUP Oxford 1998) 31. See generally: I Dennis 'Instrumental Protection, Human Right of Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 52 CLJ 342; *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] 1 Ch 1 (CA); *Cross and Tapper* 432–6; R Clayton and H Tomlinson *The Law of Human Rights* (OUP Oxford 2000) vol 1, 595 ff; *Phipson* 561–3.

[112] eg Supreme Court Act 1981, s 72: *AT & T Istel Ltd v Tully* [1993] AC 45 (HL) 54, 64. See also *Saunders v UK* Reports 1996-VI, (1998) 23 EHRR 313. For criticism of anomalies and uncertainties resulting from such provisions, see *Cross and Tapper* 434. On whether statutory abrogation violates Art 6(1) ECHR see *Phipson* 556–8, 564–5.

some compromise (through restricting further use) is required to compensate for the violation imposed.

Arguably, the real driving force behind the compulsion rationale is not protecting privacy per se (as the rhetoric suggests) but rather judicial distaste for the self-incriminatory (or condemnatory) element embodied within compulsory disclosure.[113] The various dicta of Lord Browne-Wilkinson noted above appear to support this proposition.[114] So too does the fact that judges have enforced the rule against subsequent use vigorously against document-recipients who wish to reuse damaging information in subsequent litigation (civil or criminal). This perhaps could explain why subsequent litigation use is categorised as objectionable when invading privacy to get to the truth in the original proceedings is not. If judicial qualms about self-incrimination truly are the crux of the rule against subsequent use, then this should be acknowledged openly and addressed directly as part of a general reappraisal of the foundations and scope of that privilege.[115] Obfuscating the foundations of CPR 31.22 by relying on privacy as a flawed proxy for self-incrimination is inappropriate.

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[113] *Eagles* 299. Again, this overlooks the fact that disclosures may be adverse to others, not simply to the person compelled to give disclosure.

[114] See also *Medway v Doublelock* [1978] 1 WLR 710, 713.

[115] Clarifying the status of self-incrimination privilege is important as attitudes vary. Even in the subsequent use rule context, while the privilege survives (*Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL)) it has been castigated as a 'hangover from medieval times' (*Twentieth Century Fox Film Corp v Tryrare Ltd* [1991] FSR 58, 59 and as 'an archaic and unjustifiable survival from the past' (*AT & T Istel v Tully* [1992] 1 QB 315 (CA) 350). Judges also disagree over whether it is available in respect of civil contempt proceedings in the same action in which information is disclosed. Compare the *Crest Homes* case 859 (Lord Oliver, obiter); *Cobra Golf Inc v Rata* [1998] Ch 109; *Memory Corp plc v Sidhu plc* [2000] Ch 645.

D SUBSEQUENT USE RULE RATIONALES—CONCLUDING COMMENTS

In some situations, the need to secure candid disclosure, protect confidentiality, or limit harmful invasions of privacy may well justify restricting or preventing subsequent use of disclosed materials. All three principal rationales put forward to justify the modern rule against subsequent use in CPR 31.22—candour, confidentiality and compulsion—express important aspects of the public interest. The candour rationale seeks to promote the proper administration of justice by ensuring full access to evidence (at least, in the original proceedings in which disclosure is given). The confidentiality rationale purports to balance the pursuit of justice against the public interest in preserving private confidences. The compulsion rationale seeks a fair trade-off between achieving rectitude of decision and preserving privacy or autonomy. Yet, as Chapters 3–5 have argued, none of these rationales affords sound justification for having an automatic, blanket general rule against subsequent use. Each rationale rests on questionable assumptions, an impoverished conception of what doing 'justice' entails, and a misunderstanding of procedural fairness requirements. None accords adequate weight to the full gamut of competing rights and interests that militate in favour of allowing subsequent use in certain circumstances.

Sometimes, judges have cited the rationales in combination. Thus, the compulsion rationale has been invoked in conjunction

with candour[116] and confidentiality.[117] Yet, the three rationales are conceptually distinct. Moreover, they work from incompatible theoretical predicates. Confidentiality focuses on content; whereas compulsion focuses on provenance. The two rationales therefore capture quite different subsets of the total universe of materials disclosed during litigation. Similarly, candour assumes that parties have a choice about disclosure compliance (positing the rule as an incentive to be candid); whereas compulsion presupposes precisely the opposite. The fact that these three, mutually inconsistent rationales subsist—and even are cited together—is indicative of the conceptually flawed nature of the underlying rule.

On occasion, courts and commentators have referred to document-producers' property rights over disclosed documents as being another possible reason to restrict subsequent use.[118] Usually, property rights are seen merely as an implicit precursor to privacy-based justifications for the rule. In the *Halcon* case (at 121), Megaw LJ observed that 'documents belonging to a party are their [*sic*] own property. . . . [I]t is in general wrong that one who is thus compelled by law to produce documents for purposes of particular proceedings should be in peril of having these documents used' for some other purpose.[119] However, in the *Cobra* case,[120] Laddie J

[116] The *Riddick* case 912; the *Harman* case 308; the *Crest Homes* case 858; *Tassilo Bonzel v Intervention* [1991] RPC 43, 47; *Mahon v Rahn* [1998] QB 424 (CA) 436.
[117] eg the *Riddick* case, where Lord Denning MR articulated all three rationales.
[118] *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158; S Sime *A Practical Approach to Civil Procedure* (3rd edn Blackstone Press London 1997) 242 (omitted from 4th edn).
[119] See also the *Derby (No 2)* case; *Tassilo Bonzel v Intervention* [1991] RPC 43, 47, 49*; Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969.
[120] At 824.

intimated that property rights could play a much stronger role. While favouring the confidentiality rationale, he suggested that 'private' documents should be protected whether or not they are strictly confidential. He opined that 'interference with [a] party's proprietary rights' for the limited purpose of resolving the litigation at hand should be the key. Outside the original litigation, a party should be 'entitled to reassert his rights of control over dissemination or use of his own property'.

The main problem with treating property as a free-standing rationale for the general rule against subsequent use is that it affords no basis for protecting those who do not own disclosed documents, but who would be harmed were they to be reused. A good illustration is the factual situation in *Farnsworth v Procter & Gamble Co* 758 F 2d 1545 (11th Cir 1985). A litigant sought disclosure from a non-party medical research institute. It wanted the names and addresses of toxic shock syndrome victims who had participated in a medical survey undertaken by the institute. Were property rights (rather than confidentiality) the basis for protection against subsequent use, the victims in this scenario would be utterly dependent on the research body's willingness to champion their interests. They would have no standing themselves under the rule to oppose disclosure and any subsequent use flowing from it. Likewise, where document-owners and document-producers differ, again, a property-centred rationale would afford no explanation for why document-producers (as opposed to document-owners alone) should be able to claim protection under the rule (as CPR 31.22 permits them to do).

All of these various shortcomings in the rationales put forward to justify CPR 31.22 demonstrate both the advantages and disadvantages of the rule's origins as a common law creation. Unlike statutory provisions, judicial decisions must be reasoned.[121] Not only does this foster debate about legal values and concepts and fulfil the law's expressive function, it also facilitates rigorous critical analysis. Yet, because case law rules (unlike statutes) lack any canonical form of expression, imprecise judicial analysis is much more of a vice. Later courts are hidebound by poor reasoning in earlier cases, without the possibility of remedial recourse to any authoritative, legislative text. As the analysis over the past three chapters has shown, the general rule against subsequent use in CPR 31.22(1) is beset by conceptual confusion, practical shortcomings, indeterminacy, imprecision and inconsistency.[122] None of its purported rationales, either singly or in combination, is persuasive. In particular, none is able to meet the primary challenge thrown down at the beginning of Chapter 3: to explain how precluding subsequent litigation use can be justified where it stifles good claims and results in parties being denied access to justice.[123] Overcoming this and other difficulties with the rule is not simply a matter of formulating newer, more robust rationales. The problem lies much deeper. As a matter of principle and practice, the existing, global rule against subsequent use fundamentally is flawed.

[121] ECHR, Art 6(1).
[122] *Eagles* 284–5.
[123] 91 above.

That judges have, since the *Riddick* case, evolved broad discretion to permit subsequent use arguably reflects an implicit realisation that, without modification, the rule would lead to unjust and unfair results in many cases. Nevertheless, as Chapter 6 will suggest, successive judicial attempts to use discretion to ameliorate the rule's shortcomings in individual cases—rather than starting afresh from first principles—has muddied the waters even further.

CHAPTER 6—JUDICIAL DISCRETION AND EXCEPTIONS TO THE GENERAL RULE

A INTRODUCTION

The *Riddick* case inaugurated the fully-fledged modern rule against subsequent use of disclosed documents. According to Laddie J, who canvassed the leading cases to date in the *Cobra* case, all three *Riddick* judges articulated the rule 'in stark and uncompromising terms'.[1] None purported to be exercising a discretion. All expressed the rule as imposing an automatic, global prohibition against any use beyond the proceedings at hand. Laddie J further claimed that none of the *Riddick* judges contemplated there being any exception to the rule either.[2] This is not quite correct. Stephenson LJ acknowledged that, conceivably, a case could arise 'in which a plaintiff would be justified in bringing an action on a document disclosed in an earlier action'. But he suggested no means for differentiating such a case from the vast majority in which subsequent use is 'an improper use which the court should not countenance'.[3] As the rule was stated in 1977, effectively it imposed an absolute prohibition against subsequent use.

Zuckerman has observed that such a blanket rule 'is as likely as not to distort the course of justice'.[4] One need look no further than *Riddick* itself to see that this is so.[5] Deprived of the ability

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[1] At 826.
[2] At 826. See also *Eagles* 298.
[3] At 902–3.
[4] AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 336, 357.
[5] The facts are outlined at 52–53 above.

to reuse TBM's memorandum, Riddick's defamation action was stymied. His access to justice and freedom of expression rights were denied, in circumstances where both parties had full knowledge of the memorandum's contents, and where TBM need have suffered no material prejudice through reuse of the memorandum in subsequent litigation. Given the inflexibility of the absolutist rule and its potential for injustice, not surprisingly judicial discretion to allow subsequent use soon was reasserted. Barely 16 months after the *Riddick* decision, a differently constituted Court of Appeal decided the *Halcon* case. It held[6] that 'it is open to the court, if the court sees fit, to give permission to a party who has obtained documents . . . on discovery . . . to use those documents for a purpose other than the purposes of the action in respect of which they have been produced'.[7]

Since the *Halcon* case, this seemingly broad discretion has become firmly entrenched in English case law.[8] Its legitimacy and desirability as a pragmatic tool for ameliorating the harshness of the general rule have never been questioned. Courts simply have invoked discretion as and when they have seen fit to facilitate subsequent use. This process culminated with CPR 31.22(1), which sets out three exceptions to the general rule. All are products (directly or indirectly) of judicial discretion. According to CPR 31.22(1), the general rule against subsequent use applies, except where:

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[6] At 121, 124 (citing *Bray* and *Reynolds v Godlee* (1858) 4 K&J 88, 70 ER 37).
[7] At 121.
[8] Subsequent use has been authorised under the banner of discretion approximately 22 times since 1979. Discretion has been referred to or reaffirmed in over 45 cases.

(a) the documents are read to or by the court, or referred, to at a hearing held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

Despite its wide acceptance, judicial discretion to sanction subsequent use is deeply problematic. As this chapter will show, its theoretical and practical shortcomings are evident in respect of all three exceptions.

B FOUR DIFFICULTIES WITH DISCRETION

Four key difficulties arise out of judicial discretion to allow subsequent use of disclosed documents. The first two are theoretical in nature. As they draw upon matters examined elsewhere in this thesis, they will not be developed here. The second two concern the construction and practical operation of the three exceptions. This chapter will concentrate on substantiating the claims made about them in this section, and assessing their impact on the law.

First, the availability of discretion is incompatible with the theoretical underpinnings of the general, blanket rule against subsequent use. Its foundational precept is that reusing disclosed documents for any purpose except the immediate litigation is, ipso facto and *a priori*, 'improper'. Yet, discretion exists precisely to permit such use. Either, then, subsequent use must not be universally improper—in which case, the general rule condemning it is theoretically unsupportable—or exercising discretion to enable such

use must be illegitimate. Logically, one cannot have it both ways. A central purpose of Part I of this thesis has been to demonstrate that maintaining a blanket, general rule against subsequent use is neither theoretically valid nor pragmatically desirable. The emergence of judicial discretion affords valuable corroborating evidence.

Second, the availability of discretion contradicts the three principal rationales put forward to justify the modern rule. This substantially undermines their persuasive force. The candour rationale claims that subsequent use must be prevented lest litigants be dissuaded from giving full and frank disclosure. To work as an effective, reliable incentive for candour, the rule against subsequent use must be absolute—or, at least, subject only to highly predictable, precisely defined exceptions. As this chapter will show, the three exceptions in CPR 31.22(1) are far from predictable or well defined. Inconsistent outcomes, vague standards and questionable reasoning render their application in individual cases something of a lottery. The confidentiality and compulsion rationales respectively claim that subsequent use must be prevented because it is unfair and unacceptable to invade document-producers' confidentiality or privacy or autonomy interests any more than securing justice in the original litigation demands. Yet, in the name of discretion, judges have approved such incursions on numerous occasions.[9] This demonstrates that neither confidentiality nor privacy or autonomy concerns

[9] eg *Birds Eye Walls Ltd v Harrison* [1985] ICR 278 (EAT); *Re Esal (Commodities) Ltd (No 2)* [1990] BCC 708.

are so pressing as to render subsequent use intrinsically unfair or objectionable. It all depends on the competing interests at stake.

Third, although the terminology used by judges to describe the discretion is uniform and well settled, it misrepresents (by over-inflating) the discretion's true nature and extent. This point will be developed below under the second exception to the general rule—that reuse may be made where the court gives permission. To summarise, according to the standard rhetoric (exemplified by the *Halcon* dictum cited above), judges enjoy expansive discretionary power. Assuming adequate grounds exist, they may permit reuse of disclosed documents in any manner, and for any purpose they deem fit.[10] In Dworkinian terms, the discretion appears to be 'strong'; judges may exercise lawful freedom of choice to create rules about what uses are legitimate and when.[11] This supposed breadth is reflected in the unqualified language of CPR 31.22(1)(b). However, when one examines how discretion actually is employed in practice, and patterns in its usage, a different picture emerges. Courts do not wield discretion as a broad, robust power to authorise any use that may be considered desirable. Nor do they employ it across a wide range of situations. They are far more circumspect. While occasionally judges have entertained the possibility of allowing publication[12] or revelation of disclosed materials to the proper authorities,[13] in

[10] The *Prudential* case 775.
[11] On Dworkin's senses of 'strong' and 'weak' discretion, see RM Dworkin *Taking Rights Seriously* (rev edn Duckworth London 1978) 31–3.
[12] The *Distillers* case.
[13] *A v A; B v B* [2000] 1 FCR 577.

fact, discretion has been exercised to permit only one form of reuse to date—use in subsequent litigation. Contrary to the rhetoric, English judges treat their discretion as akin to a 'weak' discretion, to allow a single form of reuse (use in subsequent litigation) in certain circumstances.

This hypothesis leads directly to the fourth difficulty associated with the discretion. It is incapable of compensating for the principled and practical shortcomings of the general rule. Evolution of facially broad discretion has enabled courts to side-step the need to acknowledge and address the underlying rule's over-inclusiveness, irrationality and scope for injustice. In characteristic English fashion, judges have invoked 'discretion' as a pragmatic means for delivering just outcomes on an ad hoc, case-by-case basis.[14] Sometimes, this has worked well—if one measures success purely by the quality of results achieved in select instances.[15] Overall, the shortcut has exacerbated rather than eradicated the rule's deficiencies. In practice, courts have confined discretion to situations of use in subsequent litigation. But this is not exhaustive of the full range of contexts in which reuse may be legitimate and desirable. Others—such as where disclosed materials reveal subsisting public hazards, official misconduct, or other matters of pressing public concern—spring readily to mind. Even within the narrow context of use in subsequent litigation problems

[14] *Atiyah* 3 (English lawyers and judges 'are not only inclined to the pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference'). See also *R v Deputy Governor of Camphill Prison, ex p King* [1985] QB 735 (CA) 751.

[15] The *Sybron* case; *Dory v Richard Wolf GmbH* [1990] FSR 266; *Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969.

abound. Discretion has not been exercised in a consistent, coherent or predictable manner. The principles and criteria supposedly guiding its operation are vague and contradictory. There is no benchmark for measuring their relative priority, tendency or weight. At times, decisions appear to be little more than thinly veiled reflections of judges' subjective preferences. In a few instances the results have been simply bizarre.

C THE PARTY CONSENT EXCEPTION

It is convenient to examine the three exceptions to the general rule in reverse order. CPR 31.22(1)(c) provides that document-producers (together with document-owners, where the two are separate entities) may permit reuse of documents they disclose. Where they do, document-recipients are relieved of their duty, owed to the court, under the general rule. Judges long have described party consent as an exception to the general rule.[16] Pragmatically speaking, it seems efficient and sensible to allow subsequent use where no party objects to the reuse proposed. Yet, this exception ignores the fact that additional interests may be implicated. Despite party concurrence, strong grounds may subsist for continuing to preclude subsequent use, so as to protect other important concerns.

One such concern is potential prejudice to non-parties. Disclosed documents frequently contain information about third

[16] The *Harman* case 322, 326; the *Cobra* case 831 para (7) (noting that subsequent use requests should be directed first to the other party, and only upon refusal to the court).

parties. In employment discrimination suits, medical negligence claims or passing off litigation, for example, defendants' documents commonly will reveal sensitive personal, medical or financial details about non-party employees, patients or customers. Those persons may well object to further dissemination or reuse, when document-producers and document-owners are indifferent (or even favour it). In principle, there is no reason why the law should overlook non-party interests by excluding them from consideration under CPR 31.22(1)(c). This is the net effect of the party consent exception.

It is unclear whether judges have effective discretionary power to countermand party consent. Under CPR 31.22(2), courts may enter protective orders to continue to prevent reuse notwithstanding the exceptions in CPR 31.22(1). According to CPR 31.22(3), however, only parties and document-owners have standing to seek such orders—not third parties. Courts may have jurisdiction *proprio motu* to issue protective orders. But where no party objects to reuse the issue is unlikely to come to the court's attention. Even if judges have the power, in practice the opportunity to exercise it rarely will arise.

This has relevance to a second concern that may warrant precluding subsequent use despite party consent, namely safeguarding the integrity of the civil process. As Chapter 2 noted, a classic form of 'improper' subsequent use, recognised by 19th century courts, is misuse of the disclosure process—for example, through parties cynically seeking disclosure solely to obtain information for

extraneous, ulterior ends.[17] CPR 31.22(1)(c) overlooks the fact that the rule against subsequent use inures in part to protect disclosure processes themselves from being abused. Given this fact (and the potential vulnerability of non-parties), it seems distinctly odd that private parties should be given the power to authorise other parties' non-compliance with obligations owed to the court.[18] The creation of the party consent exception illustrates the sort of judicial pragmatism powerfully criticised by Atiyah for neglecting the need for rationality in the law, and trying to settle disputes 'by wholly pragmatic means, without regard to the principles of law and the broader purposes which those principles must have'.[19]

D THE JUDICIAL DISCRETION EXCEPTION

1 General guiding principles

The second exception to the general rule, now enshrined in CPR 31.22(1)(b), is that disclosed documents may be reused 'where . . . the court gives permission'. On its face, this discretionary power is extremely broad. But the gap between rhetoric and reality is wide. Judicial discretion to permit subsequent use, notwithstanding the modern, blanket rule, was enunciated initially in the *Halcon* case. Whitford J at first instance opined that subsequent use could be allowed where 'there are very strong grounds for making an exception

[17] 58–61 above. See *Gibbons* 306–7; 303–305 below.
[18] The *Harman* case 319; *Gibbons* 306.
[19] *Atiyah* 126.

to the general rule'.[20] On appeal, counsel argued that Whitford J put the 'principle of law' on which discretion should be exercised much too high in requiring 'some *exceptional* circumstances which would justify . . . use'.[21] The Court of Appeal avoided grappling with this point by confining the decision to its 'own facts'.[22] At one level, this approach is consistent with the tenor of Whitford J's decision. His wording suggests that he was seeking to justify the creation of true exceptions to the general rule, based on specific policy factors, rather than carve out a broad discretion to dispense with the operation of the rule.[23] Yet, later courts quickly came to regard the *Halcon* case as having inaugurated a broad discretion.

As in the *Halcon* case, later courts have remained conspicuously chary of identifying the correct 'principle of law' underpinning the discretion with any precision. The much-cited leading authority is the *Crest Homes* case. There, Lord Oliver asserted that there is 'no general principle of law' beyond that a court will not release or modify the prohibition against subsequent use 'save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery'. The onus is on the party who wishes to reuse disclosed information 'to demonstrate cogent and persuasive reasons why it should be released'. Each case 'must turn on its own individual facts'.[24] Following the *Crest Homes* case, courts' descriptions

[20] The *Halcon* case 109.
[21] At 111 (emphasis added).
[22] At 119, 122.
[23] On the distinction between 'true' and 'illusory' exceptions to legal rules, see *Zuckerman in Tapper* 251.
[24] At 859–60.

of the general scope of discretion have been essentially uniform. Most have repeated Lord Oliver's terminology. Yet, beneath the surface of this apparent unanimity the underlying principles remain distinctly opaque. As a result, the foundations and application of discretion are confused. This can be seen by isolating and unpacking the four key elements from Lord Oliver's speech.

Before doing so, it is illuminating to reflect briefly on the theoretical backdrop to discussions about judicial discretion. In stark contrast to the presumption embedded in the subsequent use authorities, jurisprudential literature shows 'discretion' to be 'neither a simple nor a single concept'.[25] The term is ambiguous, bearing a range of senses depending on the context and attitude of those involved.[26] As Christie has said: 'It is universally accepted that discretion has something to do with choice; beyond this, the consensus breaks down'.[27] Many scholars regard judicial discretion as an essential tool for filling 'gaps' in the law by overcoming legal indeterminacy—where questions of law arise that have no single right

[25] SM Waddams 'Judicial Discretion' (2001) 1 Oxford U Commonwealth LJ 59, 59.

[26] DJ Galligan *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press Oxford 1990) 54. For seminal (opposing) accounts of discretion, see RM Dworkin *Taking Rights Seriously* (rev edn Duckworth London 1978); HLA Hart *The Concept of Law* (2nd edn Clarendon Press Oxford 1994). See further: A Barak *Judicial Discretion* (Yale UP New Haven 1989); essays in M Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth London 1984); DN MacCormick *Legal Reasoning and Legal Theory* (Clarendon Press Oxford 1994).

[27] GC Christie 'An Essay on Discretion' [1986] Duke LJ 747, 747. For good outlines of the main strands of jurisprudential scholarship, see: CM Yablon 'Justifying the Judges' Hunch: An Essay on Discretion' (1990) 41 Hastings LJ 231, 235–44; K Hawkins 'The Uses of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins (ed) *The Uses of Discretion* (Clarendon Press Oxford 1992).

answer.[28] Certainly, it can serve as an invaluable tool for flexibility. But discretion has been criticised heavily.[29] Legal realists, for example, have voiced trenchant opposition. According to that school, while couched in the language of logic, judicial decisions are opinions as to policy. Regardless of how they may be rationalised substantively in the text, they in fact embody a given decision-maker's policy preferences or political ideology at a given point in space and time.[30]

In the present context this viewpoint has a degree of resonance. Courts have arrogated broad discretionary power to themselves without defining its parameters clearly. The vague standards asserted afford considerable scope for ad hoc, preference-driven decision-making.[31] Courts can accommodate a wide range of outcomes and, at the same time, conceal the true grounds upon which their decisions rest. One should not overstate the argument. Judges' simultaneous rhetorical assertion of broad discretionary power, but practical restriction of it to a single category of cases, suggests ambivalence—perhaps over departing from the general rule in an area so incompletely theorised. Nevertheless, while in practice judges have treated their discretion as 'weak' (in the second Dworkinian sense) it

[28] Hart (n 26 above) 272; K Einar Himma 'Judicial Discretion and the Concept of Law' (1999) 19 OJLS 71, 74; TAO Endicott *Vagueness in Law* (OUP Oxford 2000) 2, 9.

[29] See references in R Pattenden *Judicial Discretion and Criminal Litigation* (2nd edn Clarendon Press Oxford 1990) 11–2.

[30] J Frank *Courts on Trial: Myth and Reality in American Justice* (Antheneum New York 1963); Dworkin (n 26 above) 3; EL Rubin 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 Harvard L Rev 1393; D Robertson *Judicial Discretion in the House of Lords* (Clarendon Press Oxford 1998) 7–9, 34.

[31] The preferences being spoken of are judicial, not personal.

still satisfies Pattenden's definition of 'concealed discretion'.[32] The rules governing it are open-textured, too elastic to compel particular results. Judges therefore enjoy considerable freedom of choice in settling the reasons and standards according to which the power should be exercised, and in applying them in specific cases. Atiyah too has noted that, in areas where the theoretical basis of English law is weak (as here), the case law 'tends to conceal what is going on'.[33] Evidence supporting a modified version of the legal realist viewpoint, based on this element of concealment, can be seen in many facets of the discretion.

(a) 'Special circumstances'

The first such facet is the court's reticence about articulating clearly the general principles underlying the discretion. Two of Lord Oliver's opaque propositions in the *Crest Homes* case have become the standard test for determining whether discretion is applicable. The first is that 'special circumstances' must be found to exist.[34] What constitutes sufficiently 'special' circumstances has never been defined. The authorities provide limited guidance by way of example. Thus, where a judge considers it 'purely adventitious' that two proceedings were brought separately rather than together, so that 'in substance' they

[32] Pattenden (n 29 above) 2. See also Galligan (n 26 above) 20 ff.
[33] *Atiyah* 103.
[34] *CBS Songs Ltd v Amstrad Consumer Electronics plc (Amendment & Discovery)* [1987] RPC 417 (CA) 425; the *Crest Homes* case 858, 560; *Dory v Richard Wolf* [1990] FSR 266, 271; *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43; *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 977; *Bourns Inc v Raychem Corp* [1999] FSR 641 (CA).

are 'a single set of proceedings', reuse may well be allowed.[35] But adventitiousness is not a precise standard. Predicting when it will be found is far from straightforward.[36]

Moreover, it is difficult to derive concrete guidance from the authorities due to interpretative inconsistencies. To illustrate, it is unclear whether the fact that two proceedings involve the same parties and same subject-matter counts towards there being 'special circumstances' or not. In the *Sybron* case, Scott J considered '[t]he identity of the causes of action sued on . . . a relevant factor' with 'strong prima facie appeal' in deciding to allow reuse.[37] In *Dory v Richard Wolf GmbH* [1990] FSR 266 'special circumstances' were held to exist where identical parties were engaged in corresponding patent infringement proceedings in England and the USA. Similarly, in *CBS Songs Ltd v Amstrad Consumer Electronics plc (Amendment & Discovery)* [1987] RPC 417 (CA) 424–5, the fact that the causes of action and parties were not the same in the original and subsequent proceedings was central to the court's finding that 'special circumstances' were not present. Yet, in *Tassilo Bonzel & Schneider (Europe) AG v Intervention Ltd (No 1)* [1991] RPC 43 Aldous J held that the identity of parties, subject-matter and issues (in patent litigation at least) is 'not unusual' or 'special in the sense of being very rare'. So, he concluded, it is

[35] The *Crest Homes* case 860; *Eagle Star Insurance Co Ltd v Arab Bank plc* (QBD 25 February 1991).
[36] Cf *Cobra Golf Inc v Rata* [1998] Ch 109, 168.
[37] At 320, 325. See also 327.

irrelevant to determining whether 'special circumstances' exist.[38] Jacobs J followed a similar line in *Beecham Group plc v Norton Healthcare Ltd* (ChD 5 February 1997). While the *Tassilo Bonzel* case may reflect an ordinary meaning of the word 'special', adopting it in this context is, to borrow from Bentham, nonsense on stilts. Precluding use in subsequent litigation where the parties and issues are most alike is, *cetera paribus*, irrational. That judges can adopt contradictory interpretations reflects the lack of conceptual clarity over what 'special' properly should mean; that is, about what differentiates situations where subsequent use is legitimate from those where it is not.

(b) 'Injustice'

The second limb of Lord Oliver's two-fold test is that subsequent use must 'not occasion injustice to the person giving discovery'.[39] Again, the vagueness of the discretion's theoretical foundations has generated confusion. In the absence of clearly articulated principles, courts have had no framework within which to define relevant prejudice, or to weigh it against other affected interests. Thus, a number of cases have treated the prospect that reuse may cause confidential disclosed documents to enter the public domain as relevant 'injustice'.[40] But in *Apple Corps Ltd v Apple Computer Inc* [1992] 1 CMLR 969 Ferris J

[38] See further N Jenkins 'Patent Actions in the United Kingdom: Release from Implied Undertaking on Discovery' [1992] EIPR 434; *Beecham Group plc v Norton Healthcare Ltd* (ChD 5 February 1997).
[39] The *Crest Homes* case 860 and other authorities in n 34 above.
[40] The *Sybron* case 322–3; *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155, 165–6; *Tassilo Bonzel v Intervention* [1991] RPC 43, 50.

described the 'due weight' supposedly to be given to this possibility as 'highly speculative'. Where documents are 'commercially confidential' the subsequent decision-maker may well receive them *in camera* or exercise other powers to preserve confidentiality. Alternatively, it may choose not to hear the evidence at all.[41] This factor (possible publicity) also sits somewhat uncomfortably alongside the traditional rationales for the general rule. Is further invasion of confidentiality reason enough to preclude subsequent use, as the confidentiality rationale holds? If so, considering it under the rubric of discretion is otiose. If, instead, compulsion or candour is the key, why should possible diminution of confidentiality downstream be relevant to the exercise of discretion? It may be a regrettable consequence of allowing subsequent use. But in principle it should not count as reason to prevent it, any more than it did in the original litigation—where production was compelled.

Similar uncertainty surrounds whether it is sufficient 'injustice' that allowing subsequent use would force a document-producer to divulge further confidential documents in order to amplify or explain those reused.[42] The authorities are inconsistent. When the cost or delay of subsequent proceedings will comprise relevant 'injustice' also is unpredictable.[43] Equally problematic is the restriction of attention to 'injustice' suffered by 'the person giving discovery'. This is

[41] At 979, 981. See also *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA) 1008.
[42] The *Halcon* case 118, 122, 124; *Bibby v Cansulex* [1989] QB 155, 167 (sufficiently prejudicial). Cf *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 992, 994 (not 'prejudicial . . . in a relevant sense').
[43] *Tassilo Bonzel v Intervention* [1991] RPC 43 cf *Beecham Group v Norton* (ChD 5 February 1997).

even narrower than under the party consent exception. It overlooks potential prejudice both to non-parties (information relating to whom appears in materials disclosed by others) and to document-owners (where distinct from document-producers). It also ignores the injustice suffered by parties who are prevented from reusing disclosed materials, whether original document-recipients or similarly-situated third parties. The *Riddick* case is a good illustration of injustice to the former;[44] the *Cobra* litigation of injustice to the latter. Because the *Cobra* litigation epitomises the modern rule's capacity for bizarre results—and discretion's inability to rectify them—it is worth examining as a case study.[45]

Rata (a sporting-goods retailer) sold counterfeit golf clubs. Two manufacturers, Cobra and TM, found out. Both independently sued Rata for trademark infringement and passing off. Their actions were stayed by consent when Rata undertook to stop its nefarious dealings and deliver up all remaining stock and records. However, TM became suspicious. Sure enough, further investigations revealed that Rata had been thoroughly dishonest. TM commenced a fresh action and obtained a search order. Rata was found in contempt. Cobra believed that it too had been duped and wished to bring contempt proceedings. But, in all probability, TM now held most of the relevant evidence. To avoid 'a substantial waste of time and money' by obtaining and executing its own, possibly futile, search order,[46]

[44] *Gibbons* 323–4.
[45] See also AAS Zuckerman 'Practice and Procedure' [1997] All ER Ann Rev 336, 350–4.
[46] The *Cobra* case 823 (Laddie J).

Cobra sought leave (with TM's support) to reuse the documents in TM's possession. In the course of giving judgment, Laddie J canvassed the discretion's evolution in detail. He even generated a list of 15 considerations relevant to its exercise.[47] But, in the event, while he 'appreciate[d] the inconvenience and potential wastage of costs',[48] he felt constrained to refuse to allow reuse. For, in an obiter passage in the *Crest Homes* case, Lord Oliver had disapproved of reuse for bringing civil contempt proceedings 'in some wholly unrelated proceeding' to that in which disclosure was made.[49]

Cobra was forced, therefore, to get its own search order. Lindsay J was unhappy issuing such an order in stayed proceedings.[50] So, on his recommendation, Cobra commenced a fresh action (for infringements since the first) and obtained the search order therein. It uncovered documents showing serious contempt by Rata in connection with the first action. But when Cobra sought to use the documents to bring contempt proceedings in the first action—known all along to be its 'dominant intention'[51]—Rimer J refused permission. He too deferred to the unfortunate *Crest Homes* dictum. He also concluded that 'special circumstances' did not exist, as there was 'nothing adventitious' about Cobra having commenced two separate proceedings.[52]

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[47] At 831–2.
[48] At 833 (Laddie J).
[49] At 859.
[50] *Cobra Golf Inc v Rata* (ChD 16 April 1996).
[51] *Cobra Golf Inc v Rata* [1998] Ch 109, 165, 168.
[52] At 168.

As happened in the *Tassilo Bonzel* case, Rimer J applied somewhat mechanically the *Crest Homes* terminology without reflecting on the underlying purposes or interests at stake. Writing on the 'serious weaknesses in the common law pragmatic tradition, because of the tendency . . . to concentrate on precedent rather than principle', Atiyah has condemned the 'mindless, blind application of rules or precedents without any attempt to understand what the law is for'.[53] After enduring a convoluted, time-consuming and expensive procedural maze—involving a duplicative and ultimately pointless search order, and an entirely superfluous second action—Cobra was left without a remedy. Its proposed use (enforcing Rata's undertaking via contempt proceedings) was plainly legitimate. Yet, perversely, the law rewarded Rata for its 'cavalier disregard to court orders',[54] by enabling it to evade liability through having breached two undertakings rather than just one. In the circumstances, Cobra could be forgiven for agreeing with Dickens's beadle that the law is an ass.[55]

Tellingly, injustice to would-be subsequent users does not feature in Laddie J's taxonomy of considerations relevant to discretion. Only once does it appear to have been influential. In *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919, Millett J allowed the claimant to divulge disclosed information to a non-party. The litigation concerned misappropriation of US$200m. Various banks furnished information in the English proceedings. Concurrently, the Bank of Greece

[53] *Atiyah* 125–6, 127.
[54] The *Cobra* case 832.
[55] Charles Dickens *Oliver Twist* (OUP Oxford 1999) ch 51.

appointed a special investigator to trace the funds and to submit a report to the Governor of the Bank of Greece and the examining magistrate in criminal proceedings. Millett J held that the claimant should not be forced either to infringe the English rule against subsequent use or to break Greek law.[56] Also relevant, he held, was the fact that '[c]ivil proceedings are not an end in themselves'.[57] In dishonesty-related cases litigants often must pursue multi-jurisdictional proceedings to obtain restoration of funds.[58] Had the *Cobra* judges espoused a similarly enlightened view of the purposiveness of law and civil processes, the *débâcle* there might never have occurred.

(c) Onus

A third *Crest Homes* proposition now accepted as orthodoxy is that would-be subsequent users bear the burden of showing 'cogent and persuasive reasons' to justify reuse. No onus falls on document-producers to advance reasons why reuse should be restrained.[59] *In Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155, 163 Hirst J held that the burden 'is a particularly heavy one' where non-parties seek reuse. In the *Derby (No 2)* case, Browne-Wilkinson V-C commented that permission to divulge

[56] Greek law required the claimant to transmit disclosed information that it had obtained under subpoena to the special investigator. Unless reuse were permitted, the claimant would have had to have chosen whether to violate Greek or English law.

[57] At 924.

[58] eg *Omar v Omar* [1995] 1 WLR 1428.

[59] The *Crest Homes* case 859. See also *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 977; *Bourns Inc v Raychem Corp* (CA 17 January 2000).

disclosed information to non-parties who wish to pursue claims against original document-producers 'is virtually never given'.[60]

This approach reflects the general rule that it is the party who wishes the court to act who bears the burden of persuading it to do so. Yet, in the context of subsequent use of disclosed documents, the mere fact that it is standard practice is not a good enough reason to justify imposing the burden exclusively on would-be subsequent users. Historically, the opposite approach prevailed. In *Tagg v The South Devon Railway Co* (1849) 12 Beav 151, 50 ER 1017 Lord Langdale MR refused to preclude subsequent use as '[n]o case [was] made for it'.[61] As Eagles has put it, the *Tagg* case stands as 'a salutary and since forgotten reminder' of where the onus originally lay—and where properly it still should lie.[62] If the theoretical argument is correct that subsequent use is not universally 'improper' (which the existence of discretion implies), then there is no reason why would-be subsequent users exclusively should bear the burden. Where specific forms of reuse prima facie are unobjectionable, the onus should be reversed.[63]

Also, in principle, there is little reason why the burden should be heavier where non-parties seek reuse (for example, similarly-situated

[60] See also the *Harman* case 326–7*; Milano Assicurazioni SpA v Walbrook Insurance Co Ltd* [1994] 1 WLR 977, 983. Cf *ex p Coventry Newspapers Ltd* [1993] QB 278 (CA).
[61] At 151.
[62] *Eagles* 286.
[63] 370 below.

claimants in mass litigation).[64] Under Lord Oliver's bifurcated test, courts already take 'injustice' to document-producers into account. Reuse by non-parties may warrant closer judicial scrutiny—to ensure that adequate controls against accidental or deliberate misuse exist, for example. But modern judges' automatic distaste for non-party use apparently stems from subjective perceptions or preferences rather than any norm or principle. This is another facet of discretion that supports the modified legal realist viewpoint.

(d) 'Own facts'

Lord Oliver's final general proposition in *Crest Homes* is that each case in which discretion is exercised must turn on its 'own facts'. This mantra is repeated throughout the authorities.[65] The overarching consideration in Laddie J's 15-part *Cobra* taxonomy is that 'discretion . . . must be exercised to achieve justice on the basis of all the circumstances of the case'.[66] This is evidence *par excellence* of judges' reluctance to formulate clear guiding principles. Given the harshness of the general rule, a desire to preserve (facially) expansive discretion to facilitate just outcomes in deserving cases is understandable. But ad hoc decision-making accounts for much of the law's confusion and unpredictability. Atiyah has criticised 'decisions in all the

[64] One possible reason to make the burden heavier might be to encourage joinder of proceedings rather than a multiplicity of single actions. But, given that devices such as joinder and group litigation orders are not always available or appropriate, this is insufficient reason to justify a heavier burden.

[65] eg the *Sybron* case 328; the *Crest Homes* case 858; *ex p Coventry Newspapers* [1993] QB 278 (CA) 286; *Miller v Scorey; Miller v Forrest* (CA 12 September 1996).

[66] The *Cobra* case 831.

circumstances of the case' for being 'decisions under apparent legal principles, but principles so malleable that they can be made to yield up any solution at all'.[67] The 'own facts' standard (if it can be termed so) accords judges virtual *carte blanche* to take previously unspecified matters into account; to accord variable weight to the same factors on different occasions; to ignore or reinvent previously recognised criteria; and to render decisions based on subjective impressions rather than any solid, consistent theoretical footing.

These observations suggest that, rather than persisting with broad, ill-defined discretionary power, attention should focus on refining the rule governing subsequent use, and creating clear, justified exceptions to it. Part II of this thesis attempts just such a task. Meanwhile, a good illustration of the uncertainty produced by the 'own facts' standard (mentioned already under 'special circumstances') is the court's variable treatment of the similarity of parties in original and subsequent proceedings. No hard and fast rule emerges as to whether an overlap is essential, helpful, optional, or even relevant to the exercise of discretion. Different cases say different things, based on their 'own facts'. In the *CBS Songs* case, leave was refused because the parties were not identical. But in the *Crest Homes* case it was 'quite immaterial' that they differed and leave was granted.[68] In *Bibby* leave was refused again, in part, because the parties were not the same. But in *Eagle Star Insurance Co Ltd v Arab Bank plc* (QBD 25 February 1991) and the *Bank of Crete* case it

[67] *Atiyah* 126.
[68] At 860.

was enough that at least some parties overlapped. Meanwhile, in *ex p Coventry Newspapers Ltd* [1993] QB 278 (CA), where none of the parties were in common, the issue was irrelevant; subsequent use was permitted.

Similar uncertainty surrounds whether public interests are required, or whether merely private interests supporting subsequent use suffice to tip the balance in its favour.[69] The degree of 'materiality' of disclosed documents to subsequent proceedings that must be established is quite unclear.[70] It is also unclear whether (or when) *founding* a subsequent case using previously disclosed documents—as opposed merely to *supporting* an independently sustainable case—is permissible. Judges' views differ, and correlate strongly with their perceptions of the merits of the proceedings proposed. Thus, in the context of a subsequent defamation claim, the *Riddick* judges held that neither form of reuse (founding or supporting) is acceptable. But in the *Coventry Newspapers* case (which involved reuse to found a *defence* of justification to defamation proceedings) the House of Lords granted leave.[71] Similarly, in the *Sybron* case, where massive fraud was concerned, Scott J allowed reuse even though the claimants otherwise would have struggled to formulate a viable claim. Yet, in *Re Esal (Commodities) Ltd (No 2)* [1990]

[69] Compare the *Halcon* case 109–10 (Whitford J first instance) ('some overriding public interest' must be found 'not the mere furtherance of some private interest'); the *Sybron* case 328 (*Halcon* dictum a 'valuable general guide' but of no assistance in the 'unusual circumstances' at hand); *A v A; B v B* [2000] 1 FCR 577, 598 (courts allow reuse for private interest reasons, although 'not readily').

[70] *Apple Corps v Apple Computer* [1992] 1 CMLR 969, 980.

[71] 238 below.

BCC 708 permission was granted in large part because the claimant did not need the material to plead his case.

In the *Cobra* case, Laddie J listed as a relevant criterion whether granting leave 'will have the effect of generating new proceedings or whether it will merely help in pursuing a claim or defence which already exists or could be run anyway'.[72] Conspicuously, this says nothing about *how* these factors should count. His next criterion was that 'prima facie it is not in the interests of justice to hinder a party from advancing a good claim or defence in other proceedings'.[73] Combining the two, their implication is that, where a court perceives a case to be 'good', it need not matter that reuse is essential to found it. But, where a case is seen as unattractive or unmeritorious, a court may refuse permission based on the support–vs–found preference. As well as encouraging unpredictable decision-making, this approach conflicts with the courts' usual stance that judges should not attempt to second-guess the strength of proposed proceedings (unless bound to fail or be struck out[74]) when deciding subsequent use applications.[75] It also contradicts the 'materiality' criterion. Logically, the more essential a document is for founding an action, the greater its materiality must be. Yet, co-existence of materiality as a discretionary factor and the support–vs–found preference produces the extraordinary result that documents falling anywhere on a continuum

[72] At 831.
[73] At 831.
[74] eg *Bedfordshire County Council v Fitzpatrick Contractors Ltd* [2001] LGR 397.
[75] The *Sybron* case 326; *Plant v Plant* [1998] 1 BCLC 38, 51.

from potentially relevant to highly material may well be reused, but absolutely crucial ones may well not.

In the *Re Esal* case, Millett J allowed reuse of material subject to an express undertaking to bring subsequent proceedings. His judgment is a clear illustration of how easily the 'own facts' standard and judges' subjective merit perceptions can merge.[76] The case concerned a 'major banking scandal' that, Millett J believed, 'the court should [not] assist in hushing up'.[77] His concern was so great that he suggested that 'the very magnitude and seriousness of the allegations . . . constitute a special circumstance which might by itself justify the granting of leave'.[78] As with the other examples, this case is dramatic evidence that the discretion lacks meaningful, predetermined guiding principles. It is the quintessential instance of a case turning on its 'own facts'. It is also indicative of the strained reasoning that CPR 31.22(1) forces judges to employ in order to justify subsequent uses that, but for the general rule, plainly would be supportable. The 'own facts' standard exemplifies a generic problem with judicial discretion, identified by Birks in the judicial remedial discretion context:

> without rules, principles, and well-defined concepts—or, in other words, without a coherent understanding of that which the cases are

[76] See also the *Harman* litigation (243–246 below), where (in the Court of Appeal) Lord Denning MR's attitude to the case apparently altered fundamentally once he had read (and vehemently disliked) the journalist's article: NV Lowe 'Discovering Contempt' (1982) 1 CJQ 10, 15.

[77] At 725.

[78] At 726. See also *ex p Coventry Newspapers* [1993] QB 278 (CA) 293.

> about—the mass of precedent can only degenerate to a wilderness of single instances. Free-spinning criteria will provide no map...[79]

2 The true scope of judicial discretion

The unqualified wording of CPR 31.22(1)(b) reflects the broad rhetoric of subsequent use authorities. In practice, however, courts have exercised discretion only in a limited range of situations. All English cases to date in which judges have allowed reuse have involved some form of use in subsequent litigation. Four sub-categories can be identified. The judicial attitudes that they reveal are illuminating.

The first sub-category is reuse of information obtained under search orders, or via disclosure orders ancillary to freezing injunctions, to facilitate proceedings (including those against non-parties and abroad) aimed at securing a remedy.[80] This was the first form of subsequent use ever to be permitted post-*Riddick*. Initially, judges seemed reluctant to be seen to authorise what otherwise would be deemed 'improper' use. So, ingeniously, they classified such reuse as falling outside the rule against subsequent use.[81] In *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981]

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[79] P Birks 'Book Review of DA Wright, *The Remedial Constructive Trust*' (1999) 115 LQR 681, 685.

[80] *Roberts v Jump Knitwear Ltd* [1981] FSR 527; *Bayer AG v Winter (No 2)* [1986] FSR 357; *Tate Access Floors Inc v Boswell* [1991] Ch 512; *Twentieth Century Fox Film Corp v Tryrare Ltd* [1991] FSR 58; *Levi Strauss & Co v Barclays Trading Corp Inc* [1993] FSR 179. This may include criminal proceedings: *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981] FSR 398; *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA).

[81] *Gibbons* 310–1; 76 above.

FSR 398, 401 Browne-Wilkinson V-C described search orders as 'quite a different species of action' to the norm. Over time, judges have had to concede that permitting such reuse does implicate the discretion—especially since, on occasion, permission has been refused.[82]

The second sub-category of use in subsequent litigation to be permitted was reusing disclosed documents to bring contempt proceedings[83]—at least, in the same or related litigation.[84] Again, judges employed contrived reasoning. In the *Crest Homes* case, which involved proceedings for breach of copyright in 60 house designs, the defendants failed to comply fully with a search order. The claimant found this out when it commenced a second action covering additional designs, executed another search order, and the concealed evidence came to light. The House of Lords permitted the claimant to reuse the evidence for contempt proceedings in its first action. As noted above, Lord Oliver justified this decision in part by asserting that the two actions were '[i]n substance . . . a single set of proceedings' and that it was 'purely adventitious' that different proceedings were brought. He then asserted that the 'proper policing and enforcement or observance' of court orders is not 'collateral' use.[85] Taking these together, discretionary leave, strictly speaking, was not required. If the proceedings were one, and the proposed use not collateral, then it was use in the same proceedings and no special permission was required.

[82] *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990); the *Cobra* case.
[83] *Garvin v Domus Publishing Ltd* [1989] Ch 335; the *Cobra* case.
[84] See text to n 49 above.
[85] At 860.

As with the *Sony v Anand* case, the *Crest Homes* case demonstrates marked judicial ambivalence toward the discretion—especially as, in both cases, the courts strongly supported subsequent use on the merits.

Reuse of documents in parallel proceedings (including quasi-judicial),[86] or in litigation concerning the same transaction or subject matter,[87] is the third sub-category of approved reuse. As judges have grown more confident, they have permitted reuse in a wider range of subsequent litigation situations—and on increasingly purposive grounds. In the *Apple Corps v Apple Computer* case, the claimants were allowed to submit the defendants' disclosed documents to the EC Commission, which was considering the same issue (compatibility of a trademark delimitation agreement with the Treaty of Rome), as it was 'highly desirable' that both tribunals should have access to the same evidence.[88] In the *Eagle Star* case, reuse was permitted in proceedings raising 'virtually identical issues' about transactions based on property over-valuations, as it was 'wholly unreal to try to compartmentalise' the claimant's knowledge of the fraudster's role in the transactions.[89] In *Omar v Omar* [1995] 1 WLR 1428, 1435 documents produced for a tracing claim could be reused to add personal claims and bring proceedings abroad as the 'objective' was the same—'to obtain redress'.

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[86] *Dory v Richard Wolf* [1990] FSR 266.
[87] The *Sybron* case; *Re Esal* [1990] BCC 708.
[88] See also *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA).
[89] *Eagle Star v Arab Bank* (QBD 25 February 1991). See also *Killick v PricewaterhouseCoopers* (ChD 11 October 2000).

These cases (and others) provide compelling evidence that use in subsequent litigation is not inherently 'improper'. Nor do courts regard it as such. They may not acknowledge this openly. But, in practice, English judges have used discretion to carve out a de facto exception to the general rule for subsequent litigation use. Once again, this fact supports—and partially explains—the modified legal realist argument. Implicitly, judges sense that, in most instances, use in subsequent litigation is not only legitimate but positively desirable. However, due to lack of courage, the constraints of precedent, or inadequate capacity for proper critical reflection, they continue to adhere to the blanket general rule inherited from the *Riddick* case. Rather than admit that the acceptability of use in subsequent litigation (and possibly other uses) fatally undermines the general rule—which would require embarrassing (although not unprecedented[90]) backtracking and time-consuming construction of an entirely new paradigm for dealing with subsequent use of disclosed documents—they conceal the truth beneath the disguise of discretion. By keeping discretion broad and standards vague, courts can engineer acceptable results as if the general rule did not exist. Yet, discretion remains an imperfect means for restoring rationality and workability to the law. As the earlier sub-categories indicate, judges sometimes lack boldness to use discretion whenever they should. The exclusion of anything other than use in subsequent litigation is unfortunate. Moreover, the law's vagueness and absence of clear guiding principles leave room for discretionary freedom to be exploited.

[90] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

The case law concerning subsequent defamation actions—the fourth relevant sub-category of subsequent litigation use—is one such area where judges' policy preferences appear to have dominated their discretionary decision-making. To date, every request to reuse disclosed documents to bring subsequent defamation proceedings has been refused. In the *Riddick* case, the Court of Appeal openly denigrated Riddick's claim—despite a first instance jury having found in his favour (including a finding of malice after hearing witness testimony).[91] In *Tejendrasingh v Christie* [1995] EMLR 152 Drake J resorted to a highly dubious (and since discredited[92]) reading of the public hearing exception to block a subsequent defamation claim. Some courts have taken advantage of the rule against subsequent use as an unofficial mechanism for striking out defamation actions prejudged as unmeritorious.[93] In *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 the House of Lords did not even advert to the possibility of using discretion in affirming the striking out of

[91] At 891–2, 897, 903, 905–6. Given the judges' open hostility to the merits of Riddick's action, it is reasonable to speculate that this may have influenced the outcome. Had the issue of subsequent litigation use arisen in a worthier case, they may have been less inclined to introduce a blanket rule prohibiting subsequent use across the board. This hypothesis is supported by the fact that judicial discretion to allow subsequent use was reintroduced in the very next subsequent use authority after *Riddick*, the *Halcon* case. It too concerned reuse in subsequent litigation. Notably, Waller LJ presided in both cases.

[92] *Phipson* 602–3 (discussing *Mahon v Rahn* [1998] QB 424 (CA)); *Style and Hollander* 274–5.

[93] *Nothman v Hartigan* (CA 23 October 1980); *Yhip v Comr of Police for the Metropolis (No 2)* (CA 18 June 1990); *Somba-Tola v London Borough of Lewisham Social Services* (CA 11 November 1993); *Tejendrasingh v Metsons* [1997] EMLR 597 (CA). That several of these cases are unreported makes their scrutiny especially important. It demonstrates the rule's scope for manipulation in practice. Whether or not the cases deserved to be struck out, using the rule as a convenient substitute for, or supportive adjunct to, striking-out procedures is improper.

subsequent defamation proceedings brought by a person implicated in SFO documentation as having been party to serious fraud.[94]

In all probability some of these cases did not deserve to be heard. One claimant ultimately was deemed a vexatious litigant.[95] But surely it cannot be a universal truth that subsequent defamation claims inevitably are devoid of merit. Riddick's case was arguable. Many claimants have been self-represented.[96] Their statements of case (and reuse applications) may not have been well presented. Nonetheless, judges have been unforgiving. Such consistent opposition suggests that an unarticulated, policy-based disapproval of exposing document-producers to subsequent defamation actions based on their own documents may underscore these decisions.[97] Interestingly, in the public interest immunity context, equally strong judicial hostility to derivative defamation claims can be detected.[98] The fact that publication to third parties is an essential element for defamation actions to succeed further reinforces the hypothesis. For, it shows that courts consistently have refused to allow use in subsequent

[94] Although, Lord Hoffmann reasoned that the rule against subsequent use 'prevents, so far as possible, the publication or dissemination of disclosed documents and therefore restricts the extent to which damage can be caused by defamatory statements which they may contain'. 'In this sense', he opined, the 'injustice' which preventing reuse may cause 'is reduced' (at 208).

[95] *R v A-G, ex p Tejendrasingh* (QBD 10 April 1997).

[96] Historically, legal aid was unavailable for defamation claims. Until the Courts and Legal Services Act 1990, s 58 was amended in 1998 conditional fee agreements also were illegal.

[97] This recalls judicial concern over self-incrimination, postulated at 200 above.

[98] *R v Lewes Justices, ex p Secretary of State for the Home Dept (aka Rogers v Home Secretary)* [1973] AC 388 (HL) 399–400, 409. Good reason may support according defamation cases special treatment. If so, this should be addressed by the substantive law: 114 above.

defamation proceedings despite the fact that, in such cases, the information already has been revealed to some extent and does not remain absolutely confidential to the holder.

The sole occasion when subsequent defamation reuse has been allowed was in the *Coventry Newspapers* case—to enable a *defence* to be pleaded with full particularity. The defendant-newspaper was sued by two police officers after it published an article suggesting that one officer had fabricated admissions against a criminal accused (who was convicted), and that both officers had then tampered with the court file by removing incriminating evidence showing the fabrication. When the accused appealed against his conviction, the Police Complaints Authority disclosed various documents. After the appeal succeeded, the accused sought permission to pass the PCA's documents to the newspaper for use in its defence. The case is striking for three reasons. First, reuse was permitted in proceedings wholly unconnected with the original litigation. Second, it was permitted by a non-party, in proceedings sharing no parties in common with the original case. Third, the Criminal Division heard the case, being the court to which the accused owed a duty under the rule against subsequent use. No appeal lay from its decision.[99] The court's choice to allow subsequent use therefore was particularly strong. This is graphic evidence that the court did not regard use in subsequent litigation—not even by a stranger, against two other strangers, for entirely novel ends—as intrinsically improper.

[99] Criminal Appeal Act 1968, s 33.

Recently, in *A v A; B v B* [2000] 1 FCR 577, Charles J expressed willingness to refer disclosed documents to the proper authorities. The case is unprecedented. It is the first occasion under the modern rule where a judge has been prepared to authorise reuse apart from subsequent litigation. It is also the first wherein a court has proposed to initiate and embark upon reuse itself.[100] During ancillary relief proceedings, two husbands belatedly admitted tax evasion. Charles J intimated that he was minded to pass their disclosed papers to the Inland Revenue. The husbands promptly volunteered the information, so Charles J did not have to act. But his willingness breaks entirely with past judicial reticence. Because his conclusions did not comport with current practice, he delivered judgment even though the proceedings settled mid-trial. At several points his readings of the prior authorities are doubtful.[101] His logic is not watertight; nor does he question continued adherence to the blanket general rule. But his basic thrust—that decisions about subsequent use should turn on the balance of competing interests at stake—accords entirely with the central argument in this thesis. For now, Charles J remains a lone voice in the judicial wilderness. It will be interesting to see whether the case initiates recognition of a new, de facto exception to the general rule (disclosure to proper authorities), or remains a maverick decision.

[100] Cf the *Cobra* case 831 ('Prima facie . . . it is not the court's function' to release disclosed documents for use outside litigation).
[101] eg 599–600, 620, 627, 630–1.

3 Subsequent litigation use—additional shortcomings

Even if the courts were to develop additional, de facto exceptions under CPR 31.22(1)(b), problems would persist. The theoretical foundations of the discretion remain weak. Although, pragmatically speaking, use in subsequent litigation is well accepted, decisions concerning it are replete with inconsistency, unpredictability and irrationality. Many examples have been noted already. Two final matters warrant mention.

First, uncertainty surrounds the question of whether and when permission to reuse disclosed materials must be sought. Reusing documents in the same proceedings may or may not require leave.[102] Judges apparently have discretionary power to authorise reuse retrospectively where it should have been obtained but was not.[103] Ascertaining when they will do so is next to impossible. Predicting when permission will be required generally is so difficult that one text has recommended that 'the prudent and proper course' *always* is to seek it.[104] The procedural inefficiency of this approach is palpable. Parties should not have to endure such wastefulness.[105] Second, irrationality is endemic. To make the use in subsequent litigation exception work at all, courts have had to hold that reusing disclosed

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[102] Compare the *Crest Homes* case; *Savings & Investment Bank v Gray (No 1)* (CA 10 August 1990).

[103] *Miller v Scorey* [1996] 1 WLR 1122, 1133; *WJ Morray Engineering Ltd v Cesare* (ChD 25 April 1997).

[104] *Matthews and Malek* 356.

[105] Zuckerman also has criticised the court's broad discretion, for fostering satellite litigation (via reuse applications) and wasting procedural resources: AAS Zuckerman 'Practice and Procedure' [1999] All ER Ann Rev 273, 286.

documents to seek legal advice on whether permission to reuse them should be sought, and then reusing the documents in applications to seek that permission from the court, are both 'a necessary exception to the otherwise all-embracing effect' of the general rule.[106]

Occasionally, judges have attempted to impose some order or discipline over discretion. Lord Oliver's *Crest Homes* guidelines and Laddie J's *Cobra* taxonomy are prime examples. Yet, rampant inconsistency persists. This is inevitable given both schemas' inclusion of cases' 'own facts' as the overarching criterion. Such attempts are doomed to fail while the underlying rule remains unsound. Moreover, Laddie J's cafeteria-style list gives little indication of when his criteria should apply and how they interact. Birks's criticism of a similar attempt to generate classes of relevant factors structuring judicial remedial discretion easily could have been written about discretion in this context:[107]

> The . . . classes become more randomly miscellaneous the more completely they are set out. What is the judge to do with them? The criteria which are mentioned are unfocused and too numerous. Even if they were fewer in number they would be useless until they were slowly made to state their priority, weight, and tendency.

[106] *Re Esal* [1990] BCC 708; the *Cobra* case 830.
[107] P Birks 'Book Review of DA Wright, *The Remedial Constructive Trust*' (1999) 115 LQR 681, 685.

E THE PUBLIC HEARING EXCEPTION

1 Introduction

The final exception, now contained in CPR 31.22(1)(a), is where disclosed documents 'are read to or by the court, or referred, to at a hearing held in public'. Where they are, the prohibition against subsequent use lapses. The documents are deemed to have entered the public domain and may be reused freely for any lawful purpose. Prima facie, the public hearing exception seems eminently sensible. Where materials are deployed during public hearings the principle of open justice is implicated.[108] In most cases, the importance of ensuring proper public scrutiny and awareness of the workings of justice will override the reasons for protecting disclosed materials from reuse outside the litigation. On rare occasions when the need to continue protection outweighs open justice imperatives, judges have power under CPR 31.22(2) to enter special protective orders that continue to restrict or prevent subsequent use. Thus, the exception appears sensible and beneficial.

Nevertheless, it is problematic. In general terms, its limited scope—applying exclusively to materials deployed in open court—can mitigate the general rule's harshness only in a handful of situations where reusing disclosed documents may be legitimate and desirable. Theoretically speaking, it is irrational that some disclosed documents should become available for any subsequent use, simply because they

[108] On the open justice principle and its rationales, see 138 n 81 above.

happen to be read or referred to at a public trial, while others do not. The fact that documents are deployed in the original litigation bears no relationship to their value or importance for other uses. More specifically, the exception's meaning and scope of application are uncertain due to two interrelated factors: inconsistent interpretation of key concepts; and evolving procedural practice.

2 Origins of the exception

Before examining the exception's shortcomings, it is worth tracing its origins. It was the unplanned offspring of the *Harman* litigation. Like the *Cobra* proceedings, the *Harman* litigation is worth exploring as a case study.[109] It too demonstrates the capacity of the general rule and discretion to produce bizarre results. A prisoner held in an experimental control unit sued the Home Office.[110] During the hearing, sensitive documents disclosed by the Home Office were read out in open court. Afterwards, the prisoner's solicitor (Harman) allowed a *Guardian* journalist who had attended portions of the hearing to inspect the documents in her office. He published a feature article highly critical of the prison system. The Home Office brought proceedings against Harman for civil contempt for breaching her duty under the rule against subsequent use. Park J found her in contempt. This was upheld by the Court of Appeal,[111] and, by a 3:2 majority, the House of Lords.

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[109] See also *Eagles*; J Jacob 'Discovery and Disclosure of Documents' (1987) 6 CJQ 293; 140 above.
[110] *Williams v Home Office* [1981] 1 All ER 1151.
[111] *Secretary of State for the Home Dept v Harman* [1981] QB 534 (CA).

The majority in the House of Lords rejected Harman's argument that a document-recipient's duty should terminate when disclosed documents are read in open court. The judges' reasons are illuminating. Inter alia, they saw the case as turning 'on its own particular facts, which [were] very special'.[112] They applied a literal, pragmatic interpretation of the open justice principle. In reality, they observed, publicity attaching to the case was extremely limited. While the public may be 'notionally present' during public hearings, in practice (as here), few people ever attend.[113] They therefore rejected the argument that the documents had entered the public domain simply because they were read out in open court. The suggested 'anomaly' that Harman (or the journalist) could have paid for a verbatim hearing transcript and used that freely was dismissed as 'hypothetical in the extreme'.[114]

By contrast, the minority judges (Lord Scarman joined by Lord Simon) stressed the importance of freedom of communication, freedom of the press, and keeping the law 'free from anomaly'.[115] They adopted a more theoretical, ontological view of the open justice principle, citing both ECHR and American jurisprudence in

[112] The *Harman* case 300.
[113] At 308. *Eagles* 289–93 criticises this 'crabbed' view of open justice and the media's forensic role.
[114] At 305, 309, 323–4. At that time, obtaining transcripts was relatively expensive and uncommon.
[115] At 311.

support.[116] In their view, the law could not 'decently and rationally permit' situations to obtain whereby document-recipients alone are excluded from reusing information that the rest of the world may disseminate freely.[117] The logic of this view is compelling. Where disclosed documents are read in open court, not only are the open justice principle and freedom of expression interests at stake. As in the *Riddick* case, access to justice rights also may be implicated. Had the *Harman* majority view prevailed, it could well have led to absurdity. In the event it did not prevail. Harman took her case to Strasbourg, claiming (inter alia) that the decision unjustifiably violated her right to freedom of expression under Article 10(1) of the ECHR. When the European Commission of Human Rights declared her application admissible,[118] the UK government promptly enacted RSC Ord 24, r 14A—the precursor to CPR 31.22(1)(a) and (2).[119]

Interestingly, elsewhere in the common law world (beyond the reach of the ECHR) the *Harman* case remains good authority. In New Zealand, for instance, by virtue of *Harman*, implied undertakings against subsequent use continue to apply even after copies of disclosed

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[116] On the American 'judicial records' doctrine see *Nixon v Warner Communications Inc*, 435 US 589, 98 S Ct 1306 (1978); *In re Halkin*, 598 F 2d 176, 186 (DC Cir 1979); *Miller* 429. See also AAS Zuckerman 'Practice and Procedure' [2000] All ER Ann Rev 295, 306 (calling for greater transparency to enable members of the public to inspect all documents relating to public proceedings in England).

[117] At 312.

[118] *Harman v UK* (1985) 7 EHRR 146 (E Comm).

[119] RSC Ord 24, r 14A provided: 'Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs'.

documents have been read out in open court.[120] The modern rule's capacity to deliver bizarre results lives on through its Commonwealth progeny.[121]

3 Shortcomings of the public hearing exception

Since the public hearing exception took effect in 1987 its interpretation and application have varied significantly. Uncertainty has grown rather than diminished. Two principal causes can be identified. The first is a lack of conceptual clarity over the meaning of three key terms—'read or referred to'; 'public domain'; and the open justice principle. The second is the fact that procedural practice has altered dramatically since the exception was created. CPR 31.22(1)(a) and (2) updated the wording in which the exception is expressed. But in substance it remained unchanged. Over time, it has become increasingly anachronistic. As a result, courts have struggled to give the exception meaningful effect under contemporary conditions.

Problems emerged as soon as the exception came into force. Judicial reactions were decidedly mixed. In the *Derby (No 2)* case, Browne-Wilkinson V-C opined that 'the purpose behind [the exception] . . . is to produce the result, save in truly exceptional circumstances, that once a document has been used and referred to

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[120] *Port Nelson Ltd v Commerce Commission* (1994) 7 PRNZ 344 (NZCA) 347. See C Finlayson and F Shepherd *Discovery* in Sir Robin Cooke (ed-in-chief) *The Laws of New Zealand* (Butterworths Wellington 2000) para 55.

[121] Writing extra-judicially, at least one Law Lord has accepted that the *Harman* case was wrongly decided: L Hoffmann 'Bentham and Human Rights' (2001) 54 CLP 61, 76.

in open court, it is a public document and no special undertaking continues'. His view rested on a generous reading of the open justice principle, holding that documents, once read in open court, automatically enter the public domain. In recent years, the *Derby (No 2)* dictum has been accepted and affirmed.[122] Yet, *Derby (No 2)* aside, initially courts displayed astonishing hostility to the public hearing exception. Some even interpreted it as allowing publication but not subsequent litigation use.[123] In the *Bibby* case, Hirst J was 'not convinced that mere publication in open court, or in a transcript, automatically in every case removes a document's confidentiality'. Like the *Harman* majority, he focused on practicalities. As there was 'no evidence as to the extent, if any, of public attendance at the trial, nor of the dissemination of the transcript', he concluded that the document in question had not even 'technically lost its confidentiality'.[124]

Such authorities reflect a major discrepancy within the law; namely, inconsistent judicial treatment of the open justice principle. Some cases, such as *Harman* and *Bibby*, have read the principle merely as embodying an 'open doors' policy—a right of public *attendance* at, or right of the public and media 'not to be excluded' from, judicial

[122] *SmithKline Beecham v Connaught* [2000] FSR 1 (CA).
[123] *Mainwaring v Goldtech Investments Ltd* The Times, 19 February 1991 (CA) (apparently decided in ignorance of the *Derby (No 2)* case); *Petch v Dept of Health* (QBD 11 October 1994); *Tejendrasingh v Christie* [1995] EMLR 152, criticised in *Tejendrasingh v Metsons* [1997] EMLR 597 (CA). This reading down is untenable as a matter of basic construction and contrary to traditional authority.
[124] *Bibby v Cansulex* [1989] QB 155, 165.

proceedings.[125] This explains these cases' concentration on the actual extent of public exposure in given situations. It also explains their definition of 'public domain'. According to these cases, when documents enter the 'public domain' through being read or referred to in open court, any person physically present in court may report their contents without restriction. But no-one thereby gains any right of access to the documents.[126] By contrast, in other cases—such as *Derby (No 2)*, *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [2000] FSR 1 (CA) and *Barings plc (in liq) v Coopers & Lybrand (a firm)* [2000] 1 WLR 2353 (CA)—courts have looked to the values and purposes underpinning the principle. They have treated it as embodying a right of public *access* to disclosed materials where necessary for comprehending and scrutinising judicial proceedings and decisions, irrespective of whether members of the public actually attend court. This viewpoint corresponds with an assumption that documents do become publicly accessible when they enter the 'public domain'.

This tension between literal and purposive readings of the open justice principle has important repercussions, not least for defining 'read or referred to'. The boundaries of the phrase are distinctly blurred.[127] As the Court of Appeal noted in the *SmithKline Beecham* case (at 12), it is 'plain' that the phrase applies where documents

[125] *GIO Personal Investment Services Ltd v Liverpool & London Steamship Protection & Indemnity Association Ltd (FAI General Insurance Co Ltd intervening)* [1999] 1 WLR 984 (CA) 994.
[126] *Plant v Plant* [1998] 1 BCLC 38, 47; *GIO v Liverpool* [1999] 1 WLR 984 (CA) 993–5.
[127] *Style and Hollander* 273–5.

are read out or referred to during public hearings and judges read them there and then. When the exception was created, these were essentially the only methods by which disclosed information came to judges' notice. In recent years, the orality principle has been superseded by procedural efficiency and expedition demands, and by liberalisation in the laws of evidence.[128] Judges now are expected to read skeleton arguments, case summaries, bundles of documents and witness statements privately before trial. Disclosed information affecting decisions may not be alluded to in court at all. To give the open justice principle meaning in the light of this 'changing forensic practice',[129] courts have had to adopt increasingly strained interpretations of the phrase 'read or referred to'.

In the *Derby (No 2)* and *SmithKline Beecham* cases, the phrase was extended to encompass documents lodged in court and read privately by judges pre-hearing, or referred to in written skeleton arguments incorporated into counsels' submissions in open court. In the *Barings* case, the Court of Appeal even interpreted it as including documents 'read by the judge, in or out of court, as part of his responsibility for determining what order should be made'.[130] Such formulae assume that judges who read disclosed documents in private do so exclusively

[128] Key evidential developments include the use of hearsay evidence and statutory abandonment of the requirement that original documents be produced: Civil Evidence Act 1995, s 1 and s 8 respectively. See generally *Cross and Tapper* 563–6, 639–46.
[129] *SmithKline Beecham v Connaught* [2000] FSR 1 (CA) 12.
[130] At 2376.

for reasons of procedural economy. Yet, as in the criminal sphere,[131] part of the reason for reading documents in private may be just so as to prevent them from becoming public knowledge. This complication compounds the difficulty of defining what comes into the 'public domain' with any precision. As Lord Roskill noted ruefully in the *Harman* case, well before major cut backs to the orality principle, the term 'public domain' is one 'of doubtful precision'.[132]

The *SmithKline Beecham* and *Barings* cases emphasised the need to allow public access to pertinent documents—with 'suitable safeguards' (as yet undefined)—'to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain'.[133] These attempts to remain faithful to the open justice principle while hearings become increasingly lean and mean generate a number of difficulties vis-à-vis the public hearing exception. Again, as long ago as the *Harman* case, Lord Scarman doubted whether procedural expedition always is reconcilable with open justice concerns.[134] In *SmithKline Beecham* the Court of Appeal suggested that '[a]s the court's practice develops' judges will need to 'give appropriate weight' both to hearing efficiency and open justice

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[131] R Pattenden *Judicial Discretion and Criminal Litigation* (2nd edn Clarendon Press Oxford 1990) 148 (medical, welfare, probation reports, read for sentencing), 251–3 (previous criminal records, read to control cross-examination).

[132] At 322. See also: *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 (CA) 215; *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 (HL); *Harman* 312, 316; R Wacks *Personal Information: Privacy and the Law* (Clarendon Press Oxford 1993) 57–68.

[133] *SmithKline Beecham v Connaught* [2000] FSR 1 (CA) 12; *Barings plc (in liq) v Coopers & Lybrand (a firm)* [2000] 1 WLR 2353 (CA) 2367.

[134] At 316.

concerns.[135] This offers no guidance as to how or where the balance should be struck.

The radical stretching of 'read or referred to' in the *Barings* case illustrates the unpredictability and uncertainty that can result when judges make up rules as they go along. At issue was how to determine what documents have entered the public domain when judges do not state in open court what they have read—and also, who should bear the burden of proof. As judges cannot be cross-examined, the Court of Appeal held that 'the only practical solution' is to assume that judges have read all materials submitted to them, and require parties who oppose subsequent use to prove otherwise. Quite how such parties should go about this task was unspecified. Perhaps appreciating their predicament, Lord Woolf MR indicated that such parties might instead 'contend . . . that the need to protect the ability of the court to do justice in a particular case' makes it 'not in the interests of justice' to apply the public hearing exception.[136] In effect, he authorised parties (and courts) to evade altogether the fraught issue of deciding whether documents have entered the public domain—almost an untenable inquiry under modern procedure. Instead, they could leapfrog the minefield, simply assume that documents fall within the exception, and proceed directly to the more pressing question of whether the exception should be disapplied. More recently, the Court of Appeal effectively conceded the need for

[135] At 16. See IR Scott 'Judges' Pre-reading and Public Access to Documents' [1999] 18 CJQ 275.
[136] At 2367.

such evasive manoeuvres. In *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 02, [2002] 1 All ER 842 (CA) it redefined the public hearing exception as capturing any documents specifically drawn to a judge's attention (by whatever means), whether or not he or she actually reads them.

Another way in which the uncertainty associated with the public hearing exception has intensified over time is the fact that hearings held in chambers (so long as not *in camera*) now count as hearings held 'in public'.[137] This has increased the exception's ambit substantially. Mirroring the irrationality of the 'exception' whereby parties may seek legal advice and permission to reuse disclosed documents using the very documents at issue, without thereby violating the general rule, in *Plant v Plant* [1998] 1 BCLC 38 Carnwath J held that documents do not enter the public domain through being referred to during subsequent use applications. As he observed, '[t]his would be a curious result . . . It would mean that the simple fact of applying in open court for release . . . rendered the application unnecessary'.[138] That this fact undermines the entire rule regretfully escaped notice.

Further difficulties surround the court's power to continue protection against subsequent use. Under CPR 31.22(2), '[a] court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been

[137] *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 (CA) 1070–1; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA).
[138] At 44.

read to or by the court, or referred to, at a hearing which has been held in public'. It is unclear when such an order may—or must—be sought. CPR 31.22(3), which allows document-producers or document-owners to request protective orders, mentions no time limits. In the *Derby (No 2)* case (decided under RSC Ord 24, r 14A), Browne-Wilkinson V-C held that any application must be made at the hearing at which reference to documents is made. Because, in his view, such documents automatically enter the public domain, unless application is made immediately the opportunity lapses. However, as noted above, judicial views differ over the meaning of 'public domain'—and, in addition, over whether documents automatically become public when they are mentioned in open court, or whether leave still must be obtained before reusing them.[139] Predicting which account of the public domain concept a given court will prefer is virtually impossible. Meanwhile, as Matthews and Malek have observed, while perhaps fostering greater certainty, the *Derby (No 2)* approach is unsatisfactory.[140] It may not be until after the hearing that a form of reuse is threatened which a document-producer finds objectionable. The *Derby (No 2)* approach encourages document-producers to seek prophylactic protective orders on every occasion, and document-recipients to conceal their true intentions.

[139] Conflicting streams of authority are noted in *Cassidy v Hawcroft* (CA 27 July 2000) para 14. Compare also the *Derby (No 2)* case, *ex p Coventry Newspapers* [1993] QB 278 (CA) and *Barings v Coopers & Lybrand* [2000] 1 WLR 2353 (CA) with *Plant v Plant* [1998] 1 BCLC 38.

[140] *Matthews and Malek* 360–1.

Finally, CPR 31.22(2) provides no guidance on the principles that courts should apply in deciding whether to continue protection. The *Derby (No 2)* case intimated that orders should be made only in 'truly exceptional circumstances'. This reflects the importance of the open justice principle. But it leaves parties substantially up in the air—especially given concurrent uncertainty about whether documents enter the public domain automatically or not. Protection has been continued in two cases.[141] The *Bibby* case concerned damage caused to ships by hazardous cargo. The claimant shipowners sought permission to pass minutes disclosed by the defendants to similarly-situated shipowners who were arbitrating against another party for similar damage. Strictly speaking, confidentiality had been lost. The minutes had been read in open court. However, the fact that they remained 'commercially sensitive', and that wide dissemination could prejudice the defendants, strongly influenced Hirst J's decision to continue protection.[142] Similar considerations arose in the *Lilly Icos* case, where a CPR 31.22(2) order was made in respect of a single document used during patent revocation proceedings. Two principal factors influenced the Court of Appeal. First, the document contained sensitive financial data 'regarded as axiomatically confidential' by pharmaceutical industry members.[143] Second, while patent litigation is of 'peculiar public importance'[144]—because it involves

[141] In *Plant v Plant* [1998] 1 BCLC 38 protection also was continued after reference to disclosed documents during a subsequent use application hearing. Strictly speaking, no protective order was needed, as the documents were held not to have entered the public domain.
[142] *Bibby v Cansulex* [1989] QB 155, 165.
[143] At 852.
[144] At 847.

potential restrictions over competition affecting goods of great public benefit—the document in question was not at all central to the case, and could not have helped the public to understand the case.

What is interesting is how both courts took account of the competing interests at stake. Freed from the shackles of the general rule and its presuppositions, they looked to the confidential character of the information at issue, and the probable harm of allowing reuse. They then sought to weigh the risk of prejudice against the interests favouring reuse (albeit, in a somewhat more developed way in the *Lilly Icos* case than in the *Bibby* case). This approach—combining a balancing test with a confidentiality-based harm principle, and starting from the position that restricting legitimate forms of reuse should be justified—foreshadows precisely the approach recommended in Part II of this thesis for addressing all questions associated with the subsequent use of disclosed documents.

F CONCLUDING REMARKS

One danger where courts fail to establish coherent, principled legal doctrine is that, either through theoretical pluralism or sheer woolly-mindedness, the law eventually will contradict itself or produce absurdities. Such has been the fate of discretionary exceptions to the rule against subsequent use. The simple wording of CPR 31.22 belies the uncertainty, inconsistency and unpredictability that dog this area of law. Rather than acknowledge and address directly the theoretical flaws underpinning the modern, blanket rule, judges have attempted to side-step them. They have used discretion as a pragmatic tool,

supposedly to ameliorate the general rule's worst effects in individual cases. Yet, as this chapter has shown, ad hoc decision-making—based on vague general principles and policies (blindly felt, as Holmes would say), and an infinitely variable smorgasbord of relevant considerations—is an inadequate proxy. Instead of offering a solution to the general rule's deficiencies, discretion has compounded the underlying problems.

As Atiyah has warned, judicial discretionary pragmatism 'can easily degenerate into complete "*ad hockery*", a casuistic methodology which eventually supplants the need for rigorous legal analysis and thought and replaces it with gut feeling and sentiment'.[145] The court's construction and deployment of the discretion to allow subsequent use demonstrates this contention. At times, judges have shied away from exercising discretion boldly, despite the breadth of their rhetoric and the theoretical defensibility and desirability of the subsequent use proposed. At other times, their decisions appear to have been directed not by pre-established principles, but by subjective perceptions or preferences. In carving out a de facto exception for subsequent litigation use, they have shown sensitivity to its intrinsic propriety. But because they have eschewed rigorous theoretical analysis, and instead perpetuated the myth that subsequent use is presumptively 'improper', judges have failed to see the full implications of recognising discretionary exceptions to the general

[145] *Atiyah* 129.

rule. The ramifications for clarity, predictability, consistency and rationality—as the cases amply demonstrate—have been considerable.

Perhaps the most intriguing aspect of CPR 31.22 discretion is judicial ambivalence. On the one hand, judges have embraced discretion as a pragmatic means for surmounting the injustice of the absolutist general rule. Instinctively, they appreciate that at least some forms of subsequent are not inherently objectionable. Use in subsequent litigation is the obvious example. Disclosure to proper authorities eventually may be added to the list. Judges appear to have kept their rhetoric deliberately broad so as to encompass any and all future (unforeseen) forms of reuse perceived to be sufficiently deserving. Yet, on the other hand, judges have upheld the blanket, general rule unquestioningly. They have exhibited marked reluctance to exercise discretion vigorously. The conservatism of their conduct belies the liberality of their language.

Looking overall at the modern rule against subsequent use as analysed in Part I of this thesis, it seems to typify four faults identified by Robertson with judicial law-making.[146] First, there is evidence of post hoc arguments—'intellectual edifices erected around a value position selected otherwise'. This can be seen both in respect of the three main rationales put forward to justify the general rule, and discretionary exceptions to it. Second, precedents have been used as 'building blocks' of theory, often for different theories from

[146] D Robertson *Judicial Discretion in the House of Lords* (Clarendon Press Oxford 1998) 155.

those they originally supported. This can be seen in relation to 19th century authorities erroneously cited by modern courts to support the modern, blanket general rule and exceptions. Third, while judges speak of 'balancing' principles, all that they state is where the balance comes down without the calculation being shown. This fault is especially evident in the assumption underpinning each of the three rationales that the factors said to warrant preventing reuse inevitably trump all other concerns. Fourth, judges' arguments generally are never tested. While most obviously true of the candour rationale, this criticism can be levelled against virtually all judicial activity in the context of the rule relating to subsequent use. Had judges thought more deeply about the theoretical foundations of the rule, and tested its rationality early on, its evolution might have been substantially different. The flawed, blanket modern rule might not have developed. The flight to discretion might never have happened.

Continued adherence to the underlying rule is untenable. As Part I of this thesis has sought to demonstrate, an entire overhaul of the law governing subsequent use of documents disclosed during civil proceedings is required. Two things are essential—a fundamental reconsideration from first principles of the underlying rule's ambit and purpose; and procedural reform designed to achieve the law's proper aims in the most efficacious and procedurally efficient manner possible. Embarking on these tasks is the project of Part II.

Part II

Reforming the Rule

CHAPTER 7—FOUNDATIONS FOR REFORMING THE RULE GOVERNING SUBSEQUENT USE

A INTRODUCTION

In the light of the analysis contained in Part I of this thesis, a compelling argument can be put forward that the modern rule governing subsequent use is unsupportable in its current form, both in theory and in terms of its practical operation. The principal elements of that argument emerge from a summary of the major lessons learned in Part I.

The general rule in CPR 31.22(1) automatically presumes that any use of disclosed documents for purposes outside the proceedings in which they are disclosed is, ipso facto and *a priori*, improper. As Chapter 2 demonstrated, presumptively banning *all* such forms of subsequent use is unnecessary, unsound and historically inconsistent. There is no justification for maintaining this blanket rule—particularly given its chilling effect on access to justice. Not all forms of subsequent use are inherently 'improper'. Much depends on the competing interests at stake, and the context and circumstances of each case. As Chapters 3–5 showed, neither candour, privacy, confidentiality nor property concerns inevitably trump the factors favouring reuse. The existing rule is too blunt an instrument for differentiating correctly between legitimate and illegitimate forms of reuse. In capturing both, it is over-inclusive.

The modern rule purports to immunise against subsequent use *all* disclosed materials, irrespective of their content or the likely

consequences of allowing particular forms of reuse to proceed. As Chapters 3–5 demonstrated, none of the three main rationales said to support the rule, singly or in combination, can justify this breadth. No rationale could. For, neither justice, procedural fairness, nor any other theoretical or pragmatic consideration demands that every disclosed document be shielded, let alone from every form of subsequent use beyond the litigation at hand. Contrary to the candour and compulsion rationales, nothing about the disclosure process per se demands that all disclosed documents should enjoy special protection against dissemination or reuse for other legitimate purposes. The existing general rule and its rationales overlook important competing concerns, such as rights of access to justice, public health and safety, rights to freedom of expression (both to convey and to receive information) and investigation of wrongdoing by the proper authorities. CPR 31.22 protects documents even where no appreciable detriment would flow from their reuse for specified purposes. In these respects, again, it is over-inclusive.

The general rule is subject to three exceptions.[1] As Chapter 6 showed, broad rhetoric surrounds judicial discretion to permit subsequent use. Yet, judges have interpreted and applied their discretion restrictively, to facilitate just outcomes within a narrow compass only. As is common with wide, ill-defined discretionary powers, discretion to permit subsequent use has crystallised into a much more limited power to authorise use in subsequent litigation in

[1] CPR 31.22(1)(a)–(c).

certain situations. The three exceptions are too restrictive—and the courts' treatment of them too unprincipled and unpredictable—to compensate for the theoretical and practical shortcomings intrinsic to the modern general rule. In this respect, the exceptions are under-inclusive.

As Sunstein has observed, over-inclusiveness and under-inclusiveness are characteristic of general abstract legal rules. Because of their *ex ante* nature, they tend to be overstated with reference to the arguments said to justify them, and to lack sufficient flexibility to provide just outcomes in highly nuanced fact situations.[2] Given these fundamental deficiencies, urgent reform of the rule governing subsequent use is required to avoid future inconsistencies and injustices, and to restore rationality to the law. Assuming one accepts this conclusion, the inevitable question is this: With what should the existing rule be replaced? This question can be refined into two interrelated, component questions of principle: (1) What documents should be eligible for protection against subsequent use? and (2) From what forms of subsequent use should those documents be protected? A further fundamental question is this: (3) Having decided in principle when (and why) protection against reuse should be available, what procedural system would be likely to prove most efficacious and efficient for facilitating proper forms of subsequent use while restricting improper ones?

[2] CR Sunstein 'Problems with Rules' (1995) 83 California L Rev 955, 1022. See also J Jowell 'The Legal Control of Administrative Discretion' [1973] PL 178, 202.

Part II will seek to answer these questions—or, in respect of question (3), to begin to do so. The principal aims of this thesis are twofold: to demonstrate the deficiencies of the existing CPR 31.22 regime; and to generate a suitable framework for its reform. Space precludes an exhaustive treatment of the topic of reform herein. Formulating and evaluating detailed possible replacement rules is a project for future work. However, Part II will attempt to set the stage. Building on Part I, it will identify key foundational precepts and principles that should govern the design of a new, theoretically defensible, regime for subsequent use, and suggest ways to realise these in procedural practice. This chapter will address questions (1) and (2), by generating general guideline propositions to delineate what kinds of disclosed documents properly should be eligible for protection against subsequent use, and in what circumstances. Chapter 8 will address question (2) in greater detail, using the theoretical framework propounded in this chapter to assess seven concrete categories of subsequent use. Finally, Chapter 9 will outline a possible structure for reform, to show how a fair, workable, theoretically sound and procedurally efficient procedure potentially may be built upon the foundations and framework constructed in Part II.

Before embarking on these tasks, it is worth pausing to consider whether any replacement regime is required. Might not CPR 31.22 simply be abolished? According to Eagles (writing in 1984 when the law still was framed in terms of the 'implied undertaking' doctrine), were the implied undertaking 'to vanish from English law' it 'would

scarcely be missed'.[3] Ample protection, he thought, could be derived from the court's other powers: to require express undertakings; to refuse to order production of particularly sensitive documents; to limit access to such materials; and to proceed *in camera*. Certainly, Eagles is correct that the 'implied undertaking'—that is, the automatic, blanket presumption against subsequent use—is superfluous. However, the failings of judicial discretionary pragmatism noted in Chapter 6 above suggest that it would be unsafe simply to leave judges to fall back on their general powers. For the sake of clarity, consistency and coherence, the law should be rationalised and systematised. Unquestionably, valuable confidential disclosed information must be safeguarded against misuse. For these reasons, CPR 31.22 should not simply be abolished. A suitable alternative procedure, incorporating clear guidelines for judges and parties, should be implemented in its place.

B COMPARATIVE ANALYSIS—AMERICAN FEDERAL PROCEDURE

In the quest for ideas and insights to assist with procedural reform, gaining a comparative perspective can be extremely beneficial.[4] By facilitating understanding of the relationship between systems of law or specific rules within them, especially where historical links exist, comparative analysis enables fruitful parallels and contrasts to

[3] *Eagles* 302.

[4] As the wealth of comparative civil procedure texts demonstrate, eg: AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP Oxford 1999).

be drawn.[5] It also fosters the borrowing or transmission of rules, structures and techniques where appropriate—a law reform process dating back millennia.[6] The general dangers of comparative studies are well known.[7] Inevitably, they are superficial. Drawing parallels can be problematic. Their aim cannot be to transplant unreconstructed concepts or procedures blithely from one jurisdiction into another. Even as between closely related systems, subtle social, legal, political, cultural and institutional distinctions generally render transplantation inapt. Nevertheless, as an analytical tool, and as a means for formulating possible reform strategies, comparative study can be highly illuminating.

In the present context, R26(c) Fed R Civ P (as amended)[8]—the American counterpart to the English rule against subsequent use—affords an invaluable comparator to CPR 31.22. As Part II of this thesis will suggest, it may be possible to fashion a suitable replacement procedure to CPR 31.22 using a hybrid version of the American approach—modified as appropriate for the English context and conditions, and restoring traditional English law elements. Even if not, R26(c) is worth examining in its own right. It

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[5] A Watson *Legal Transplants: An Approach to Comparative Law* (2nd edn U Georgia Press Athens 1993) 9; O Kahn-Freund 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, 47.

[6] Watson (n 5 above) 19, 22 ff, 95.

[7] H Collins 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396, 398; Watson (n 5 above) 10; MA Glendon, MW Gordon and C Osakwe *Comparative Legal Traditions* (2nd edn West Publishing St Paul 1994) 1–17.

[8] For the text of R26(c), see Appendix B. Until 1970, R26(c) was R30(b). Its scope expanded significantly in 1970 when the ambit of discovery also increased. R26(c) is the model for most US states' procedural discovery codes, and the main focus of academic writing.

offers a contemporary working model, within a major common law jurisdiction, of a disclosure regime operating without any presumptive rule against subsequent use. Examining the salient features of the American federal protective order system under R26(c) is invaluable, then, both for the example that it provides and so that informed reference may be made to it.

American and English civil disclosure systems have many common characteristics. Three features make comparing and contrasting them especially meaningful. These are their shared historical roots, common law heritage, and foundational procedural philosophies.[9] In basic terms, both countries' disclosure systems serve identical instrumental and intrinsic ends—to foster (insofar as is possible) equal access to relevant evidence, fair and informed settlements, and accurate judicial decision-making. Interestingly, in recent years both countries have reformed their liberal disclosure regimes along similar lines,[10] favouring increased judicial case management and control over the scope of disclosure (in the USA

[9] SC Yeazell *Civil Procedure* (5th edn Aspen Law & Business Gaithersburg 2000) 1. Equivalent goals also underpin CPR 1.1 (the overriding objective) and R1 Fed R Civ P (directing that the rules 'shall be construed and administered to secure the just, speedy, and inexpensive determination of every action'). Discovery became a vital component of American civil procedure in 1938, when the federal rules replaced the cumbersome equitable discovery devices inherited from England: JH Friedenthal, MK Kane and AR Miller *Civil Procedure* (3rd edn West Group St Paul 1999) 386.

[10] See traditionally *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55; *Hickman v Taylor* 329 US 495, 67 S Ct 385 (1947).

still called 'discovery') to cut costs and curb party excesses.[11] In both systems the law protecting disclosed information from subsequent use also was expanded during the 1970s, to cover a wider range of materials.[12]

Having said this, within their detailed disclosure and discovery procedures a great many differences have developed. For example, unlike their English counterparts, American litigants long have been able to secure pre-trial disclosure from non-party witnesses via depositions.[13] Likewise, the two jurisdictions have followed different evolutionary paths in allowing disclosure (variously) as of right, only under court order, informally, only within the rules, by way of mandatory automatic disclosure, and under pre-action protocols.[14] As Tapper has put it, England and America 'have engaged in a form of procedural leapfrog over the years' in relation to disclosure reform.[15] Some procedural distinctions reflect important historical, social or constitutional divergences—such as the pronounced emphasis placed

[11] CPR 31 (introduced in 1998); R26(a)(1) and R26(b)(1) Fed R Civ P (as amended in 2000). For American debate over judicial case management, see J Resnik 'Managerial Judges' (1982) 96 Harvard L Rev 374; S Flanders 'Blind Umpires—A Response to Prof Resnik' (1984) 35 Hastings LJ 505.

[12] In England following the *Riddick* case; in the USA following extension of R26(c) in 1970 (n 8 above). See JA Jolowicz *On Civil Procedure* (CUP Cambridge 2000) 41–5, 56–7.

[13] R30–R33; GC Hazard Jr and M Taruffo *American Civil Procedure: An Introduction* (Yale UP New Haven 1993) 114.

[14] For the US evolution, see: *WM&M* §2035; *Miller* 427, 447–63; TA Coyne (ed) *Federal Rules of Civil Procedure* (2nd edn Clark Boardman Callaghan Deerfield 1994– with suppls) V-54 ff; *Haydock and Herr* 12:5 ff; JW Stempel 'Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"' (2001) 64 Law & Contemporary Problems 197, 201–10.

[15] C Tapper 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217, 236.

on freedom of speech (particularly political speech) in the USA,[16] and the more rule-bound nature of judicial law-making in England.[17] Some distinctions merely reflect differing procedural choices over how best to achieve the same underlying goals. Rule 26(c) exhibits both characteristics. It is equivalent to CPR 31.22 in offering a mechanism to protect disclosed information from misuse. As shall be seen, in many ways R26(c) is closer than CPR 31.22 to the original 19th century English law governing subsequent use.[18] But its composition also reflects certain unique facets of American jurisprudence. Where relevant, these special attributes will be noted.

In essence, R26(c) enshrines a mirror opposite procedure to CPR 31.22.[19] In England, disclosed documents are protected automatically against subsequent use. Unless they are read or referred to in open court (as expansively defined today[20]), document-recipients hoping to reuse others' disclosed documents first must get permission either from document-producers or the court. By contrast, in America no automatic rule prevents parties from reusing or disseminating information obtained through discovery for unrelated ends—however confidential, personal or commercially valuable it may be. Document-recipients may publish or reuse others'

[16] First Amendment, US Constitution.
[17] Sunstein (n 2 above) 1005.
[18] In 1938, when the American rule was introduced, 19th century authorities still governed subsequent use in England. Not until the *Alterskye* case in 1948 did English law move away from presumptively allowing subsequent use (unless demonstrably improper): 36, 39 above.
[19] R26(c) offers both a shield against abusive or excessive discovery requests, and a means to protect confidential discovery fruits from misuse. Only the latter is relevant here.
[20] 248–252 above.

discovered documents in any lawful way.[21] To prevent such action, a document-producer either must negotiate a private confidentiality agreement with its opponent, or successfully petition the court to enter a special 'protective order' under R26(c).

American federal litigants are empowered to request discovery from one another as soon as litigation commences. The range of pre-trial discovery mechanisms available is wider than in England. It includes depositions, interrogatories (now disfavoured), mandatory automatic disclosure (in three tranches),[22] and production of relevant documents and other tangible things.[23] As parties must produce all relevant materials falling within the descriptions properly requested, formal discovery demands tend to be intricately detailed and sweepingly comprehensive.[24] Not surprisingly, discovery generally accounts for half of parties' total litigation expenses.[25] Disputes over its scope and conduct arise frequently. Adjudicating them generates

[21] *Leonia Amusement Corp v Loew's Inc*, 18 FRD 503 (SDNY 1955); *In re Halkin*, 598 F 2d 176, 188 (DC Cir 1979); although see *Marcus (1983)* 53, 56.

[22] Mandatory disclosure of basic supporting information (eg witness details, expert testimony, key documents) was introduced in 1993: Fed R Civ P, R26(a)(1)–(3). Where it applies, compliance is a prerequisite to engaging in formal discovery using traditional methods: Friedenthal *et al* (n 9 above) 405–6, 440; S Issacharoff and G Lowenstein 'Unintended Consequences of Mandatory Disclosure' (1995) 73 Texas L Rev 753.

[23] R30–R36.

[24] Hazard and Taruffo (n 13 above) 119.

[25] TE Willging *et al Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center Washington DC 1997) 2. Unlike in England, where the indemnity cost-shifting rule generally applies (CPR 44.3(2)), American litigants normally bear their own costs. This materially affects the economic incentives and moral hazards in conducting discovery: S Issacharoff 'Should There Be Rules of Procedure?' in BS Markesinis (ed) *The Clifford Chance Lectures Vol I: Bridging the Channel* (OUP Oxford 1996) 215; P Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (MacMillan Reference London 1998) vol 1, 609, 612–4.

enormous docket pressure for federal judges. As a consequence, informal exchanges of information independent of the rules have flourished in recent decades.[26] Under R26(f) parties now must confer to develop discovery plans without court involvement. Time limits aside, and subject to judicial amendment, parties may modify any discovery procedures set out in the rules by signing joint written stipulations.[27] When disputes arise, parties also must confer in good faith to try to resolve them without judicial intervention (R26(c)).

Various avenues exist for parties with sensitive discoverable information to shield it from disclosure beyond the litigation.[28] American courts' general powers—including 'gag' orders (mostly used to stop discussion of pending cases with news media) and sealing of court records (often upon settlement)—can be invoked to keep litigation details secret.[29] More specifically, parties may negotiate private confidentiality agreements restricting the dissemination or reuse of confidential discovered documents. In business litigation, where documentation frequently is voluminous and confidentiality

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[26] JB Weinstein *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Northwestern UP Evanston 1995) 68; K Sinclair *Sinclair on Federal Civil Practice* (3rd edn Practising Law Institute New York 1999) 530. One empirical study found that informal exchanges occurred in 46% of cases that involved no formal discovery under the rules, and in 62% of cases where formal discovery also took place: Willging (n 25 above) 2.

[27] R29. See RS Haydock, DF Herr and JW Stempel *Fundamentals of Pretrial Litigation* (3rd edn West Publishing St Paul 1994) 235–41; EI Niles *Federal Civil Procedure* (3rd edn Matthew Bender Charlottesville 2000) 12-20.

[28] BA Babcock and TM Massaro *Civil Procedure: Cases and Problems* (Little, Brown & Co Boston 1997) 762.

[29] Under R5(d) (as amended in 2000) discovered materials are filed only if and when they are used in the litigation. So, neither gag orders nor sealing orders provide complete protection.

issues complex, such agreements are so common that most judges today expect parties to negotiate them.[30] Private discovery agreements with confidentiality terms may be incorporated into written stipulations and submitted to the court for approval under R26(c). Once 'so ordered' they become enforceable as if adopted by rule.[31] Failing agreement, document-producers may move the court under R26(c) to enter protective orders.

Under R26(c) a court may make 'any order which justice requires' to protect parties or witnesses from whom discovery is sought 'from annoyance, embarrassment, oppression, or undue burden or expense'. Rule 26(c) lists eight forms of order (for example, that discovery not be had; that designated persons only be present; that discovered information remain sealed). It confers wide powers upon courts, both to prevent abusive discovery and to facilitate legitimate discovery without inflicting undue hardship. The eight-fold list in R26(c) is non-exhaustive. Courts have been inventive in expanding the rule to achieve its 'benign purposes'.[32] In addition to the five traditional grounds (annoyance etc)—the meanings of which appear to have been kept deliberately vague—judges take other considerations, including privacy, into account.[33] Rule 26(c)(7), which authorises orders 'that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a

[30] RD Joslin 'Confidentiality Orders in Complex Litigation' (1985) 4 Review of Litigation 109, 110.
[31] *Lewis v Capital Mortgage Investments*, 78 FRD 295 (D Md 1977); *Haydock and Herr* 1:91 ff.
[32] *WM&M* §2036, 489.
[33] Sinclair (n 26 above) 533 ff.

designated way', commonly is invoked to obtain protective orders to prevent subsequent dissemination or use of confidential information.[34]

Specific aspects of R26(c) practice and procedure will be analysed as pertinent below and in Chapter 8. For now, five observations warrant introduction. First, as the American case law shows, only a limited class of discoverable documents attracts protection under R26(c)—in short, only objectively valuable confidential information.[35] This contrasts dramatically with the position in England under CPR 31.22. Before a protective order is made under R26(c) (or a private confidentiality agreement approved), 'good cause' must exist to justify it. Sustaining the burden of demonstrating 'good cause' is difficult. The more protective the relief sought, the more persuasive the 'good cause' showing must be. To succeed, document-producers (or affected non-party intervenors) must identify specific, substantial grounds revealing 'some clearly defined and very serious injury',[36] injustice, prejudice or other consequential harm.[37] Where they do, the burden shifts to the other party to demonstrate that the information is relevant and necessary to them. If it is, the court will balance the competing concerns. To justify entry of a protective order, probable harm to the document-producer must outweigh any hardship to the document-recipient that preventing reuse would

[34] JW Moore *Moore's Federal Practice* (3rd edn Lexis Publishing New York 2000) vol 6, §26.101.
[35] 281–283 below.
[36] *US v IBM, Corp*, 67 FRD 40, 46 (SDNY 1975) (phrase italicised in source).
[37] *Glick v McKesson & Robbins, Inc*, 10 FRD 477 (DC Mo 1950); *Anderson v Cryovac, Inc*, 805 F 2d 1 (1st Cir 1986).

engender.[38] In assessing the latter—both when deciding whether to enter protective orders, and in hearing later applications to modify or vacate them—American judges take a broad range of factors into account. These include potential prejudice to the immediate parties,[39] to similarly-situated litigants in other cases,[40] and to the public.[41] This focus on actual probable harm, and on balancing the interests implicated (broadly perceived), is reminiscent of the traditional English approach to identifying and precluding only 'improper' forms of reuse.

Second, while theoretically courts must ensure that 'good cause' exists before shielding individual documents from subsequent use under R26(c)—even where parties stipulate to the entry of protective orders, or applications are unopposed[42]—in practice, this is impossible. Judges cannot scrutinise *every* allegedly confidential document to determine whether the R26(c) standards are met. In most federal districts, discovery supervision is delegated to US magistrate judges (salaried court officials empowered to hear and determine pre-trial matters). In substantial cases special masters

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[38] Haydock *et al* (n 27 above) 240; *Haydock and Herr* 1:69, 1:89; *WM&M* §2036, 484 ff, §2043, 559; *Coca-Cola Bottling Co of Shreveport, Inc v Coca-Cola Co*, 107 FRD 288, 291 (D Del 1985).

[39] *Brown v City of Oneonta*, 160 FRD 18, 21 (NDNY 1995).

[40] *Wilk v American Medical Association*, 635 F 2d 1295, 1299, 1301 (7th Cir 1980); *Miller* 497 n 339.

[41] *Public Citizen v Liggett Group, Inc*, 858 F 2d 775, 789 (1st Cir 1988) cert denied 488 US 1030, 109 S Ct 838 (1989).

[42] *Jepson, Inc v Makita Electric Works, Ltd*, 30 F 3d 854, 858 (7th Cir 1994); *Procter & Gamble Co v Bankers Trust Co*, 78 F 3d 219, 227 (6th Cir 1996). Cf *Friedenthal* 78–9 (arguing that R26(c) does not apply to stipulated protective orders, and covers contested applications only).

may be appointed.[43] But even these officials cannot always review discovered materials carefully. In *Zenith Radio Corp v Matsushita Electric Industrial Co*, 529 F Supp 866 (ED Pa 1981) for example, a massive antitrust action, the defendants alone produced 35 million documents. Hundreds of thousands of these were said to be confidential. As Judge Becker observed, careful scrutiny of every document in complex cases would make the judge 'a veritable hostage'.[44] In practice, then, stipulated motions routinely are 'so ordered' without close judicial scrutiny, or at best with only a threshold 'good cause' showing. In addition, 'umbrella' protective orders have become 'standard practice in complex cases'.[45] Under these, parties themselves designate which of their documents are 'confidential' as defined by the order. Opponents may challenge each other's designations. The aim is to alleviate courts' burdensome review obligations where all parties are happy to accept that documents warrant protection and to refrain from reuse. While in certain respects umbrella orders are an efficient pragmatic expedient, they have been criticised—with good reason.[46] If, as this thesis proposes, a modified version of R26(c) offers a viable

[43] L Silberman 'Judicial Adjuncts Revisited—The Proliferation of Ad Hoc Procedure' (1989) U Pennsylvania L Rev 2131; JH Friedenthal, MK Kane and AR Miller *Civil Procedure* (3rd edn West Group St Paul 1999) 604.

[44] At 879, n 18. See also *Transamerica Computer Co, Inc v IBM*, 573 F 2d 646 (9th Cir 1978) (reuse precluded of privileged material inadvertently included among 17m pages of documents discovered under a very tight timetable).

[45] *Cipollone v Liggett Group, Inc*, 785 F 2d 1108, 1121–3 (3rd Cir 1986) cert denied 479 US 1043, 107 S Ct 907 (1987); *United Nuclear Corp v Cranford Ins Co*, 905 F 2d 1424, 1427 (10th Cir 1990) cert denied 498 US 1973, 111 S Ct 799 (1991); *MCL3*. Strictly speaking, 'blanket' orders cover all discovered documents; 'umbrella' orders only those designated by the parties as being confidential. In practice, the terms often are used interchangeably.

[46] 347 below.

template for reforming English law, this difficult problem of ensuring adequate judicial supervision must be overcome.

Third, as noted above, American courts may modify or vacate protective orders.[47] Both original parties and non-party intervenors (including media, government investigators, public interest groups and parties to other litigation[48]) may seek (or oppose) modification to gain access to discovered materials, either before or after final judgment or settlement.[49] Unfortunately, standards vary between federal districts over such matters as who bears what burden, the relevance of document-producers' reliance (given that discovery usually proceeds only after protective orders are in place), and how exceptional modification should be.[50] Several courts (notably the seventh circuit) readily lift or vary protective orders to enable sharing of discovered materials with similarly-situated litigants in other cases.[51] The rationale is to spare them having to 'reinvent the wheel' by duplicating discovery already undertaken by others.[52] Some courts also modify protective orders to facilitate access to discovered documents in the public interest.[53] It is interesting to contrast this

[47] *Pansy v Borough of Stroudsburg*, 23 F 3d 772, 778–80 (3rd Cir 1994).
[48] *MCL3* 70.
[49] *WM&M* §2044.1, 574.
[50] *Doré* 356–67; JW Moore, AD Vestal and PB Kurland *Moore's Manual: Federal Practice and Procedure* (Lexis Publishing New York 2000) vol 2, §5.04.
[51] *Doré* 366; 318 below.
[52] *Jochims v Isuzu Motors, Ltd*, 148 FRD 624, 631 (SD Iowa 1993).
[53] *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559, 570 (EDNY 1985) aff'd 821 F 2d 139 (2nd Cir 1987) cert denied *sub nom Dow Chemical Co v Ryan*, 484 US 522, 108 S Ct 344 (1987); *Public Citizen v Liggett*, 858 F 2d 775 (1st Cir 1988). See 343–344 below.

willingness with English judges' marked reticence over exercising discretion under CPR 31.22(1)(b).

Fourth, because no automatic rule in America prevents subsequent use, most document-producers seek protective orders before giving discovery.[54] One tactician even has recommended applying before motion to compel discovery is made (R37(d)), to ensure that confidentiality claims appear serious and genuine.[55] This timing regime has several drawbacks. In many cases, no party (or non-party) ever will wish to disseminate or reuse sensitive discovered materials outside the original case. If they do, usually it will be for a single, limited purpose. Before discovery takes place, the potential future scope of reuse is very difficult to predict. So, the R26(c) regime compels document-producers to seek unnecessary—and unnecessarily broad—prophylactic orders. In addition, where confidentiality terms are agreed, once parties actually see each other's documents they may well change their minds and want to reuse them. Under R26(c) parties may request modification even of stipulated (consensual) protective orders.[56] Again, the timing regime generates procedural inefficiency—in each instance, by requiring additional hearings. Both

[54] *US v Portland Cement Co*, 338 F 2d 798 (10th Cir 1964); *Phillips Petroleum Co v Pickens*, 105 FRD 545, 549 (ND Tex 1985); K Sinclair *Sinclair on Federal Civil Practice* (3rd edn Practising Law Institute New York 1999) 537. This also avoids sanctions for non-compliance with discovery timetables.

[55] TA Mauet *Pretrial* (4th edn Aspen Law & Business Gaithersburg 1999) 283.

[56] *Public Citizen v Liggett* 858 F 2d 775, 781–3 (1st Cir 1988); *United Nuclear v Cranford*, 905 F 2d 1424, 1427–8 (10th Cir 1990); *Poliquin v Garden Way, Inc*, 989 F 2d 527, 535 (1st Cir 1993); *MCL3* 70. One rationale for this is a desire not to penalise parties for having been co-operative. Grateful thanks to Professor Oscar Chase, NYU School of Law, for providing this insight.

in America and in England, creating a mechanism to avoid such wastefulness would be beneficial.

Finally, despite its shortcomings, no significant calls to reform R26(c) have been made since its introduction in 1938—even though other aspects of American discovery practice have been overhauled comprehensively. In 1970, R26(c) was expanded from covering depositions alone to embracing all discovered materials. In 1993, a requirement was added that movants certify their good faith attempts to resolve discovery disputes with their opponents before petitioning the courts. Minor refinements aside, neither procedural reform bodies, practitioners' associations, litigant support groups nor academics appear to have mooted any material change.[57] Aspects of the courts' treatment of R26(c) have been criticised from time to time. Inconsistency over modifying protective orders (especially on alleged public right of access grounds) is one example. Nevertheless, the general schema of R26(c) for safeguarding sensitive discovered materials against unwarranted use, and balancing competing interests, commands widespread acceptance and approval.

[57] Two noteworthy publications expressing no dissatisfaction with R26(c) are D Segal *Survey of the Literature on Discovery From 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* (Federal Judicial Center Washington DC 1978) and JB Levine *Discovery: A Comparison between English and American Civil Discovery Law with Reform Proposals* (Clarendon Press Oxford 1982).

C FOUNDATIONS FOR REFORM

1 Redefining the scope of protection

Turning to the first key question of principle—what information should be eligible for protection against subsequent use—arguments presented throughout Part I of this thesis demonstrate that not all disclosed documents warrant equal (or indeed any) special protection. The mere fact that information is obtained via disclosure should not be determinative. As Part I showed (and American federal law affirms), what should be determinative is whether the cost of allowing reuse outstrips the cost of preventing it. If reusing disclosed documents is the more costly alternative, then they should be shielded from further dissemination or reuse to the extent necessary to prevent unwarranted harm. If preventing reuse is the more costly option, then the subsequent use proposed should be allowed to proceed.

At a lower level of abstraction, the essential quality that disclosed information must have before subsequent use can pose any appreciable threat of harm (to document-producers or others) is confidentiality. The CPR 31.22(1)(a) public hearing exception recognises as much. But, as under the ordinary law of confidence, mere secrecy alone cannot justify judicial intervention. Maintaining secrecy also must be valuable (and demonstrably so) in a legally cognizable sense.[58] Framed as a general guideline proposition, only confidential disclosed information, the preservation of which is

[58] See ch 4 above, especially 125–126, 128–132.

objectively valuable to avoid appreciable, legally relevant harm, should be eligible for protection under the rule against subsequent use. For the same reasons, such information should remain eligible only while its confidentiality, and the value thereof, subsist.

Recasting the scope of protection in this way accords with other doctrines aimed at safeguarding valuable confidentiality-based rights and interests under English law—including public interest immunity, legal professional privilege, and the equitable doctrine of protection of confidence.[59] It is coextensive with American law under R26(c), where (in principle at least) 'good cause' must be shown sufficient to outweigh competing factors that favour reuse before protective orders will be entered. It also complies with Article 8(2) of the ECHR, which allows public authorities (including courts) to interfere with individual privacy rights where important countervailing interests arise—such as ensuring public safety, preventing disorder or crime, or protecting others' rights and freedoms.

2 The meaning of confidential

Embedded in the general proposition stated above are several matters requiring elucidation. The first is how 'confidential' should be

[59] None of these doctrines affords total blanket protection. Protection is contingent both upon subsisting, valuable confidentiality and the balance of competing interests. Although, recently legal professional privilege has been recast as a 'fundamental' or 'absolute' right: 158 n 126 above.

defined.[60] The meaning of 'confidential information' has something of a protean quality.[61] Nevertheless, as Chapter 4 showed, the general test under the ordinary law of confidence is eminently suited to disclosed documents. This posits the three core attributes of confidentiality as being inaccessibility to the public (at least in the relevant locale); communication in private[62] (or obvious secrecy of content); and significant secrecy value.[63] While it is not always a straightforward endeavour, English judges are well acquainted with the task of identifying confidential information. It arises in many areas of law, not least those mentioned in the previous section (public interest immunity and so forth).[64] From analysing these areas of the law, and from American authorities under R26(c), one can glean more specific guidance as to what sorts of disclosed materials should count as sufficiently confidential (and valuable) to be eligible for protection against subsequent use. Generating indicative guidelines would be beneficial in reforming the rule governing subsequent use, to enhance

[60] While *Eagles* (286) and *Prescott* (490) agree (respectively) that only disclosed information 'of a confidential character' and 'particularly confidential or sensitive documents' should be protected from subsequent use, neither examines how 'confidential' should be defined.

[61] Many people can possess it simultaneously, even in ignorance that others possess it: C Tapper *Computer Law* (4th edn Longman London 1989) 78. The concept of 'ownership' of information likewise is problematic: G Jones 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463, 463–5, 466–73; JW Harris *Property and Justice* (Clarendon Press Oxford 1996) 341–5.

[62] Which includes disclosure: 130 n 54 above.

[63] 128–132 above. See generally *Gurry* 70–86; RG Toulson and CM Phipps *Confidentiality* (Sweet & Maxwell London 1996) 38–41.

[64] Toulson and Phipps (n 63 above) chs 20, 21.

consistency and predictability, foster party agreements, and minimise the need for contested applications.[65]

To illustrate, two broad categories of confidential information identified by Gurry are personal confidences and trade secrets.[66] To be covered by the ordinary law of confidence, personal information must contain sensitive, intimate or embarrassing details, revelation of which would cause significant harm.[67] There may be some uncertainty as to whose sensitivity is material here (that of the subject or object of information); from whose perspective value should be evaluated; and whether the test should be subjective or objective. These issues are explored in the next section. Sometimes, there may be 'no bright line' distinguishing private from public information.[68] Nevertheless, many concrete examples of materials qualifying for protection under the head of personal confidences can be derived from English authorities on point. Some were noted in Chapter 4.[69] Inter alia, they include information relating to health, personal relationships and finances. In America, an equivalent test applies to discovered information.[70] Rule 26(c) covers only intimate personal details—employment records,

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[65] A categorical approach is used frequently in America to define materials presumptively qualifying as confidential under umbrella orders: *Doré* 333. However, this method cannot resolve all disputes: *Marcus (1991)* 493.

[66] Also, artistic and literary confidences and governmental secrets: *Gurry* 7–21, ch 5.

[67] R Wacks *Personal Information: Privacy and the Law* (Clarendon Press Oxford 1989) 26.

[68] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, [2001] 76 ALJR 1 (HCA) 10, cited with approval in *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA) para 11(vii).

[69] 132–133 above. See also *Gurry* ch 5.

[70] *Doré* 308; 132 above.

earnings and taxation information, credit reports, medical records, information about sexual practices and the like.[71] In respect of these materials harm readily is presumed.[72]

For commercial information, R26(c) jurisprudence again affords useful insights, supplementing general English experience.[73] American corporate litigants commonly seek protective orders in product liability suits,[74] antitrust actions[75] and other disputes involving competitors.[76] Much debate surrounds the proper parameters of 'trade secret' and 'confidential . . . commercial information' under R26(c)(7).[77] Courts tend to be strict. Secret processes and formulae generally qualify for protection, as do other secrets conferring a substantial competitive advantage—such as customer information, marketing strategies, pricing structures, financial data and general manufacturing know-how. However, detailed evidence is required (inter alia) as to the extent of secrecy, measures taken to guard it,

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[71] L Doggett and MJ Mucchetti 'Public Access to Public Courts: Discouraging Secrecy in the Public Interest' (1991) 69 Texas L Rev 643, 668.

[72] The Data Protection Act 1988 (UK), s 2 defines 'sensitive personal data' by reference to similar topics (eg race, political opinions, sexual life). See 294 below.

[73] eg Law Commission *Legislating the Criminal Code: Misuse of Trade Secrets—A Consultation Paper* (Law Com No 150 1997) para 1.29.

[74] *Ward v Ford Motor Co*, 93 FRD 579 (D Colo 1982).

[75] *GAF Corp v Eastman Kodak Co*, 415 F Supp 129 (SDNY 1976).

[76] *Tosa Chrysler-Plymouth, Inc v Chrysler Motors Corp*, 55 FRD 41 (ED Wis 1972); DB Smith 'Anti-Dissemination Orders in Product Liability Suits' (1982) 5 American J Trial Advocacy 507, 509; LS Kaplan *Complex Federal Litigation: An Attorney's Guide to Management and Trial* (Shepard's/McGraw-Hill, Inc Colorado Springs 1993–) 427.

[77] SM Angele 'Rule 26(c) Protective Orders and the First Amendment' (1980) 80 Columbia L Rev 1645, 1664; Smith (n 76 above) 773–7; *Marcus (1991)* 490 ff; JW Moore *Moore's Federal Practice* (3rd edn Lexis Publishing New York 2000) vol 6, §26.101.

the cost and effort expended in developing the information, and its ongoing commercial value.[78] Claims of commercial embarrassment or damage to reputation or goodwill generally fail to establish 'good cause' unless linked with concrete evidence of significant financial or competitive disadvantage.[79]

3 Measuring confidentiality value

Another matter requiring unpacking is how confidentiality 'value' should be gauged. While objective secrecy value is not a precondition for information to be confidential, as under the law of confidence it should be central to determining the degree of protection that disclosed documents receive under the law governing subsequent use.[80] Several factors support adopting an objective test for assessing confidentiality value. One is the virtual impossibility of making true interpersonal comparisons of subjective benefits and harms.[81] Not surprisingly, given this fact, English courts generally have held that only the public interest in preserving confidentiality (not purely private interests) is relevant when production or use of private documents is at issue.[82] Neill recently favoured an objective

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[78] *US v IBM, Corp*, 67 FRD 40, 47 (SDNY 1975).

[79] *Cipollone v Liggett Group*, 785 F 2d 1108, 1121 (3rd Cir 1986). Unlike individuals, American corporations currently do not enjoy personal privacy rights: 180 n 57 above.

[80] *Gurry* 81–3; *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 282. Under the equitable doctrine of protection of confidence, confidentiality value goes to the measure of damages for breach. It may also help to establish whether information is confidential. See 131 n 57 above.

[81] JE Gottlieb 'The Paradox of Balancing Significant Interests' (1994) 45 Hastings LJ 825, 841.

[82] *D v NSPCC* [1978] AC 171 (HL); the *Riddick* case.

test, by suggesting that a right to personal privacy should protect confidential personal information 'the disclosure of which would cause distress to a person of ordinary sensibilities'.[83] Two recent cases concerning celebrity privacy have adopted a strikingly similar approach. In *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA) and *Campbell (Naomi) v Mirror Group Newspapers* [2002] EWHC 499 (QB) the courts approved a 'useful practical test' for identifying private information propounded by Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, [2001] 76 ALJR 1 (HCA) 10—that 'disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities'.

Under an objective test, 'value' need not be defined in a restrictive sense, such as would take account purely of the economic worth of disclosed information to document-producers, document-recipients or third parties. As Tapper has noted,[84] social or other factors too may warrant cloaking certain forms of information with protection against reuse. In respect of personal information, human dignity and autonomy related considerations are apposite. Thus, unless maintaining the confidentiality of disclosed documents serves some objectively valuable purpose—intrinsic or instrumental[85]—they should not be eligible for protection against

[83] B Neill 'Privacy: A Challenge for the Next Century' in BS Markesinis (ed) *Protecting Privacy* Clifford Chance Lectures vol 4 (OUP Oxford 1999) 22.
[84] Tapper (n 61 above) 328.
[85] Such as Lockean justifications for exclusive possession of commercial secrets to foster technological innovation (*Miller* 473); or preventing salacious media intrusion into parties' personal affairs.

reuse for legitimate purposes. Formulating this idea another way, if confidentiality alone (irrespective of value) were deemed sufficient for documents to attract prima facie protection under the rule, then the value of immunising trivial, useless or worthless information against subsequent use should be nil. Thus, where a proposed subsequent use has any merit at all, on a balancing approach it should be allowed to proceed.

Protection against (legitimate) forms of subsequent use should lapse whenever such use of disclosed documents ceases to pose any appreciable risk of harm—that is, when their confidentiality value has expired. This could arise in two situations. One is where confidentiality is destroyed—for example, once disclosed documents are published[86] or mentioned in open court.[87] The other is where information becomes stale. While its confidentiality may persist, preserving it no longer serves any useful purpose, and no pressing public or private interest therefore demands its continued protection. Old trade secrets rendered obsolete by new technologies would fall into this category, as would information that loses its sensitivity, or its *raison d'etre* for secrecy, due to the effluxion of time.[88] In all such situations, the confidentiality 'value' of the information has become

[86] *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL); *Gunn-Russo v Nugent Care Society* [2001] EWHC Admin 556, [2002] 1 FLR 1, 14; Toulson and Phipps (n 63 above) 56.

[87] Protection under R26(c) similarly lapses (absent a showing of 'most compelling' reasons) where material is introduced at trial: *Poliquin v Garden Way, Inc*, 989 F 2d 527, 532–3 (1st Cir 1993); *Leucadia, Inc v Applied Extrusion Technologies, Inc*, 998 F 2d 157, 161–5 (3rd Cir 1993).

[88] *A-G v Jonathan Cape Ltd* [1976] QB 752, 771; Toulson and Phipps (n 63 above) 63–4; *Cross and Tapper* 476 n 7.

zero.[89] Accordingly, the information should cease to be immune from legitimate subsequent use, and any protective orders covering it should lapse.

Once again, English judges are no strangers to the task of assessing the relative value of maintaining informational secrecy. They must do so whenever asked to limit the scope or performance of disclosure, or publicity of hearings, for reasons of confidence. Also, the inquiry is integral to applying the various exclusionary rules of evidence based on privilege and public policy, and the ordinary law of confidence. Despite this prevalence, the precise methodology that judges use in evaluating confidentiality is somewhat mysterious. Like temperature, the value of confidentiality—and, therefore, the measure of protection that disclosed materials properly deserve under the subsequent use rule—is a matter of degree. But, unlike temperature, it is not amenable to scientific calculation. In most cases judges appear simply to intuit it, by applying some internal, unarticulated weighting to the perceived cost of refusing protection.

4 The balancing test

The question of how courts measure the value of confidentiality and adjudge between competing interests for and against subsequent use is, along with the interrelated issue of defining 'legally relevant

[89] Assessing staleness can be problematic, eg where disclosing old information would engender present harm: *Zenith Radio Corp v Matsushita Electric Industrial Co*, 529 F Supp 866, 891 (ED Pa 1981); JS Guénégo 'Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score' (1991) 60 Fordham L Rev 541, 556.

harm', the final aspect of the first general proposition requiring elaboration.[90] Harm will be considered in the next section. For now, a few words about the so-called 'balancing' test are apposite. In the course of Part I, reference was made to the need for courts to 'balance' or 'weigh' conflicting interests, rather than to apply the existing rigid, blanket presumptive rule against subsequent use in CPR 31.22(1). The reason given was that the modern rule and its exceptions unjustifiably undervalue or overlook important factors favouring reuse. As already noted, this is a common failing of broad legal rules. Yet, the precise cognitive processes involved in judicial 'balancing' are opaque.

Although 'balancing' is a convenient, popular and attractive metaphor, many writers warn that it is an imprecise and problematic account of the process of legal judgment.[91] Balancing involves three steps: identifying the factors (rules, rights, principles, interests, values) to be balanced; weighing them; and announcing the victor.[92] Locating the correct factors is not always straightforward; especially where—as in the context of the rule governing subsequent use—the full universe cannot be specified exhaustively in advance. Incommensurability is another problem, given the absence of a single metric for weighing

[90] An inherent problem with confidentiality is that, in order to vindicate it by forensic means (eg, via intellectual property litigation), it must be destroyed to some extent. Any publicity is likely to damage the very confidentiality that claimants in such cases seek to protect. Claimants more generally also may be inhibited from bringing actions by the fact that confidentiality attaches to their disclosable information. Inevitably, therefore, the balancing exercise will be a delicate one.

[91] For a good outline of competing arguments, see J Auburn *Legal Professional Privilege: Law and Theory* (Hart Publishing Oxford 2000) 107–11 and references therein.

[92] P McFadden 'The Balancing Test' (1988) 29 Boston College L Rev 585, 596.

diverse criteria, and qualitative differences between instrumental and intrinsic values.[93] In the context of the rule governing subsequent use, no obvious single scale exists upon which to compare the assorted public and private interests in privacy, freedom of expression, access to justice, procedural economy, public safety, redressing wrongdoing, freedom of information, freedom of the press, and so forth. The open-textured nature of 'balancing' also raises issues of consistency, transparency and legitimacy—particularly where no scale external to decision-makers is articulated, so that forensic balancing takes place 'inside a black box'.[94] Without adequate controls, 'balancing' risks becoming a front for decision-makers' *ad hominen* preferences.

Many critics of 'balancing' advocate greater adherence to formal rules and established doctrine. Yet, where values conflict, even rules must depend upon intuitive judging for their interpretation and application. As Gottlieb has put it, '[h]owever the decision-making process is constructed or described, the value of interests will almost certainly be intuited. Precision is unavailable'.[95] The criticisms of balancing can be levelled against any intuitive process (judicial or

[93] CR Sunstein 'Problems with Rules' (1995) 83 California L Rev 955, 999, 1001; C Tapper 'Trends and Techniques in the Law of Evidence' in P Birks (ed) *Pressing Problems in the Law* (OUP Oxford 1995) vol 1, 28–9. For one notable attempt in the criminal justice context to derive a common currency, see A Sanders and R Young *Criminal Justice* (2nd edn Butterworths London 2000) 33–9, 51–62. The authors suggest that freedom is the fundamental value underpinning individual rights in the criminal context. Thus, at each stage in the process, conflicting rights should be prioritised based on what would maximise freedom (of the community as a whole).

[94] TA Aleinikoff 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943, 976; also JE Gottlieb 'The Paradox of Balancing Significant Interests' (1994) 45 Hastings LJ 825, 837.

[95] Gottlieb (n 94 above) 860.

otherwise) for compromising competing social interests or attributing relative meaning to public values.[96] Meanwhile, as the analysis in Part I amply demonstrated, overreaching *a priori* legal rules carry their own drawbacks, and cannot guarantee certainty or consistency either.

In *Science Research Council v Nassé* [1980] AC 1028 (HL) 1067, Lord Wilberforce described 'balancing' as a 'rough metaphor' denoting 'a more complex judicial process' comprising 'an exercise in judicial judgment'. References to 'balancing' and 'weighing' in this thesis should be viewed in that light. While the terminology may be imperfect, perhaps conveying a false pretension to precision, the underlying process to which it points is theoretically defensible. As Auburn has observed, understood in its correct sense, balancing allows courts to assess the individual merits of cases within a stipulated framework, thereby ensuring that the law does not violate important public policies for the sake of less weighty ones.[97] English and American judges are familiar and comfortable with the notion of balancing.[98] In the context of the rule governing subsequent use, explicitly authorising courts to evaluate competing interests arguably

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[96] Gottlieb (n 94 above) 842. See also OM Fiss 'The Forms of Justice' (1979) 93 Harvard L Rev 1, 2; Sunstein (n 93 above) 1022. See generally: R Pound 'A Survey of Social Interests' (1943) 57 Harvard L Rev 1; L Henkin 'Infallibility Under Law: Constitutional Balancing' (1978) 78 Columbia L Rev 1022; DN MacCormick *Legal Reasoning and Legal Theory* (rev ed Clarendon Press Oxford 1994).

[97] Auburn (n 91 above) 110–11. See also W Twining and D Miers *How to Do Things With Rules* (4th edn Butterworths London 1999) 364.

[98] Balancing is the standard test used under R26(c): JW Moore, AD Vestal and PB Kurland *Moore's Manual: Federal Practice and Procedure* (Lexis Publishing New York 2000) vol 2, §15.04, 15.64 ff. For recent English guidelines for balancing ECHR, Art 8 and Art 10 rights pending breach of confidence suits, see *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA) paras 6, 11–2.

is a sound and appropriate approach. To avoid arbitrariness and indeterminacy, such balancing would need to take place within clearly stated parameters, with guidelines indicating the proper scope of permissible use,[99] and identifying and justifying (so far as possible) the relative generic weighting of relevant factors and key competing interests.[100]

Interestingly, in relation to reusing documents disclosed during family financial proceedings, English courts already have stressed the need for careful balancing.[101] Where, for example, subsequent litigation use is proposed of affidavits of means filed in ancillary relief proceedings (to prevent deponents giving inconsistent accounts of their wealth in parallel proceedings between former spouses), procedural fairness and special confidentiality considerations in the matrimonial court clash with access to justice rights in the other litigation. In *Nayler v Beard* [2001] EWCA Civ 1201, [2001] 3 FCR 61 the Court of Appeal identified the matrimonial court as the preferable forum to conduct the balancing exercise in such cases, as it is 'an exercise of some complexity and some delicacy'.[102]

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[99] Wacks (n 67 above) criticises 'ad hoc balancing' in the law of confidentiality for affording little such guidance.

[100] Precision in articulating such guidelines is essential: 300 below.

[101] *Medway v Doublelock Ltd* [1978] 1 WLR 710; *S v S (Judgment in chambers: disclosure)* [1997] 1 WLR 1621; *A v A; B v B* [2000] 1 FCR 577; *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA).

[102] At 72. While special court rules apply in family proceedings, the same principles as under CPR 31.22 guide the court's subsequent use discretion (at 67). Normally, reuse applications should be directed to the court to which the CPR 31.22 duty is owed: 238 above.

5 The harm principle

The lynchpin of the general proposition stated above[103] is the notion of legally relevant harm. This is the conceptual glue that binds the two component questions of principle—defining what materials should be eligible for protection; and determining the circumstances in which they should be protected against reuse. As noted above, the *telos* of the law governing subsequent use should be to prevent unwarranted harm, by enabling courts to select the least costly option given the actual balance of countervailing interests in each case. Subsequent use may produce an array of potential costs for document-producers, document-owners and third parties (where matters concerning them are contained in disclosed materials)—embarrassing publicity, loss of competitive advantage, further litigation, criminal prosecution, danger of harassment or physical injury to mention but a few. A crucial question is how, as a general matter of principle, legally relevant harm should be defined.

As demonstrated above, the *sine qua non* for eligibility under any recast rule relating to subsequent use is confidentiality. Only documents the confidentiality of which protects some valuable underlying right or interest should be eligible for protection. The necessary corollary to this is that only subsequent uses likely further to undermine confidentiality—and, thereby, to harm the valuable underlying right or interest—should be liable to be precluded. Even then, whether they are precluded or not in a given case should

[103] At 278 above.

depend upon the balance of competing interests for and against the subsequent use proposed. Thus, subsequent use that would further diminish the confidentiality of disclosed documents should be barred if and only if it is likely to result in undue prejudice or cost—that is, cost exceeding the perceived value or benefits of allowing the proposed subsequent use to proceed. Given that such benefits potentially include securing access to justice and ensuring public safety, the showing required to justify subsequent use restrictions may be considerable.

These conclusions lead to several more foundational reform propositions. First, the modern general rule's core presumption—that all forms of subsequent use outside the original proceedings are improper—is incorrect and should be abolished. Subsequent use for legitimate purposes should be presumed proper and permitted unless good cause can be shown to justify limiting or precluding it. Relying exclusively on judges' express powers to enter protective orders (in a coherent, guided fashion) where warranted, in place of the automatic presumption against subsequent use currently enshrined in CPR 31.22, accords with traditional English authority as canvassed in Chapter 2. Although this inverts the current law, it is not a sea change. English judges long have enjoyed express powers to enter protective orders under their inherent jurisdiction and, more recently, under CPR 31.22(2). American experience with R26(c) shows that reversing the current presumption is viable—even this side of the information revolution, and in a liberal democracy where privacy rights are legally (and perhaps constitutionally) enshrined.

Second, precluding subsequent use is justifiable only if good cause exists. This will be the case only where: (a) the subsequent use proposed threatens materially to diminish the confidentiality of eligible disclosed information (beyond the damage already caused by the original disclosure); (b) such confidentiality protects subsisting, valuable underlying interests; (c) allowing subsequent use would be likely to cause substantial hardship by violating or impairing those valuable interests; and (d) such hardship outweighs the probable prejudice or cost of preventing the subsequent use proposed. Third, any express orders restricting or precluding subsequent use should be narrowly tailored and proportionate to the legitimate aim of safeguarding the overriding interests at stake.[104] Unquestionably, important confidentiality-dependent rights and interests should be sheltered under the law to the fullest extent required to prevent undue harm. However, no greater restrictions should be imposed than are necessary in the circumstances to achieve that end. As far as possible (given the lack of precision under the balancing test), protective orders should be designed to minimise the net cost, taking account of all legally relevant, conflicting considerations.

Three matters deriving from these propositions merit closer attention. One is the meaning of *legally relevant* harm. This also feeds into the definition of confidentiality 'value'. While subsequent use may entail many adverse consequences, it does not follow that all harms should count (or count equally) under the subsequent use rule.

[104] Proportionality to the legitimate aim pursued is an HRA requirement for restrictions over qualified ECHR rights to be acceptable: 139 n 82 above.

Maintaining confidentiality cannot be valuable and legally defensible unless the harm thereby prevented warrants prevention under law. Just as the ordinary law of confidence excludes serious misdeeds,[105] so too the law governing subsequent use should not allow parties to evade liability where their disclosed materials reveal additional serious civil or criminal wrongdoing.[106] Otherwise, the law itself would defeat the proper administration of justice, by contravening important public and private interests in upholding the law and bringing wrongdoers to account.[107] Conspicuously, the CPR 31.22 general rule has precisely this effect.

A second noteworthy point is that not all legally relevant harms are equally severe. Different harms carry different weights. Again, severity is intertwined with the value of preserving confidentiality, and with the importance of the underlying interests at stake. A parallel illustration exemplifying this point—and supporting the centrality of the harm principle as propounded herein—is the difference between how the Data Protection Act 1998 treats 'personal data' (s 1(1)) and 'sensitive personal data' (s 2). Both may be used for various listed, approved purposes where necessary, including the administration of justice and performance of public functions in the public interest.[108] However, a stricter regime applies to sensitive personal data. Additional conditions must be met before its use for the approved

[105] 124 above.
[106] Unless some additional, independent justification exists.
[107] *Saccharin Corp v Chemical & Drugs Co* [1900] 2 Ch 556 (CA) 558–9; *Bayer AG v Winter (No 2)* [1986] FSR 357, 363; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA) 329; *Prescott* 490.
[108] Sch II, para 5.

purposes is justified.[109] This reflects a presumption that greater harm is likely to flow from its misuse. Under s 10(1) of the Act, data subjects have a general right to prevent processing of data that is likely to cause 'substantial damage or substantial distress' that is 'unwarranted'. Thus, the Act contemplates a balancing exercise where approved forms of processing are proposed—to ensure that 'unwarranted' harm is avoided, while allowing use for legitimate purposes where the damage or distress thereby caused is justified.

This legislative distinction rests on an assumption that the degree of sensitivity of information (being the value of preserving secrecy to data subjects) should dictate the extent of protection that it receives under the law. As noted already, in respect of intimate personal information, intrinsic dignity and autonomy arguments support this approach. However, generally speaking, it may be preferable not to use sensitivity as the determining factor in deciding the degree of protection afforded to confidential disclosed information.[110] Sensitivity from document-producers' standpoints (even objectively assessed) need not equate with the worth of information to others. There may well be an asymmetry. To illustrate, most people likely would be more concerned to protect information about their medical treatment for sexually transmitted diseases than how much they paid for their car and where and when they bought

[109] Sch III. See generally R Jay and A Hamilton *Data Protection: Law and Practice* (Sweet & Maxwell London 1999) ch 10; P Birkinshaw *Freedom of Information: The Law, the Practice and the Ideal* (3rd edn Butterworths London 2001) ch 7; *Campbell (Naomi) v Mirror Group Newspapers* [2002] EWHC 499 (QB).

[110] C Tapper *Computer Law* (4th edn Longman London 1989) 327–8.

it. Yet, in the normal course (celebrities and politicians aside) the latter is much more likely to be valuable to outsiders. For this reason, Tapper has argued that protection should be tailored to the degree of threat, rather than to sensitivity. Secrecy value should be measured by reference to the resources that document-recipients (or third parties) are willing to expend in order to reuse information. The degree of protection should be just sufficient to make unwarranted violation of confidentiality uneconomic.[111] Translating this analysis to the disclosure subsequent use context, it can be seen that, in assessing value and legally relevant harm, the perspectives both of document-producers and document-recipients may well be pertinent.

A third point warranting expansion is the idea that the law should permit subsequent use for *legitimate* purposes, whether inside or outside the original proceedings. This begs the question of what constitutes a 'legitimate' purpose. In short, any purpose will be legitimate where it is legally defensible or desirable in itself, or serves a legally defensible or desirable end; and illegitimate where the opposite is true. Thus, prima facie, subsequent litigation use can be seen to be legitimate (although whether it should be permitted in a given case will depend on the competing interests at stake). Inter alia, it facilitates access to justice, fosters the proper administration of justice, and supports the public policy of law enforcement. By contrast, selling opponents' titillating private details to the tabloids in

[111] 103 above.

order to embarrass them or make money is illegitimate. It serves no legally meritorious public or private interest.

D CONCLUDING REMARKS

This chapter has propounded a fresh conceptual approach for determining when subsequent use of disclosed documents should be permitted or precluded. Its central norm is the harm principle—that the law should constrain legitimate forms of reuse only when they would inflict unwarranted harm through diminishing the confidentiality of valuable disclosed documents. The core mechanism for assessing when harm is unwarranted is the balancing test.

This approach is not particularly novel or radical. Implicitly, the harm principle always has underpinned English law governing subsequent use. In the 19th century, it was not articulated or theorised clearly. In the 20th century, following the *Riddick* case, the principle got submerged beneath the rigid 'purpose of the proceedings' test. Judges lost sight of the true *telos* of the law governing subsequent use. Since then, they simply have assumed—erroneously—that the modern presumption against subsequent use in CPR 31.22, and the three principal rationales said to justify it, accurately reflect the balance of competing harms and interests at stake. As Chapter 8 will show further, reorienting the law explicitly around the harm principle demonstrates vividly that they do not.

This chapter has laid the groundwork for reforming the rule against subsequent use, by generating theoretically defensible, abstract

foundational guidelines, and setting up American R26(c) federal procedure as a benchmark for comparison. It has attempted to answer the key question of what materials should be eligible for protection against reuse. It has defined (at least, in broad conceptual terms) the circumstances in which eligible disclosed materials should enjoy such protection. To illustrate how the recast approach could be applied in practice—both to test its validity, and to generate a more precise framework for procedural reform—it is illuminating to translate these broad, abstract propositions into concrete terms. Chapter 8 will undertake that task, by re-evaluating seven specific forms of subsequent use using the theoretical approach outlined in this chapter.

CHAPTER 8—PROPER AND IMPROPER FORMS OF SUBSEQUENT USE

A INTRODUCTION

Chapter 7 put forward a new conceptual approach for reforming the law governing subsequent use of disclosed information. In doing so, it posited two key questions of principle. These concerned what materials should be eligible for protection against subsequent use; and from what forms of reuse they should be protected. In respect of the former, Chapter 7 identified valuable confidentiality as being the essential criterion, and suggested means for identifying information that satisfies the eligibility test. In respect of the latter, it provided no more than a generalised, abstract answer. It suggested that legitimate forms of reuse should be permitted unless good cause justifies limiting or precluding them in given situations. It defined 'legitimate' as encompassing those forms of reuse that are intrinsically legally defensible or desirable, or instrumental for furthering such purposes; and 'illegitimate' forms of reuse as being those where the converse is true.

An effective way to demonstrate the differences between presumptively legitimate and illegitimate forms of subsequent use (or prima facie 'proper' and 'improper' forms, in traditional terminology) is to identify and examine leading examples of each. This chapter will undertake that task. It is advantageous for many reasons. Evaluating concrete categories of reuse models how the theoretical approach propounded in Chapter 7—particularly the

harm principle and balancing of interests—may be applied in practice. It tests the soundness and workability of the proposed new approach, and highlights further issues relevant to reforming the law. It demonstrates the interplay between the major conflicting interests at stake in the disclosure subsequent use context, and indicates their comparative weighting in various generic situations. It indicates which forms of reuse should be permitted or precluded most readily, and which may be balanced more finely. It illustrates the 'good cause' concept at work.

All of these insights may be harnessed to formulate a more detailed framework for procedural reform.[1] In addition, they highlight matters that may be worth incorporating into procedural guidelines (perhaps under practice directions), to help foster party agreements, minimise satellite litigation, place proper parameters around the exercise of judicial discretion, and provide clear assistance to judges in applying the balancing test. As Tapper has observed, discretionary guidelines are susceptible to at least two, complementary flaws.[2] Simple *aide memoire* checklists of relevant factors are of little use unless they state explicitly each factor's tendency, effect and weight.[3] Precision in defining and articulating the relevant factors, rules and focused policy considerations is essential to avoid

[1] See ch 9 below.
[2] C Tapper 'Trends and Techniques in the Law of Evidence' in P Birks (ed) *Pressing Problems in the Law* (OUP Oxford 1995) vol 1, 29.
[3] Laddie J's taxonomy of 15 considerations in the *Cobra* case (223 above) falls into this trap.

arbitrariness and indeterminacy.[4] Yet, generating purportedly comprehensive lists of guidelines risks rendering judgments effectively appeal-proof, through judges claiming to have taken all listed factors into account.

Bearing these cautions in mind, additional propositions to help guide future reform of the rule governing subsequent use can be stated. Courts should have discretionary power to enter protective orders to limit or prohibit subsequent use of eligible information whenever warranted. They should do so only where good cause exists. Protective orders should involve the least possible restriction over subsequent use consonant with affording the full range of protection needed. Flexibility is essential to facilitate nuanced, just outcomes tailored to the circumstances of each case. Discretionary guidelines must be clear and precise, and indicate the major factors at stake, their tendency, how courts should take them into account, and their relative generic weighting in given circumstances. However, such guidelines should avoid undue rigidity and pretension to completeness.

Arguably, at least two prima facie illegitimate, and up to five prima facie legitimate, forms of subsequent use can be identified using the conceptual approach set out in Chapter 7. Each of these seven generic classes of reuse is examined in turn below. In respect of the two *illegitimate* forms of reuse, guidelines should advise judges and

[4] On the advantages of pre-determined rules over broad, uncontrolled discretion, see J Jowell 'The Legal Control of Administrative Discretion' [1973] PL 178, 184–94.

parties to assume that reusing eligible information in either case will be improper. Were such uses to be attempted or proposed, protective orders almost always should be imposed. Cost sanctions also may be appropriate. Only in truly exceptional circumstances should judges contemplate permitting reuse of either kind. In respect of the five *legitimate* forms of reuse, these could be recognised under guidelines as being presumptively permissible. The expectation should be that unless good cause can be shown—either to prevent reuse outright or to limit it to avoid undue incidental harm—inherently legitimate forms of reuse should proceed.

Exhaustive treatment of the seven forms of reuse is not possible herein. Nor is it necessary. The aim is not to provide a comprehensive account, nor to address every theoretical or procedural issue raised. It is to analyse the main factors and features relevant to each form of reuse, to achieve the advantages listed above, and to present evidence supporting the central contentions in this thesis. Such analysis is also beneficial, in that it illustrates the broad range of subsequent uses that potentially are legitimate, and illuminates the path toward effective reform. In canvassing the different forms of reuse, it is instructive to note aspects of American experience under R26(c) Fed R Civ P.[5] As well as supporting the basic classifications in this chapter, comparative analysis is a useful tool for projecting possible future implications of reforming the English law, and identifying key associated problems and issues.

[5] American federal law and practice are summarised in ch 7 above.

B TWO ILLEGITIMATE FORMS OF SUBSEQUENT USE

1 Reuse flowing from abuse of process

Two forms of subsequent use of disclosed documents arguably stand out as being inherently illegitimate. The first arises where disclosure is obtained improperly, not to prosecute a bona fide case at hand, but purely for ulterior ends.[6] According to well-established procedural norms, allowing subsequent use here would be improper, as document-recipients thereby would benefit from abusing the court's disclosure processes by invoking them with unclean motives. This form of reuse is analogous to cases where parties obtain evidence improperly—such as in *ITC Film Distributors v Video Exchange Ltd* [1982] Ch 431, where privileged information procured via contempt of court was held to be inadmissible. In both situations, the legally relevant harms overlap. The overriding public (and private) interests at stake include maintaining judicial authority, safeguarding the integrity of the civil justice system, preventing procedural unfairness, and ensuring the proper administration of justice.

This historically recognised 'improper' form of use was examined in detail in Chapter 2.[7] As noted there, before the Judicature Acts of 1873 and 1875, the temptation for litigants was to seek disclosure in equity for use at law. Nineteenth century judges did not hesitate to use their express powers to prevent such misconduct.

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[6] Where proceedings apparently have merit, identifying abusive disclosure may be difficult: *Andrews* 245 (discussing tortious abuse of process).

[7] 58–61 above.

For, it represented an attempt by litigants to circumvent procedural restrictions in one forum, by exploiting or subverting avenues available in another without just excuse.[8] In modern times—and especially should the current presumption against subsequent use be abandoned as this thesis recommends—litigants may be tempted to institute spurious actions to obtain disclosure of documents useful in foreign proceedings or before other fora (perhaps where disclosure is less extensive or unavailable), or to pressurise their opponents in some other way. A good illustration is *Grupo Torras SA v Bank of Butterfield International (Cayman) Ltd* (2000–01) 3 ITELR 712, where parallel proceedings were commenced in Jersey, the Bahamas and the Cayman Islands alleging massive international fraud. The claimant sought permission from the Grand Court, Cayman Islands to use disclosed documents obtained there for the Jersey proceedings. Smellie CJ refused leave, on the ground of abuse of process. The Cayman action, he held, was no more than a 'fishing expedition', brought to obtain disclosure intended for use elsewhere. Although rife in historical times, the days when courts would tolerate or even welcome fictions, such as to achieve jurisdiction, are long since past. Under R26(c) American courts likewise have condemned reuse stemming from abuse of discovery.[9]

[8] Contrast *D v NSPCC* [1978] AC 171 (HL), noted at 61 n 66 above.

[9] *Johnson Foils, Inc v Huyck Corp*, 61 FRD 405, 410 (DCNY 1973); *Patterson v Ford Motor Co*, 85 FRD 152, 154 (WD Tex 1980); *Jennings v Peters*, 162 FRD 120, 122 (ND Ill 1995); *Echostar Communications Corp v News Corp*, 180 FRD 391, 395–6 (D Colo 1998). See generally *WM&M* §2036, 528. See also *Oppenheimer Fund, Inc v Sanders*, 437 US 340, 352 n 17; 98 S Ct 2380, 2390 n 17 (1978) ('when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied').

Where innocent third parties acquire materials obtained abusively and, unaware of the abuse, reuse them for legitimate purposes (such as bringing litigation), different considerations potentially could arise. Unlike the *ITC Film* line of cases, authorities on reusing privileged materials innocently obtained do not provide clear guidance here.[10] On the one hand, the merits may well favour allowing reuse. But, on the other hand, once the prior abuse becomes apparent, the importance of safeguarding the integrity of disclosure processes and the proper administration of justice is no different from that where wrongdoers themselves seek reuse. This may be an area where discretionary flexibility is beneficial—particularly if prior abuse is not uncovered until after innocent third parties have changed their positions in reliance on tainted information.

2 Publication purely for private gain

The second presumptively improper form of reuse also features in historical English authority. It is publication or dissemination of others' confidential disclosed documents purely for gratuitous or self-serving private ends. The early case of *Williams v Prince of Wales Life, &c, Co* (1857) 23 Beav 338, 53 ER 133,[11] in which such publication was precluded, identified both the key mischief (public dissemination of material eligible for protection without good cause)

[10] *R v Tompkins* (1977) 67 Cr App Rep 181 (CA); *Goddard v Nationwide Building Society* [1987] QB 670 (CA) 686. No precedent is precisely on point, and judges' views appear to diverge. Also, the modern recasting of legal professional privilege as an 'absolute' right (158 n 126 above) may well colour future cases.

[11] 41 above.

and the overriding factors at stake—preventing unwarranted harm to document-producers' legitimate privacy and property-based interests.

This form of reuse pulls into sharp focus the considerable weight that should attach to preserving confidentiality—both as a private right (including under Article 8 of the ECHR) and as a matter of public interest. As Miller has stressed, informational privacy and property rights do not evaporate when party (or non-party) document-producers come into contact with the civil justice system.[12] As Chapter 4 showed, protecting eligible disclosed information from unjustified revelation is vital—especially where (as here) reuse would cause it to enter the public domain. Mere self-enriching or self-aggrandising private interests in publication, unaccompanied by any socially valuable imperatives (such as ensuring access to justice, public scrutiny of official conduct, or revelation of vital matters of public concern, each revisited below), should not override document-producers' confidentiality interests. Purely private goals falling into this category would include embarrassing document-producers or others, or otherwise pressurising them;[13] gaining financially (such as through selling information to the media, or exploiting another's commercial secrets); and furthering personal, professional or political ambitions.

[12] *Miller* 466; AR Miller 'Private Lives or Public Access?' (1991) 77 American Bar Association J 64, 68. See also Lawyers for Civil Justice Task Force 'Court-Approved Confidentiality Orders: A Critical Analysis of Their Need' (1990) 57 Defense Counsel J 89, 94.

[13] For a protective order barring publication to prevent harassment and reprisals, see *Seattle Times Co v Rhinehart*, 467 US 20, 104 S Ct 2199 (1984).

Protective orders limiting publication—indeed, *all* subsequent use restrictions—affect freedom of expression. Like preserving valuable confidentiality, safeguarding worthy expression is an important private and public concern. Article 10(1) of the ECHR guarantees freedom both to impart and to receive information and ideas without unwarranted state interference.[14] Subsequent use restrictions imposed under law constrain both document-recipients' expression rights,[15] and the rights of others legitimately interested in disclosed information (including the public) to learn of it. Publication reuse demonstrates vividly the inexorable conflict between privacy-based and expression-based interests in the arena of the subsequent use of disclosed documents. What it shows is that in this arena, unless expression serves some weighty, legally defensible purpose, confidentiality should prevail.[16] This balance accords with the reality that Article 10 embodies a qualified right, and that not all expression deserves equal protection.[17] It accords with the imminent recognition of a qualified right to personal privacy in England.[18] It

[14] On the leading principles underpinning free expression, see *Zana v Turkey* Reports 1997-VII, (1997) 27 EHRR 667, para 51. See also J Raz 'Free Expression and Personal Identification' (1991) 11 OJLS 303, 310, 324; R Clayton and H Tomlinson *The Law of Human Rights* (OUP Oxford 2000) vol 1, ch 15.

[15] On attorneys' free speech rights, see *Chicago Council of Lawyers v Bauer*, 522 F 2d 242 (1975).

[16] *Marcus (1983)* 62–4. The proportionality principle is the central mechanism for balancing competing or qualified ECHR rights: 139 n 82 above. For a recent case concerning the relative priority between ECHR Arts 6, 8 and 10 in specific circumstances, see *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865 (CA). The five forms of reuse classified as legitimate below each involve additional factors to be weighed in the balance.

[17] Some forms (eg, child pornography, fraud, perjury) are not legally protected at all.

[18] 167–175 above.

also accords with American law under R26(c). Following a period of confusion and inconsistent lower court pronouncements, the US Supreme Court has upheld the constitutionality of protective orders.[19] They implicate the First Amendment, being akin to prior restraints over free speech, but to a far lesser extent than in other contexts. Strict scrutiny is not required. Free speech may be overcome under R26(c) by a showing of good cause; proof that a legitimate governmental goal, unrelated to suppressing communication, exists.[20]

Publication reuse also raises the important general issue of who should have standing to seek protective orders. As Chapter 5 observed, document-producers and document-owners are not the only ones who may be harmed through subsequent use. Third parties too may be at risk where disclosed information concerns them. Under CPR 31.22(3) only parties and document-owners may seek protective orders when disclosed documents are mentioned in open court. In America, litigants, deponents and witnesses may move for

[19] *Seattle Times v Rhinehart*, 467 US 20, 104 S Ct 2199 (1984). See generally *WM&M* §2036, 545 ff; *Haydock and Herr* 1:74 ff. See also: M Dore 'Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process' (1978) 14 New England L Rev 1, 10–4; DJ Rendall Jr 'Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause' [1980] Duke LJ 766; DL Bratvold 'Protective Orders and the Use of Discovery Materials Following Seattle Times' (1986) 71 Minnesota L Rev 171; *Miller* 436–7.

[20] SM Angele 'Note: Rule 26(c) Protective Orders and the First Amendment' (1980) 80 Columbia L Rev 1645, 1653–4; *Anderson v Cryovac, Inc*, 805 F 2d 1, 7 (1st Cir 1986). Under the HRA, s 12, courts must consider carefully before imposing prior restraints: *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038, 1064. However, freedom of expression does not have presumptive priority over other rights, even under s 12: *Douglas v Hello! Ltd* [2001] QB 967 (CA) 1004–5.

protective orders under R26(c), but only to protect themselves.[21] In situations such as *Farnsworth v Procter & Gamble Co*, 758 F 2d 1545 (11th Cir 1985) (identities of toxic shock syndrome victims sought by a tampon manufacturer from a medical research institute[22]) both provisions leave third parties dependent upon others—assuming their interests in seeking to maintain confidentiality happen to coincide.

Restricting applicants to self-protection would avoid evidentiary difficulties and prevent spurious applications by self-appointed 'champions' where affected parties in fact are unperturbed by the reuse proposed.[23] But non-party and public interests in preventing reuse should not languish undefended. American judges have inherent authority to issue protective orders *sua sponte*.[24] Conceivably, English judges could use equivalent power to act as guardians of important, otherwise unrepresented, interests. This could prove problematic. Judges may not be best placed to second-guess absent parties' needs or discern public interest concerns—especially where disclosure is extensive and complex. Simply granting standing to anyone facing appreciable, legally relevant harm through subsequent use also could prove inadequate. Non-parties may be unaware that information concerning them has been disclosed, let alone that further use is proposed. Combining both court-initiated protective orders and discretionary intervention by affected non-parties or public

[21] *Commercial Laundry, Inc v Linen Supply Assn*, 90 F Supp 470 (SDNY 1950).
[22] 203 above.
[23] Parties may be able to resist revealing confidential information relating to third parties where revelation would involve a breach of the latters' ECHR, Art 8(1) rights: *MS v Sweden* Reports 1997-IV, (1999) 28 EHRR 313.
[24] *Sokolski v Trans Union Corp*, 178 FRD 392 (EDNY 1998).

interest groups (with appropriate provision for costs), together with notice requirements before subsequent use takes place, may be the preferable way forward.

C FIVE LEGITIMATE FORMS OF SUBSEQUENT USE

Up to five forms of subsequent use potentially could be classified under the disclosure rules as presumptively proper—or, at least, not automatically improper. Some of the five clearly seem unobjectionable. For these, a high showing should be required to establish good cause for limiting or precluding them. With others, the preponderance of competing factors is more evenly balanced. Several are somewhat controversial. Discussion will move from the most clear-cut through to the most radical.

1 Subsequent litigation use

Detailed evidence and arguments presented throughout Part I of this thesis demonstrated the propriety of document-recipients reusing disclosed documents in subsequent proceedings (judicial, quasi-judicial or otherwise) involving some or all of the original parties. The theoretical framework and propositions propounded in Chapter 7 firmly support this view. Subsequent litigation use does not entail publication of disclosed documents to strangers. It simply allows those who already possess information to reuse it to bring further (usually private) disputes to court for resolution. Save in exceptional circumstances (considered below), the risk of additional, appreciable harm is negligible. Being held to account for wrongdoing uncovered

during disclosure is not legally relevant harm. Likewise, revelation of secrets to the new court and any extra litigants, lawyers, witnesses or others involved in the second proceedings is no more harmful than disclosure during the original case.[25] In both, limited invasion of confidentiality should be warranted for precisely the same reasons—to promote access to the court, equality of arms, vindication of parties' legal entitlements, and accurate judicial decision-making. The overarching consideration is access to justice—both as a private right (including under Article 6(1) of the ECHR), and as a fundamental component of the public interest in the proper administration of justice.

Since the mid-19th century, English judges have recognised the legitimacy and desirability of allowing subsequent litigation use.[26] Even under the modern rule, discretionary reuse to support certain related proceedings has been permitted.[27] Yet, this is insufficient. The absence of harm, and overriding importance of access to justice, remain constant whether subsequent proceedings relate to the original action or not. Moreover, the importance of facilitating access to justice—and, hence, the weight that should attach to it—increases where reuse is required to mount (not merely support) claims that otherwise would founder because previously disclosed information is unavailable from independent sources. Conspicuously, both the Court of Appeal's decision on the merits in the *Riddick* case

[25] 135 above.
[26] 62–65 above. See also *Prescott* 490 (reusing disclosed documents for 'seeking redress in a court of justice is not, *prima facie*, an improper purpose').
[27] 232–239 above.

(stifling a subsequent defamation action) and its formulation of the modern, blanket general rule against subsequent use overlook these fundamental points. As Part I observed, CPR 31.22 rests on an unjustifiably impoverished conception of 'justice'. It focuses solely on reaching a 'just' (accurate) outcome in the original case, while ignoring wider access to justice imperatives. Introducing the reforms proposed in this thesis would help to rectify that deficiency, by reviving the courts' traditional, holistic conceptualisation of 'justice'.

Presumptively allowing subsequent litigation use would carry further benefits relevant to the balancing test. It would respect document-recipients' expression rights (to inform the court of information necessary to vindicate their legal dues, and to undertake litigation, itself a protected form of expression[28]). By avoiding duplicative disclosure it would satisfy CPR 1.1 by making adjudication cheaper, quicker and more efficient. Where repeat disclosure is unavailable (such as where disclosed documents are the embodiment, or sole evidence, of further wrongdoing), it would enhance public confidence in courts and the legitimacy of judicial decision-making by ensuring that different fora have access to all relevant evidence, and that courts do not—without good cause—withhold pertinent evidence from one another or stifle meritorious claims.[29] It would help to rationalise the law by dispensing with the vague 'special

[28] At least in America: *In re Primus*, 436 US 412, 98 S Ct 1893 (1978); *In re Halkin*, 598 F 2d 176 (DC Cir 1979). To date, the point does not appear to have been addressed directly in English or ECHR jurisprudence. Arguably, litigation would fall within the European Court's definition of political speech. See 13 n 22 above.

[29] AAS Zuckerman 'Practice and Procedure' [1999] All ER Ann Rev 273, 285.

circumstances' test,[30] which currently has the unfortunate effect that subsequent litigation use is least likely where the parties and issues most overlap so that repeat disclosure is most likely to be reordered. Also, it would comport with the fact that amending statements of case to include fresh causes of action is permitted. Tellingly, in America it goes virtually without saying that subsequent litigation use is entirely proper.[31]

In rare cases, subsequent litigation use may produce unwarranted, incidental harm and need to be limited or barred. For example, where particularly sensitive documents are mentioned in open court during subsequent proceedings, a protective order may be needed to prevent general publication. There is nothing problematic about such a narrowly tailored order (assuming sufficient grounds justify overriding the publicity principle attaching to hearings). But, in the normal course, the mere risk of such publication cannot constitute undue harm any more than it did in the original proceedings. Coupled with the special safeguards available where secrecy concerns are acute (such as conducting hearings *in camera*), carefully tailored subsequent proceedings need not compromise confidentiality.[32] Thus, to establish good cause sufficient to prevent

[30] 218–220 above.

[31] *Haydock and Herr* 1:70; JW Moore *Moore's Federal Practice* (3rd edn Lexis Publishing New York 2000) vol 6, §26.101; *MCL3* 61.

[32] Compelling evidence of what can be achieved is espionage prosecutions, which proceed without compromising vital state secrets: eg *R v Britten* [1969] 1 WLR 151 (CA). Extreme measures, such as appointing security-cleared advocates to represent litigants while they and their representatives are absent, may need to be used: *Chahal v UK* Reports 1996-V, (1996) 23 EHRR 413, 469, 472; *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47, [2001] 3 WLR 877 (HL) 890. See also *Cross and Tapper* 476–81.

subsequent litigation use outright, exceptional grounds should be required. Of all English cases to date in which subsequent litigation use has been prevented, only the *Halcon* case seems sufficiently strong. There, allowing reuse of disclosed trade secrets in Dutch patent office appeal proceedings unavoidably would have rendered them publicly accessible. Because of the special rules governing that body, the English court's resultant inability to extend protection under its own powers, and the total annihilation of objectively valuable confidentiality faced by the document-producer, precluding subsequent use appears to have been justified.

2 Sharing with similarly-situated litigants

The same factors that render subsequent litigation use presumptively legitimate—especially access to justice and procedural efficiency—also justify allowing similarly-situated litigants, in appropriate cases, to share their opponents' disclosed documents. Here, instead of original document-recipients reusing materials to bring further proceedings (as in the *Riddick* case), third parties seek to do so, by obtaining them not through disclosure in the ordinary way, but from the original document-recipients (or their lawyers). Such a situation arose in the ill-fated *Cobra* litigation,[33] where two golfing manufacturers, TM and Cobra, wished to share the fruits of a search order executed by TM to bring parallel contempt proceedings against a common defendant (Rata). Sharing was essential for both actions to be

[33] 222–224 above.

brought, as TM had seized the relevant documents. By refusing to allow sharing—which entailed no legally relevant harm for Rata—the courts denied Cobra access to justice in circumstances where no compelling need whatsoever arose.

The *Cobra* situation was somewhat unusual. As American experience demonstrates, sharing more commonly is sought in the mass litigation context where multiple claimants have similar actions against common defendants.[34] Because each case turns on equivalent issues, claimants' disclosure needs are coextensive.[35] The aim of sharing here is to bypass repetitive disclosure where similarly-situated litigants inevitably would receive the same materials from common opponents (or non-parties) to avoid duplication, cost and delay for all concerned. In England, disclosure sharing is unproblematic where multiple litigants are united under group litigation orders, representative proceedings, or via consolidation.[36] But where the prerequisites for these procedural vehicles are not met or they are inapt—for example, where latent defects or creeping

[34] *In re Upjohn Co Antibiotic Cleocin Prods Liab Litig (MDL No 343)*, 81 FRD 482 (ED Mich SD 1979) aff'd 664 F 2d 114 (6th Cir 1981) (pharmaceuticals); *US v Hooker Chemicals & Plastics Corp*, 90 FRD 421, 426 (WDNY 1981) (environmental pollution); *Burlington City Board of Education v US Mineral Products Co*, 115 FRD 188, 190 (MDNC 1987) (asbestos); *Baker v Liggett Group, Inc*, 132 FRD 123, 126 (D Mass 1990) (tobacco). See further *Miller* 497 n 339.

[35] FH Hare Jr, JL Gilbert and WH ReMine *Confidentiality Orders* (John Wiley & Sons New York 1988) 2–3.

[36] CPR 19.III, CPR 19.12(4), CPR 19.II, CPR 3.1(2)(g). Equivalent procedures exist in America. Moreover, the Multidistrict Litigation Venue Statute (28 USC §1407 (1982)) allows pre-trial management of similar cases on a nationwide basis: PD Rheingold 'The Development of Litigation Groups' (1982) 6 American J Trial Advocacy 1; *MCL3* 77, 313, 326; *Haydock and Herr* 9:3–9:7.

injuries appear only gradually,[37] or different manufacturers' products are used in different markets, at different times, or have differing characteristics[38]—the question of sharing becomes significant. Because the potential benefits and pitfalls are most marked in the mass litigation context (a burgeoning field on both sides of the Atlantic), this will be taken as the backdrop for analysis.[39]

In relation to striking the general balance, document-producers (and others concerned to maintain confidentiality) need suffer no additional, legally relevant harm through sharing. The same reasons given above in relation to subsequent litigation use apply equally well here. Meanwhile, as Hare has argued forcefully,[40] the importance of ensuring widespread access to justice, procedural equality of arms,

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[37] *Farnum v GD Searle & Co*, 339 NW 2d 384 (Iowa 1983); *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293 (7th Cir 1995). In *The Creuzfeldt-Jakob Disease Litigation Group B Plaintiffs v UK Medical Research Council* (1997) 41 BMLR 157 group litigation could proceed despite inability to crystallise the group. Unlike American class actions, CPR 19.III group litigation orders co-ordinate only the management (not disposition) of multiple claims sharing common or related issues of law or fact. Aside from resolving generic issues via test claims, individual hearings (eg quantum trials) still are required. For these, disclosure sharing may be desirable.

[38] Many of the hundreds of thousands of American asbestos cases fell into this category: Hare *et al* (n 35 above) 3, 12. See also DB Smith 'Anti-Dissemination Orders in Product Liability Suits' (1982) 5 American J Trial Advocacy 507, 509. Claimants in some English multi-party actions have had to be split into several groups for such reasons: eg, *AB v John Wyeth & Brother Ltd* (1992) 12 BMLR 50 (CA). Sharing between such groups may be desirable.

[39] Almost all sharing in America involves similarly-situated claimants, not defendants. In most mass litigation (eg transport disasters, defective products, antitrust, securities fraud), defendants hold the vast bulk of relevant materials. As no special issues relevant to similarly-situated defendant sharing arise here, claimant sharing will be the focus.

[40] Hare *et al* (n 35 above) 15 ff; FH Hare Jr and JL Gilbert 'Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding' (1989) 12 American J Trial Advocacy 413; FH Hare Jr, JL Gilbert and SA Ollanik *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press Washington DC 1994) 157 ff.

unimpeded access to evidence, and procedural efficiency may be substantial. Mass proceedings typically involve actions by injured individuals against large-scale corporations. Disclosure is voluminous and technical. Allowing sharing would reduce the impact of economic and other imbalances that can distort settlement terms.[41] Corporate defendants can exploit economies of scale, spreading litigation costs over the entire range of cases. They also commonly collaborate among themselves. Sharing would enable individuals likewise to pool resources—thereby avoiding isolation, delay and duplicative legal and expert costs in obtaining, sifting, assimilating, organising, cataloguing, summarising and analysing disclosed materials.[42] Under conditional fee arrangements, such savings would enhance horizontal access to justice, by lowering the minimum expected recovery levels required for claims to be viable. Sharing also would help to alleviate the imbalance flowing from the fact that many corporate defendants will be members of industry associations even before litigation commences, whereas claimants must create their alliances *ex post facto*. Sharing may reduce systemic costs, by obviating repetitive judicial supervision and adjudication of disclosure disputes and streamlining parties' trial

[41] For an economic account of party imbalances, see D Rosenberg 'The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System' (1984) 97 Harvard L Rev 851, 902–5.

[42] Hare *et al* (n 35 above) 11, 24; BN Friedman 'Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order' (1985) 60 NYU L Rev 1137, 1140.

preparation.[43] It also would minimise the potential for uneven or unjust results, and better equip claimants to detect stonewalling or other disclosure misconduct.[44]

Like subsequent litigation use, sharing would accord with the traditional conception of the role of civil courts as being to resolve private disputes impartially on neutral principles of law.[45] Even under the current English law, sharing of a kind has been permitted. In *Dory v Richard Wolf GmbH* [1990] FSR 266 Aldous J allowed an ordered, translated trial bundle to be reused in foreign proceedings where the scope of discovery was comparable—precisely to avoid wasteful, duplicative costs.[46] In America, sharing overwhelmingly is accepted and approved.[47] Federal judges have castigated repeat discovery exercises as 'gratuitous roadblocks' that 'hamstring' smooth information exchanges,[48] and as tantamount to requiring each

[43] *DeFord v Schmid Products Co*, 120 FRD 648, 654 (D Md 1987); *Nestlé Foods Corp v Aetna Casualty & Surety Co*, 129 FRD 483, 486 (DCNJ 1990); *Marcus (1991)* 496. Some commentators dispute systemic cost-saving claims, arguing that sharing increases defendants' incentives to resist original disclosure more vigorously: *Marcus (1983)* 43; Lawyers for Civil Justice Task Force 'Court-Approved Confidentiality Orders: A Critical Analysis of Their Need' (1990) 57 Defense Counsel J 89, 90; RP Campbell 'The Protective Order in Products Liability Litigation: Safeguard or Misnomer?' (1990) 31 British Columbia L Rev 771, 824; *Miller* 500. Unfortunately, empirical data is lacking.

[44] *Marcus (1991)* 496; Hare, Gilbert and Ollanik (n 40 above) 157–67.

[45] JIH Jacob *The Fabric of English Civil Justice* (Stevens & Sons London 1987) 5–15; P Devlin *The Judge* (OUP Oxford 1979) 8; the *Harman* case 315, 326; JA Jolowicz *On Civil Procedure* (CUP Cambridge 2000) 70.

[46] Although the same parties were involved, they had fresh lawyers. Sharing took place between the latter.

[47] *Williams v Johnson & Johnson*, 50 FRD 31, 32 (SDNY 1970); *Earl v Gulf & Western Manufacturing*, 366 NW 2d 160 (Wis Ct App 1985); *Wauchop v Domino's Pizza, Inc*, 138 FRD 539 (ND Ind 1991). For further examples see *Miller* 497 n 339. See also *Haydock and Herr* 1:80–1:81.

[48] *Wilk v American Medical Association*, 635 F 2d 1295, 1301 (7th Cir 1980).

litigant to 'reinvent the wheel'.[49] Even if courts must modify existing protective orders to allow sharing, normally they will do so—unless this would tangibly prejudice substantial rights.[50]

In Virginia, state legislation prohibits protective orders that bar sharing between attorneys engaged in similar personal injury or wrongful death actions.[51] Judicial permission for sharing must be obtained, following notice to any party or person protected under pre-existing protective orders, with opportunity for them to be heard. Receiving attorneys must agree to be bound by the terms of such orders. Where limited restrictions over reuse or dissemination are warranted (such as controlling who may access sensitive materials), and were imposed in the original action, the Virginian approach has considerable merit. In England, similarly-situated litigants and their advisers easily could be required to accept the same terms, after giving document-producers notice of the sharing proposed and opportunity to object (for good cause). There is no obvious reason to confine sharing to personal injury type claims.[52]

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[49] *Ward v Ford Motor Co*, 93 FRD 579, 580 (D Colo 1982).

[50] *Grove Fresh Distributors, Inc v Everfresh Juice Co*, 24 F 3d 893, 896 (7th Cir 1994). See also: *ex p Uppercu*, 239 US 435, 36 S Ct 140 (1915); *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559 (EDNY 1985) aff'd 821 F 2d 139 (2nd Cir 1987) cert denied *sub nom Dow Chemical Co v Ryan*, 484 US 522, 108 S Ct 344 (1987); *Garcia v Peeples*, 734 SW 2d 343 (Tex 1987); *Jochims v Isuzu Motors, Ltd*, 151 FRD 338, 345 (SD Iowa 1993); *Glenmede Trust Co v Thompson*, 56 F 3d 476, 485 (3rd Cir 1995). See generally: *Marcus (1983)* 43, 42, n 175; *Miller* 497; *MCL3* 70; *WM&M* §2044.1, 577; *Doré* 361.

[51] Va Code Ann §8.01–420.01 (1989).

[52] *Marcus (1991)* 465; TY Blumoff, MZ Johns and EJ Imwinkelried *Pretrial Discovery: The Development of Professional Judgment* (Michie Co Charlottesville 1993) 63; J Tidmarsh and RH Trangsrud *Complex Litigation and the Adversary System* (Foundation Press New York 1998) 1109; *Friedenthal* 93–4; Friedman (n 42 above) 1148.

While the preponderance of competing interests strongly supports a general presumption in favour of sharing, in practice, certain factors may shift the balance. First, there may not be a tight fit between the information properly disclosable in similar cases. Yet, sifting through voluminous disclosure to achieve a close fit before sharing—or undertaking disclosure afresh—may be unduly burdensome. This problem has arisen in America. In *US v AT&T Co*, 461 F Supp 1314, 1341 (DDC 1978) cert denied 439 US 962, 99 S Ct 477 (1978) the court observed that the federal discovery rules do not require 'absolute precision'. It found it 'difficult to envisage what prejudice could ensue' from revelation of a 'small number' of irrelevant documents. Irrelevant documents also may get shared where claimants' attorneys form litigation support groups.[53] Such groups—whose activities include publishing newsletters, commissioning research, managing databases and providing sample pleadings, trial handbooks and transcripts—regularly act as document depositories and clearinghouses. They hold collated sets of defendants' discovered materials that they make available to their members for a modest fee.[54] Under the narrower English disclosure regime, over-expansive sharing should prove less problematic. Provided sufficient safeguards prevent further

[53] See generally PD Rheingold 'Mass Disaster Litigation and the Use of Plaintiffs' Groups' (1977) 3(3) Litigation 18; PD Rheingold 'The Development of Litigation Groups' (1982) 6 American J Trial Advocacy 1; Hare *et al* (n 35 above) 15–9; Blumoff *et al* (n 52 above) 64.

[54] eg PD Rheingold 'The MER/29 Story—An Instance of Successful Mass Disaster Litigation' (1968) 56 California L Rev 116, 123 (group members each paid a US$100 joining fee, then US$200 per firm to finance the discovery programme).

unauthorised dissemination, and require the return or destruction of inappropriately shared materials, a degree of inaccuracy should be accepted. The likely harm for document-producers still should be minor, while the advantages of sharing over repeating disclosure *ab initio* remain considerable.

Second, uncontrolled sharing may increase unacceptably the risk of unwarranted harm. Policing violations and preventing unauthorised 'leaks' may be impossible if the range of document-recipients (or sub-recipients) is ill-defined. This problem could arise if American-style litigation support groups were to flourish in England. Dangers also could arise whenever disclosed documents are scanned and stored electronically (as in the *Silicone Gel Breast Implant* litigation[55]), so that distributing them via CD-ROM, over the internet or by similar means is quick and virtually cost-free. Another potential danger is unwarranted 'fishing', where similarly-situated recipients could not have obtained materials independently themselves through disclosure. Requiring similarly-situated litigants to demonstrate a general entitlement to repeat disclosure before sharing occurs would minimise these risks.[56] But it would entail judicial supervision. Also, it might preclude sharing with similarly-situated *prospective* litigants, contrary to the spirit of the CPR pre-action disclosure rules and

[55] *In re Silicone Gel Breast Implant Prods Liab Litig*, MDL 926, Order No 4 (ND Ala, 9 September 1992). See *MCL3* 77. The disks held approximately 15,000 pages and cost US$25.

[56] *Marcus (1983)* 44; *Miller* 499; *Doré* 367.

pre-action protocols.[57] Again, if warranted in a given case, express judicial permission for pre-action sharing conceivably could be sought.

A third concern relates to the sale of document-producers' bundles. Where sharing occurs, original document-recipients incur the cost of replicating materials for similarly-situated litigants. American courts have approved court-supervised fees covering 'out-of-pocket' expenses.[58] This seems reasonable. But some commentators have suggested that document-recipients also should be entitled to recoup part of the cost of original disclosure.[59] This would involve compensating either original litigants for undertaking costly disclosure that subsequent litigants are spared, or conditional fee lawyers for having assumed the risk that such expenditure would not be recovered. In mass litigation the profits may be substantial; even exceeding the original cost of disclosure and creating a windfall at document-producers' expense.[60] As well as obvious ethical implications,[61] allowing informational markets to develop could encourage parties (or lawyers) to seek excessive disclosure and advertise sharing aggressively. In England, such dangers are

[57] CPR 31.16, CPR 31.17.
[58] *Williams v Johnson & Johnson*, 50 FRD 31, 32–3 (SDNY 1970); *In re Upjohn*, 81 FRD 482, 484–5 (ED Mich 1979).
[59] eg Friedman (n 42 above) 1151–8. Cf DL Bratvold 'Protective Orders and the Use of Discovery Materials Following Seattle Times' (1986) 71 Minnesota L Rev 171, 202.
[60] Hare *et al* (n 35 above) 133.
[61] *Eagles* 297.

lessened by stricter ethical rules, court control over disclosure, and the narrower disclosure ambit.[62]

Fourth, to prevent sharing, document-producers may try to manipulate document-recipients into entering private confidentiality agreements—either pre-disclosure (by offering to co-operate without raising costly, time-consuming disputes) or during settlement (by offering to pay a premium for confidentiality terms). Hare has dubbed such practices the 'voluntary agreement trap'.[63] They may enrich a few claimants. But generally they isolate them, thwarting procedural efficiency and wider access to justice, and contravening important interests of other litigants, the public and the court.[64] If allowed unchecked, such agreements also could suppress information about public hazards (discussed further below). This was a key motivation for the Virginian statute (noted above). Under current English ethical rules, claimants' lawyers would be obligated to accept sweetened settlements for their clients in return for silence. In conditional fee cases, this may serve their own interests as well—unless they represent other similarly-situated litigants, in which case conflicts of interest could arise. There may be good reason to regulate private

[62] The issue is likely to become more pressing as the use of computerised databases of disclosed documents increases: C Tapper 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217. The cost of creating these is enormous; the cost of reproducing their contents minimal. In such circumstances, reasonable sharing of original disclosure costs may well be thought justified.

[63] Hare *et al* (n 40 above) 167 ff. See eg *Thayer v Liggett & Myers Tobacco Co*, CA No 5314 (WD Mich 19 February 1970) (cited by Hare at 162) where '[f]ruitful consultation . . . was thus effectively throttled'.

[64] In *Dean v AH Robins Co*, 101 FRD 21, 23 (D Minn 1984) (Dalkon Shield IUD litigation) the defendant's anti-sharing machinations were likened to a 'war of attrition' designed to exhaust individual claimants' resources pre-trial.

agreements that seek to prevent sharing, either by banning them or by making them subject to judicial approval and modification to facilitate sharing (or other reuse in the public interest) in appropriate cases.[65]

This raises the general issue of who should have standing to seek modification of protective orders (whether original parties alone or non-party intervenors) and for what purposes (sharing, regulatory investigation, public interest access and so on). Given the manifold valuable interests that reuse may serve—not necessarily foreseeable when protective orders are entered—formally limiting who may apply and on what grounds seems undesirable. In America, judges have permitted non-parties to intervene (including individuals, similarly-situated litigants, public interest organisations and the investigative press) both to request modification of protective orders and to contest their original issue.[66]

3 Passing information to the proper authorities

Referring disclosed information that shows or reasonably suggests significant wrongdoing or subsisting hazards to the proper authorities is the third arguably legitimate form of reuse. Such transmission has a long pedigree in related areas of English law. Within the law of confidence, revelation of dangers or misdeeds to official bodies

[65] JB Weinstein 'Secrecy and the Civil Justice System—Secrecy in Civil Trials: Some Tentative Views' (2000) 9 J Law & Policy 53, 65 ('Any secrecy agreement should have a judicial imprimatur, with the discretion in the court to modify the agreement on application of a party to the litigation or of a third party').

[66] *Public Citizen v Liggett Group, Inc*, 858 F 2d 775, 781–2 (1st Cir 1988) cert denied 488 US 1030, 109 S Ct 838 (1989); *Grove Fresh v Everfresh Juice*, 24 F 3d 893 (7th Cir 1994); *Pansy v Borough of Stroudsburg*, 23 F 3d 772 (3rd Cir 1994).

falls squarely within the public interest exception.[67] A key question there—as in common law defamation qualified privilege cases—is whether a confidant has an overriding 'duty' (legal, moral or social) to divulge confidential information to the intended recipient.[68] Similarly, courts sometimes are asked to make available to non-parties confidential evidence adduced during closed hearings. On many occasions they do so, where the balance of public interest favours limited publication over maintaining complete confidentiality. Examples include revelation to the police of material assembled during care proceedings (to further the public interests in prosecuting serious crime and protecting children)[69]; by the police to other regulatory or professional bodies (particularly where public health or safety could be at risk)[70]; to criminal defendants (thereby serving the public interest in enabling a proper defence to criminal charges);[71] and even to the press (where general public attention is warranted).[72]

Equivalent considerations apply in the disclosure context. Confidentiality concerns may well be outweighed by factors such as those just listed. Allowing revelation of disclosed documents reasonably indicating serious wrongdoing to the proper authorities would promote important public interests, notably public welfare and

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[67] *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260.
[68] *Initial Services v Putterill* [1968] 1 QB 396; *Gaddafi v Telegraph Group Ltd* [2000] EMLR 431 (CA); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL) 195–6.
[69] *In re EC (a minor) (care proceedings: disclosure)* [1997] Fam 76 (CA) 85.
[70] *A County Council v W (disclosure)* [1997] 1 FLR 574, 583; *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 (CA) 36–7.
[71] *A County Council v W* [1997] 1 FLR 574; *Re C (restraint order: disclosure)* (QBD 4 September 2000) paras 45–6.
[72] 335 ff below.

law enforcement. It would serve the wider social good by speeding up regulatory and investigative processes. It would reflect the reality that public watchdogs—often under-resourced—cannot always provide an adequate check against illegal or unprofessional conduct.[73] Key questions in assessing the relative importance of reuse would include the nature and gravity of the alleged wrongdoing and the value of the information to it.[74] Possible wrongdoing warranting referrals could include serious criminal offences, professional misconduct or incompetence, tax evasion, company mismanagement, securities fraud, violations of competition law (antitrust) and breaches of regulations governing environmental protection, food standards or health and safety.

In respect of the likely harm, reporting reuse need not diminish confidentiality significantly. Key questions in assessing harm would include the sensitivity of the information, the identity and nature of

[73] AB Morrison 'Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?' (1989) U Richmond L Rev 109, 114; JB Weinstein *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Northwestern UP Evanston 1995) 68–9. Cf *Miller* 489, 482 (criticising the treatment of protective orders as a 'convenient scapegoat for other failures in the flow of information in . . . society'); *Marcus (1991)* 479. American class actions have been rationalised (in part) as an evolutionary response to the existence of injuries unremedied by government regulatory action: *Deposit Guaranty National Bank v Roper*, 445 US 326, 338–9; 100 S Ct 1166, 1173–4 (1980); RS Tur 'Litigation and the Consumer Interest; The Class Action and Beyond' (1982) 2 LS 135, 153. In England, see Lord Chancellor's Department *Representative Claims: Proposed New Procedures—A Consultation Paper* (HMSO London 2001), proposing that organisations representing collective interests (eg consumer associations, trade unions) be able to bring representative claims under CPR 19.II for their members without needing a direct interest themselves.

[74] *In re EC* [1997] Fam 76 (CA).

the appropriate recipient,[75] and the degree to which that recipient can control subsequent dissemination. As noted in *Re a Company's Application* [1989] Ch 477, where an authority decides not to investigate, or investigates and finds no wrongdoing, the matter stops there. The invasion of confidentiality is limited and contained. Where wrongdoing is found, any resulting 'harm' (including wider publicity if charges are laid) is not legally relevant harm. It is implicit in the regulatory role, and consequent upon document-producers being held to account. As Lord Griffiths observed in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) 269, public authorities are under a duty not to abuse confidential information. They may use it only for their inquiries. Once the FOIA comes into force, the risk of harm seems unlikely to change materially.[76] Under the FOIA, information held at any time by a 'public authority' (which includes private bodies performing public functions[77]) for the purpose of investigating possible offences is exempt from production to information requestors.[78] Also exempt is personal information the disclosure of which would contravene the Data Protection Act 1998

[75] *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385, 393.

[76] Cf the American position under Federal Freedom of Information Act, 5 USC §552 (1966 as amended). There, disclosed information in government hands may be subject to statutory disclosure. Document-producers may seek protective orders to prevent such dissemination: L Pedowitz 'Obtaining the Right Protective Order in Litigation with Private Parties and the Government, and Blocking Disclosure of Confidential Information to the Government' in J Glekel and L Pedowitz (eds) *First Annual Civil Litigation Practice: All You Need to Know, But Weren't Taught in Law School* (Law Journal Seminars-Press New York 1982) 444, 457; *Public Citizen Health Research Group v FDA*, 953 F Supp 400 (DDC 1996).

[77] Sections 3–7, Sch I. See generally P Birkinshaw *Freedom of Information: The Law, the Practice and the Ideal* (3rd edn Butterworths London 2001).

[78] Section 30.

(s 40), and trade secrets and any other information the disclosure of which would be likely to prejudice the commercial interests of any person (s 43).

To date, English courts almost invariably have refused document-recipients permission to furnish information to the proper authorities—including to the police[79] and fiscal agencies.[80] In *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919 revelation to a Greek special investigator was allowed, but only because 'exceptional circumstances' and special policy considerations arose.[81] The court's general hostility is a little incongruous given judges' willingness to allow original parties to reuse disclosed materials to bring criminal proceedings against third parties, even abroad.[82] Surely both forms of reuse serve (inter alia) the same end of enabling wrongdoers to be brought to account.

The potentially self-incriminatory aspect of reporting wrongdoing may underlie the distinction.[83] In *Saunders v UK* Reports 1996-VI, (1996) 23 EHRR 313 the European Court of Human Rights held that reusing transcripts of inspectors' compulsory interrogations in evidence in subsequent criminal proceedings contravenes Article 6(1) of the ECHR by violating the right of those

[79] The *Alterskye* case; *General Nutrition Ltd v Pattni* [1984] FSR 403.
[80] *EMI Records Ltd v Spillane* [1986] 1 WLR 967, 997; *S v S (Judgment in chambers: disclosure)* [1997] 1 WLR 1621.
[81] 224 above. See also *Customs and Excise Comrs v AE Hamlin & Co* [1984] 1 WLR 509.
[82] *Sony Corp v Anand: Seiko Time (UK) Ltd v Domicrest (Fancy Goods) Ltd* [1981] FSR 398; *Re Bank of Credit and Commerce International SA (No 9)* [1994] 1 WLR 708 (CA); *A-G for Gibraltar v May* [1999] 1 WLR 998 (CA).
[83] 200 above.

interrogated to remain silent. Properly construed, the impact of this ruling is limited to assessing the procedural fairness of subsequent criminal trials.[84] It does not relate to civil litigation. Moreover, it does not impugn compulsory acquisition of information per se, or the use of such information by other competent authorities—whether prosecutorial, regulatory, disciplinary or legislative.[85] Thus, in *A v A; B v B* [2000] 1 FCR 577, 592–3 Charles J was willing to transmit affidavits evidencing tax evasion to the Inland Revenue. Reviewing the 'overall public interest', he emphasised 'the public interest in detecting, or preventing, illegal or unlawful conduct'. Also relevant was the fact that the proposed revelation was 'to a proper authority who will respect confidentiality'.[86]

In principle, there is no reason to prevent document-recipients from passing information to proper authorities in legitimate circumstances—particularly where cases settle or information is not used during proceedings, so it does not come to the attention of judges or any agencies monitoring the litigation. American courts have allowed disclosed information to be passed to appropriate authorities for investigation.[87] A good example is *Anderson v Cryovac,*

[84] *IJL, GMR and AKP v UK* (2001) 33 EHRR 225, 251.

[85] *Saunders v UK* Reports 1996-VI, (1996) 23 EHRR 313, para 67. See further B Emmerson and A Ashworth *Human Rights and Criminal Justice* (Sweet & Maxwell London 2001) 446–8, 452. See also *Cross and Tapper* 434; *Preston Borough Council v McGrath* The Times, 19 May 2000 (CA); *BOC Ltd v Instrument Technology Ltd* [2001] EWCA Civ 854, [2001] 3 WLR 1687 (CA).

[86] See also *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 (HL) 447 ('If a defendant's answers to interrogatories tend to show that he has been guilty of a serious offence I cannot think that there would be anything improper in his opponent reporting the matter to the criminal authorities with a view to prosecution').

[87] *Miller* 494.

Inc, 805 F 2d 1 (1st Cir 1986), where toxic waste pollution of a city's water supply was alleged. The court allowed dissemination to public health and environmental authorities, but refused newspapers access. It held that the public interest required that the information be released to those charged with protecting the public's health. But, until the allegations were substantiated, general publication was unwarranted. In the event, no proof of contamination by the defendants was found.[88]

If this form of reuse were to be accepted in England, a crucial question would be who should be able to divulge information and how. Various permutations are possible—including references initiated by judges, lawyers, experts and litigants, and applications by non-party public authorities for access. Each raises special issues. Perhaps judges should be encouraged to follow Charles J's example in the *A v A; B v B* case. Whether they should have a positive duty to alert relevant bodies when documents indicating serious wrongdoing or subsisting hazards come before them is debatable. This raises wider jurisprudential issues as to the proper role of modern civil courts. In the USA this topic is hotly debated—in part, fuelled by public law litigation and the fact that state and local judges are elected. Yet, the broad parameters of that debate have relevance to reforming CPR 31.22—particularly vis-à-vis forms of reuse that involve revealing disclosed secrets outside the litigation context.

[88] *Marcus (1991)* 480.

Traditionalists in America (as in England) see private dispute resolution as describing exhaustively the civil courts' proper function.[89] Others see adjudication more as a social process, with courts (as public bodies) existing to explicate and give meaning to public values by creating and enforcing community-wide norms.[90] Thus, Judge Weinstein has deprecated judges' failure to take account of socio-political realities beyond the courthouse door, and to fulfil their public responsibilities by making confidential information available in the public interest, as 'tantamount to abdication of responsibility'.[91] The English judicial role is circumscribed by culture, convention and constitutional arrangement. Yet, judges have shown willingness to release disclosed materials outside litigation where the public interest demands it. The *A v A; B v B* case and the *Distillers* case (where Talbot J contemplated general publication of information about thalidomide) spring immediately to mind.[92] While deep

[89] *WM&M* §2042, 553; LL Fuller 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353; *Miller* 431–2, 441; *Marcus (1991)* 468–70, 493; *Friedenthal* 69–72.

[90] OM Fiss 'The Forms of Justice' (1979) 93 Harvard L Rev 1; MR Damaška *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale UP New Haven 1986); J Resnik 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA L Rev 1471, 1527; D Luban 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown LJ 2619, 2626, 2654–7; *Doré* 298, 307. See also A Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard L Rev 1281 (highly influential but now outdated).

[91] JB Weinstein 'Ethical Dilemmas in Mass Tort Litigation' (1994) 88 Northwestern UL Rev 469, 540–1; Weinstein (n 73 above) 92. See also JB Weinstein 'Secrecy and the Civil Justice System—Secrecy in Civil Trials: Some Tentative Views' (2000) 9 J Law & Policy 53; SMC Gibbons, Notes of Interview with Hon Jack B Weinstein, Senior US District Judge EDNY (Brooklyn, 28 September 2000, unpublished).

[92] See also *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, where police dissemination of photographs (held in confidence) of potential shoplifters to shopkeepers was upheld on public interest grounds.

philosophical questions concerning the proper role of courts cannot be canvassed in detail here, for present purposes the central point is clear. Releasing confidential disclosed information to the proper authorities—or even to the general public—where warranted on the balance of competing interests at stake, is, at least arguably, a matter falling within the authority, competence and jurisdiction of English courts.[93]

Empowering or requiring lawyers and experts to communicate information (or the fact of its existence) to relevant bodies, or to draw it to the court's attention, could prove burdensome where document-producers object, or where pre-disclosure confidentiality agreements exist. In either case, parties would be forced to expend precious resources negotiating or litigating over matters peripheral to the merits of their case. If extended to document-producers' own advisers, reporting requirements could engender conflicts of interest. Nevertheless, in relation to medical experts, restricted revelation of patients' psychiatric disorders to the proper authorities (including criminal prosecutors[94]) has been upheld. In *W v Egdell* [1990] Ch 359 the Court of Appeal held that the public interest in limited revelation of confidential information by doctors to protect others from possible

[93] See also *Prescott* 490 (suggesting that communications with proper authorities are justified where disclosed documents reveal a course of conduct endangering societal interests); J Waldron *The Law* (Routledge London 1990) 147 (arguing that 'courts can perform a useful function in a democracy of initiating and orchestrating public debate'); JAG Griffith *The Politics of the Judiciary* (5th edn Fontana Press London 1997) 290–1; JA Jolowicz *On Civil Procedure* (CUP Cambridge 2000) 70–3, 80. Cf C Passmore 'Implied Undertakings: Some Reminders' (1996) 146 NLJ 1209, 1209–10.

[94] *R v Crozier* [1991] Crim LR 138.

violence 'decisively' outweighs the public interest in preserving patient confidentiality.[95] Equivalent reasoning easily could be extended to disclosed information in the hands of experts, assessors or lawyers.

Allowing document-recipients and their lawyers freedom to refer others' disclosed documents to public authorities would raise fears about abuse. References might be threatened as an improper bargaining tool, or made to damage or distract document-producers.[96] One possible safeguard to minimise this risk would be to require all document-recipients (parties, lawyers, experts or judges), before they transmit information voluntarily to others, to forewarn document-producers and any identifiable non-parties reasonably likely to be affected or concerned. Such a notice requirement would afford the latter opportunity to object and seek protective orders where good cause exists—or, where protective orders already stand, to oppose their modification.[97]

Facilitating governmental intrusion into citizens' private affairs by allowing public authorities to access disclosed information carries civil liberty implications. Official powers of examination and investigation already are extensive without additional bolstering from

[95] At 424. See also 415–6.

[96] Both *Matthews and Malek* 356 and *Miller* 491 oppose party references (and favour references by neutral judges only) for this reason. Some English judges view the 'leaking' of tax-related documents to the revenue as potentially an irresistible temptation for warring opponents, and even as reason for withholding disclosure of tax returns altogether: *News International plc v Clinger* (ChD 11 November 1996); *S v S* [1997] 1 WLR 1621, 1625.

[97] *Woolgar v CC of Sussex Police* [2000] 1 WLR 25 (CA) 36–7.

the courts.[98] In America, where R26(c) protective orders apply and no governmental entities or personnel are listed under them as approved document-recipients, judicial permission is required before parties can transmit information to any government agency.[99] Given the liberal freedom of information regime there, this precaution is a valuable safeguard. Generally, American judges require federal agencies to use their own investigative weapons where they possess them.[100] But they do grant discovery access to less well-equipped public bodies.[101] In England, Article 8(2) of the ECHR permits privacy interference where necessary (inter alia) in the interests of public safety or for preventing disorder or crime. Thus, Article 8(2) encapsulates the public interests in averting hazards and law enforcement noted above. So long as significant wrongdoing is implicated, then, it appears legitimate for courts to allow proper authorities (including governmental bodies) to access confidential disclosed information—at least, where they lack sufficient resources, knowledge or power to monitor wrongdoing effectively themselves.[102]

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[98] Authorities with statutory powers include the police, Serious Fraud Office, Inland Revenue, liquidators and company inspectors.

[99] *GAF Corp v Eastman Kodak Co*, 415 F Supp 129 (SDNY 1976); RD Joslin 'Confidentiality Orders in Complex Litigation' (1985) 4 Review of Litigation 109, 119.

[100] *GAF v Eastman Kodak*, 415 F Supp 129, 131–2 (SDNY 1976); *Martindell v IT&T Corp*, 594 F 2d 291 (2nd Cir 1979); D Levitt 'Keeping Secrets Secret' (1986) 13(1) Litigation 10, 13.

[101] *Wilk v American Medical Association*, 635 F 2d 1295 (7th Cir 1980).

[102] On the wider contemporary movement to render institutions more transparent and accountable, see J Gobert and M Punch 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2000) 63 MLR 25.

4 General publication of information concerning official conduct

The final two forms of reuse both entail general publication—that is, revelation of disclosed information to the public at large (usually via the news media), resulting in it entering the public domain and its confidentiality being destroyed. Because of the grave potential for harm, the competing interests in most cases would be likely to be finely balanced. Reuse may be controversial for other reasons too. Most document-producers could be expected to oppose publication reuse vigorously. Nevertheless, at least in certain circumstances, both the remaining forms of publication reuse may be legitimate. For practical purposes, the main issue would be how judges should exercise discretion so as to allow reuse where it is warranted, while preventing undue harm.

The first potentially legitimate form of publication reuse is the revelation of disclosed information concerning the operations of organs of government, or the conduct of those who perform political or public functions. This is a special, narrowly drawn category of general publication potentially warranted in the public interest. The key factors favouring such reuse are freedom of expression and freedom of information. Where litigation concerns alleged impropriety or incompetence in the workings of government or public administration, or misconduct by public authorities, ministers or office-holders within the scope of their employment, the public has a clear interest in being informed. The policy importance of safeguarding press freedom to publish, and the public's right to receive and scrutinise, information about significant political matters

is well articulated—both within the common law[103] and under Article 10(1) of the ECHR.[104]

Civil proceedings in which governmental agents are litigants (particularly defendants) differ from those exclusively between private parties.[105] Unlike the publicity principle attaching to disclosed documents read or referred to in open court, the public's interest in securing access to confidential disclosed information about official activity derives from the substance of the information rather than its role in judicial decision-making.[106] Whether or not such information is used during proceedings, public access to it still may be justifiable. Absent robust freedom of information laws,[107] when cases settle or full information is not deployed at trial, allowing publication may be the only mechanism for making sufficient information publicly available to facilitate properly informed debate. This argument applies equally well whether document-producers are government litigants or their (private) opponents. But where documents emanate from or are held by public authorities, an additional argument arises. In Lockean terms, such documents are community property, held on trust for the

[103] *Cox v Feeney* (1863) 4 F&F 13, 19, 176 ER 445, 448; *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115 (HL) 126; *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 205.

[104] *Lingens v Austria* Series A No 103, (1986) 8 EHRR 407, paras 41–2; *Goodwin v UK* Reports 1996-II, (1996) 22 EHRR 123, para 39; *De Haes and Gijsels v Belgium* Reports 1997-I, (1997) 25 EHRR 1, para 39.

[105] *Marcus (1983)* 41; *Friedenthal* 74, 99.

[106] *Marcus (1983)* 50.

[107] The FOIA is not scheduled to take full effect until 2005 (s 87(3)). Even then, the exclusions are widely drawn: Birkinshaw (n 77 above).

public good.[108] Hence, the same theoretical rationales underpinning freedom of information legislation and transparency in government also support reuse.

In America, publication reuse has been allowed in exceptional cases involving a strong public interest in the governmental misconduct alleged.[109] It is supported by courts[110] and leading commentators—even by some devotees of traditional notions of the judicial role.[111] Yet, caution is essential. As well as examining closely the nature of the information and its purported value to the community,[112] two competing considerations are key. The first is confidentiality. Unlike private entities, public bodies do not have personal privacy interests requiring judicial protection.[113] But an overriding interest in maintaining confidentiality still may arise where publication would cause unwarranted harm—for example, if documents impinge upon national security, the safety of informants,

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[108] J Locke *Two Treatises of Government* (M Goldie ed, Everyman London 1993) 180–1, 190; *Stinchcombe v R* (1991) 3 SCR 326, 333; (1992) 1 WWR 97, 102 (SCC). See also JW Harris *Property and Justice* (Clarendon Press Oxford 1996) 106–9, 348–50.

[109] *In re Halkin*, 598 F 2d 176 (DC Cir 1979) (covert CIA surveillance of anti-Vietnam war protestors); *Krause v Rhodes* 671 F 2d 212 (6th Cir 1982) cert denied 459 US 823, 103 S Ct 54 (1982) (shooting of university students during riots).

[110] *Pansy v Borough of Stroudsburg*, 23 F 3d 772, 785–6, 791 (3rd Cir 1994); *Mullins v City of Griffin*, 886 F Supp 21, 22–3 (ND Ga 1995).

[111] *Marcus (1983)* 41, 51; *Friedenthal* 74–5. See also L Doggett and MJ Mucchetti 'Public Access to Public Courts: Discouraging Secrecy in the Public Interest' (1991) 69 Texas L Rev 643, 644, 652; *Doré* 369.

[112] *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 177.

[113] *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 (HL). See also *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL) (neither local authorities nor central government can sue for defamation, as it is of the 'highest importance' that public bodies should be open to uninhibited public criticism).

or other pressing public policy concerns;[114] or if they contain others' valuable secrets.[115] As under freedom of information legislation, certain exclusions would be required. Second, publication may prejudice the fairness of proceedings—for example, by deterring access to courts or changing settlement leverages where private parties fear that their information may become public; or through inaccurate or selective reporting or 'trial by media'.[116] To minimise the latter risks, judges perhaps could fashion protective orders to keep particularly sensitive or unfairly prejudicial documents (or extracts) from general consumption, or direct that approved summaries only be distributed.

Many difficult issues surround this form of reuse. One is defining what entities should count as 'public'. Under English law the distinction between 'private' and 'public' bodies is not at all clear cut. With the breakdown of the public–private divide through privatisation and private provision of public services, the sphere within which actual governmental conduct affects the community is shrinking. Meanwhile, the activities of large private enterprises (corporations

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[114] Applicable here would be such grounds as those justifying excluding evidence under the public interest immunity doctrine: *Cross and Tapper* ch 11; *Phipson* ch 24.

[115] eg *In re 'Agent Orange' Prod Liab Litig*, 98 FRD 539 (EDNY 1983). The US government acceded to public release of most information directed by the court, but not veterans' medical records, confidential business information or trade secrets. See SA Scheindlin 'Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multidistrict Class Action Litigation' (1986) 52 Brooklyn L Rev 397, 403, n 19.

[116] *In re San Juan Star Co*, 662 F 2d 108 (1st Cir 1981); JB Weinstein *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (Northwestern UP Evanston 1995) 66; D Luban 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown LJ 2619, 2658.

and industries), quasi-public in their nature or effects, may well implicate substantial public interest concerns.[117] The FOIA definition of 'public authority'[118] offers a helpful starting point. But whether courts should allow release of disclosed materials outside the situations covered by that Act—or of materials that could be subject to FOIA requests—also are contentious issues. In the public interest immunity context, modern courts have rejected governmental claims that judges necessarily lack competence to strike a correct balance.[119] As neutral gatekeepers they are uniquely situated to undertake fair and objective assessments of competing interests. Yet, where disclosed materials could be obtained via FOIA requests, it may be thought preferable for the specialist agencies concerned to be the arbiters of confidentiality. This conclusion was reached in the *Agent Orange* litigation. In order to assess the fairness of proposed settlement terms, Vietnam War veterans (non-representative plaintiff class members) sought from the court access to their medical records, that the US government had discovered but which were covered by a blanket protective order. Access was declined on the ground that the veterans could make freedom of information requests.[120]

A related issue is determining the appropriate mechanism through which disclosed information should become public. In many cases, the impetus for release would come from applications by

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[117] SM Angele 'Rule 26(c) Protective Orders and the First Amendment' (1980) 80 Columbia L Rev 1645, 1656. Cf *Marcus (1983)* 51.
[118] See text to n 77 above.
[119] *Conway v Rimmer* [1968] AC 910 (HL); *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 (HL).
[120] Scheindlin (n 115 above) 403, n 19.

special interest groups or the investigative press.[121] In monitoring proceedings involving public litigants, they may well perceive a need for greater information to be released than comes out during open court; or for opposing protective orders sought by the parties.[122] Under the reform framework suggested in this thesis, such non-parties would have standing to intervene for both purposes. Litigants too may wish to seek publication—particularly if they themselves are watchdog groups. Unlike publication purely for self-serving ends, document-recipients seeking publication of official documents on public interest grounds may well be justifiable. Careful scrutiny, however, would be essential.

Whether judges should have power (or a duty) *sua sponte* to disseminate information concerning official misconduct—as opposed, say, to calling for a public inquiry—is, for the reasons outlined in the previous section, a thorny issue. Even if one accepts that judges' proper role extends beyond resolving private disputes, the judicial job description has never included acting as an 'information clearinghouse'.[123] Unlike limited dissemination to proper authorities, allowing general publication does not obviously foster either the proper administration of justice or law enforcement—the two public

[121] As Lord Nicholls observed in *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL) 200 'investigative journalism' is as much a part of the 'vital role of the press and the media generally' as are reporting and commenting.

[122] Assuming they can learn of protective order applications. Notice may be a significant problem in this context: 365–367 below.

[123] *Miller* 487. See also *Wyeth Laboratories v US District Court*, 851 F 2d 321 (10th Cir 1988) (vacating trial judge's direction to create a courthouse litigation discovery library as a reference tool for other vaccine litigants and researchers, as being beyond judicial authority).

interests historically associated most closely with the judicial function. Nevertheless, it may serve other, equally significant public interests. As noted above, there is no implacable reason why judges should not champion wider social concerns. In America, special structural factors support judicially-sanctioned publication of official information. Federal judges are presidential appointees (ratified by the Senate). Under the US Constitution's system of checks and balances, they are mandated to challenge executive and legislative acts on behalf of the American people.[124] Despite these constitutional differences, English courts too are perhaps a natural forum for facilitating public access to official information, where necessary, to foster properly informed public debate. As noted above, the common law's commitment to free expression—particularly on political matters—has an impressive lineage.

5 General publication of information in the public interest

The final—and perhaps most radical—potentially legitimate form of reuse is general publication of disclosed information touching on any topic of pressing public concern. The previous category (governmental operations and official misconduct) is one particular instance where publication may be warranted in the public interest. But other exceptional situations also may arise where, on balance,

[124] Also, 'sunshine' laws in some states curb judges' discretion to enter protective orders in cases involving state or governmental operations: 344 below.

publishing confidential disclosed information is justified.[125] Historically, English courts appreciated this fact. In the *Distillers* case Talbot J examined at length whether the public interest in disseminating information about thalidomide overrode the need to safeguard disclosure. On balance, he held not. But, had he concluded otherwise, publication could have gone ahead.[126]

A critical task is to distinguish legitimate 'matters of public interest to the community' that ought to be made known, from mere 'matters in which the public may happen to be interested'.[127] With the former, circumstances may warrant destroying valuable confidentiality—depending on the information's cogency and significance to the community; whether alternative sources are available; the nature and extent of likely harm to document-producers or others; and whether steps could be taken to minimise that harm. With the latter, no sufficiently compelling need exists. In practice, differentiating between normative and descriptive senses of the term 'public interest' may not be straightforward.[128] The public appetite for

[125] The public interest exception under the law of confidence also goes beyond iniquity and misdeeds. See: *Francome v Mirror Group* [1984] 1 WLR 892 (CA) (noting the countervailing public interest in exposing both breaches of law and 'antisocial' conduct); *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA); R Wacks *Personal Information: Privacy and the Law* (Clarendon Press Oxford 1993) 68–75.

[126] 68 above.

[127] *Reynolds v Times Newspapers* [2001] 2 AC 127 (CA) 177. While the House of Lords affirmed the decision on different grounds, this point was not called into question.

[128] *Marcus (1991)* 479. See also *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, [2001] 76 ALJR 1 (HCA) 10; *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545 (CA) paras 11(vii) and 11(xii) (noting the difficulty of distinguishing between private and public information, and that disclosing personal information about public figures may be appropriate even where, in respect of private individuals, it would not).

political scandal—and the media's strong financial incentives to feed it by requesting access to disclosed materials—is but one area where the dividing line may be fuzzy. Committing it to the conscience of judges to decree what the public properly should know (or be interested in) also may seem undesirable.[129]

Nevertheless, in at least two broad contexts disclosed information may possess sufficient independent importance for the public to have a real interest in receiving it. The first (very broad) context embraces significant areas of public concern or debate (past or present), where publication materially would inform such debate, foster public awareness, or avoid misconceptions. A wide range of public interests potentially could support publication under this head. An American example is the *Agent Orange* litigation. Details of soldiers' exposure to toxic defoliants during the Vietnam War were revealed, given their significance to historians and the public and relevance to Congress in framing victim compensation legislation.[130] Other contemporary topics potentially falling under this head could include corporate cover-ups (for example, over environmental contamination), consumer

[129] *Gertz v Robert Welch, Inc* 418 US 323, 346; 94 S Ct 2997, 3010 (1974); RP Campbell 'The Protective Order in Products Liability Litigation: Safeguard or Misnomer?' (1990) 31 British Columbia L Rev 771, 801. See also JAG Griffith *The Politics of the Judiciary* (5th edn Fontana Press London 1997) 295 (arguing that appellate judges, by their education, training and careers at the bar, acquire a 'strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest' (italicised in source)), 336 (arguing that judges are not politically 'neutral', that they support existing power structures, and that their conception of the 'public interest' is too narrow adequately to embrace minority interests). Cf P Devlin 'Justice, Government and Politics' (1978) 41 MLR 501, 505 ff.

[130] Scheindlin (n 115 above) 410.

scams, stem cell research, genetic modification of foodstuffs, cellphone radiation and livestock welfare.

The second (narrower) context is where information exposes subsisting dangers to public health or safety. Here, the public interest favouring reuse is clear—alerting people to potential threats to prevent (further) loss or injury. A leading American example is *Cipollone v Liggett Group, Inc*,[131] a highly publicised failure to warn action. Several large cigarette companies attempted to enlist the aid of legislators and medical experts in suppressing information about the health risks associated with smoking. Allowing publication, the first instance judge observed that

> Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. . . . It is inconceivable to this Court that under such circumstances the public interest is not a vital factor to be considered in determining whether a court should be a party to that concealment.[132]

Several American states have enacted so-called 'sunshine' statutes or rules.[133] Inter alia, these prohibit protective orders having the

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[131] 113 FRD 86 (DNJ 1986) aff'd 822 F 2d 335 (3rd Cir 1987) cert denied 484 US 976, 108 S Ct 487 (1987).

[132] At 87.

[133] The terminology derives from Brandeis J, quoted in PH Corboy 'Court Secrecy: The Closed Circle and the Public Interest' (1991) 3(1) Maryland J Contemporary Legal Issues 1, 23: 'Sunlight is said to be the best of disinfectants'. See eg: Florida Sunshine in Litigation Act, Fla Stat Ann §69.081 (1990); Texas Rule of Civil Procedure 76a (1990). Many provisions also bar orders precluding publication of governmental information. See generally: *Miller* 442–3; Doggett and Mucchetti (n 111 above) 643–89; RA Rosen 'Protective Orders and Confidentiality Agreements: New Developments in State and Federal Courts' in *Civil Practice and Litigation in Federal and State Courts* (8th edn ALI-ABA Resource Materials Philadelphia 1998) 5–9; *Doré* 310–4; *Friedenthal* 83–5.

purpose or effect of concealing hazards likely to be injurious to general public health or safety. Discovered materials concerning such hazards—even unfiled, unused documents—are rendered publicly accessible.[134] Sunshine provisions curtailing judicial discretion reflect a perception that protective orders sometimes have delayed dangers coming to light—in part, because courts 'so ordered' stipulated party confidentiality agreements without careful scrutiny.[135] Traditionally, private litigants (and their advisers) have not had to take account of public safety in negotiating secrecy agreements. Their incentives for concealing information (and precluding sharing) may be substantial.

Critics of sunshine laws have stressed the lack of empirical evidence that vital information has been suppressed in the past, resulting in serious harm.[136] Given that the same lack of evidence equally well might suggest that suppression has been highly effective, such arguments are inconclusive at best. To date, attempts to introduce a federal 'sunshine in litigation' statute have failed. Yet, opponents' objections to such laws are not directed against publication per se. They simply favour judges retaining full common law

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[134] Normally the 'judicial records' doctrine (defining what litigation materials are public) covers only materials filed in court: *Nixon v Warner Communications, Inc*, 435 US 589, 598; 98 S Ct 1306, 1312 (1978). Despite a doctrinal split following *Seattle Times v Rhinehart*, 467 US 20, 104 S Ct 2199 (1984), it now seems settled that there is no general public 'right of access' (constitutional or common law) to unfiled discovery: *Press-Enterprise Co v Superior Court*, 478 US 1, 8; 106 S Ct 2735, 2740 (1986). See: AE Cohen 'Access to Pretrial Documents Under the First Amendment' (1984) 84 Columbia L Rev 1813, 1814; *Marcus (1991)* 474; *Haydock and Herr* 1:80; *Doré* 321. See also 130, n 54 above.

[135] Corboy (n 133 above) 5–8; JL Gilbert *et al* 'The Price of Silence' [1994] Trial 17; HJ Reske 'Secrecy Orders at Issue' (1994) 80 American Bar Association J 32; Luban (n 116 above) 2650.

[136] *Miller* 477–8, 480–2; *Marcus (1991)* 464; *Friedenthal* 88–91, *Doré* 301–2.

discretion to authorise publication where (and insofar as) the balance of public interest warrants—in preference to legislating a limited public *right* of access to private information.[137]

There is merit in this aspect of the critics' position. In supplanting the balancing approach by introducing a presumptive public right of access, the more extreme sunshine provisions foreclose the crafting of nuanced protective orders—such as releasing only redacted versions of documents or agreed summaries. Such orders could serve to protect document-producers' legitimate interests (for example, by keeping technical design details from trade competitors) while still achieving the aim of averting possible danger to the general public. Banning protective orders that suppress evidence of public hazards—and perhaps ethically obliging lawyers and experts to draw such evidence to the court's attention[138]—could be beneficial (albeit raising similar issues as identified in the previous section). Avoiding the creation of a presumptive public access 'right' would comport with traditional English jurisprudence on publishing confidential information in the public interest, as outlined already.

Reforming subsequent use law by allowing publication could generate problems. First, most document-producers would be likely to

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[137] See eg *Chicago-Tribune Co v Bridgestone/Firestone, Inc*, 236 F 3d 1304 (11th Cir 2001) allowing newspapers to intervene to seek access to sealed court records following settlement of vehicle roll-over claims, but denying any public 'right' of access. The intense media scrutiny in this case reflects suspicions that a series of confidential settlement agreements have suppressed evidence of tyre tread defects linked to over 150 fatalities.

[138] As advocated by M Brindle and G Dehn 'Confidence, Public Interest and the Lawyer' in R Cranston (ed) *Legal Ethics and Professional Responsibility* (Clarendon Press Oxford 1995) 122.

object, necessitating contested protective order hearings. Procedurally, this could prove burdensome. Where public hazards are alleged, judges may not be equipped—institutionally or technically—to discern whether publication is appropriate. Evaluating complex data or theories may require scientific or medical expertise.[139] Thus, if publication is sought pre-trial or after settlement, courts may face three unpalatable choices: (a) undertaking expensive mini-trials to prejudge whether allegations are well founded;[140] (b) allowing publication and risking substantial (perhaps irreparable) damage to defendants should allegations ultimately prove false;[141] or (c) refusing publication and bearing moral blame for any further losses or injuries. English courts already handle similar issues in relation to interim injunctions—particularly where one side will suffer unrecompensable loss whatever the outcome.[142] Short of general publication, other options are possible. Judges could direct disclosure only to the proper authorities (as in the *Anderson v Cryovac* case), delay publication until the facts can be determined with reasonable accuracy, or order publication of agreed summaries or press notices only. Under a flexible protective order regime, publication in the public interest need not be all-or-nothing. Given the obvious risk of substantial harm, a high showing of relevance, necessity and importance should be expected, whatever order is made.

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[139] AR Miller 'Private Lives or Public Access?' (1991) 77 American Bar Association J 64, 68; *Marcus (1991)* 481.

[140] *Doré* 369. On defendants' burden of proof difficulties, see Rosen (n 133 above) 13 n 13.

[141] *Miller* 470–1.

[142] AAS Zuckerman 'Interlocutory Remedies in Quest of Procedural Fairness' (1993) 56 MLR 325, 327–8.

Second, tensions may arise where litigants agree confidentiality terms. As Chapter 7 noted,[143] American judges commonly authorise stipulated 'umbrella' protective orders. Under these, document-producers themselves designate which documents are covered (subject to challenges from their opponents). Such orders relieve courts of the burden of document-by-document adjudication, enhancing efficiency and minimising disputes.[144] They extricate judges and litigants from having to litigate confidentiality where no party wishes to do so.[145] Yet, stipulated orders are inherently problematic—especially where proceedings have a public interest aspect. Party over-designation of materials as 'confidential' is a significant drawback.[146] Theoretically, umbrella orders dispense temporarily with the need to show good cause. Yet, in practice, so long as document-recipients can use protected information themselves for trial or settlement, few will have any incentive to question or contest their opponents' confidentiality designations. Where it is obvious from parties' identities or the pleadings that litigation is invested with a public aspect, news media or other public representatives may intervene to request access. In less obvious cases,

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[143] 274 above.

[144] *In re Alexander Grant & Co Litig*, 820 F 2d 352 (11th Cir 1987); *Poliquin v Garden Way, Inc*, 989 F 2d 527, 535 (1st Cir 1993); *Doré* 337.

[145] *Doré* 339. Although, umbrella protective orders simply may postpone, rather than eliminate, the need for courts to scrutinise documents closely, thereby delaying litigation: *John Does I-IV v Yogi*, 110 FRD 629, 632 (DDC 1986); *MCL3* 67. Cf *Miller* 502.

[146] *Marcus (1983)* 11; FH Hare Jr, JL Gilbert and SA Ollanik *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press Washington DC 1994) 152; *MCL3* 67. See eg: *AT&T v MCI Communications Corp*, 695 F 2d 594 (7th Cir 1978) cert denied, 440 US 971, 99 S Ct 1533 (1979).

unless judges themselves instigate reviews, disclosure impacting upon important public interest concerns could remain shielded by protective orders without any judicial scrutiny or justification.[147]

Were the CPR 31.22 rule to be reformed as suggested herein, courts should perhaps bear an independent duty to inquire into good cause, party attitudes notwithstanding. Moreover, protective orders banning reuse in the public interest either should be unlawful or subject to judicial approval and modification.[148] Expecting judges to initiate public-interest-based inquiries into publishing disclosed materials—especially where litigants are happy to conduct disclosure or settle on confidentiality terms—underscores the challenge that reforming the law potentially poses to traditional, party-centred, dispute resolution conceptions of civil proceedings. Where adversaries reach agreements acceptable to all sides, and no third parties intervene, English judges may consider it counterintuitive to interfere—particularly given the CPR 1.1 emphases on saving expense, preventing delay and rationing systemic resources; and the modern assumption that fostering party co-operation and settlement should be prioritised.[149] Yet, imbuing courts with an overarching

[147] *Doré* 342; Hare *et al* (n 146 above) 55.

[148] *Miller* 492. See *Pansy v Borough of Stroudsburg*, 23 F 3d 772, 785 (3rd Cir 1994) criticising courts for rubberstamping party confidentiality stipulations 'without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders'.

[149] Cf OM Fiss 'Against Settlement' (1984) 93 Yale LJ 1073; M Galanter and M Cahill '"Most Cases Settle": Judicial Promotion and Regulation of Settlements' (1994) 46 Stanford L Rev 1339; J Resnik 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA L Rev 1471; D Luban 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown LJ 2619; *Doré* 287.

responsibility to safeguard the public interest is not a novel concept. Nor is it inapt in modern mass society. It is integral to dispensing justice properly for and on behalf of the community.

Recently, in *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 02, [2002] 1 All ER 842 (CA) English judges did look beyond the parties' agreement that disclosure confidentiality should be maintained to consider wider interests. With the document-recipient's concurrence, the document-producer sought an order under CPR 31.22(2) to continue protection over a highly sensitive disclosed document mentioned in open court during patent revocation proceedings. At first instance, Laddie J refused the order of his own motion. In his view, the document-producer had failed to show clear 'necessity for secrecy' sufficient to outweigh the publicity principle (which is particularly strong in patent litigation, such litigation being of 'general public concern').[150] On appeal, a protective order was granted.[151] Crucially, however, the Court of Appeal stressed in its judgment (delivered by Buxton LJ) that '[i]n dealing with issues of confidentiality between the parties, the court must have in mind any "chilling" effect of an order upon the interests of third parties'.[152] As confidentiality obligations (whether under party agreements or court orders) incidentally affect non-party access to information and freedom of expression, courts cannot permit them, except in circumstances 'of real need', without raising 'serious questions' under

[150] At 849.
[151] For the reasons, see 254 above.
[152] At 851.

Article 10 of the ECHR.[153] Moreover, Buxton LJ continued, '[s]imple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document'.[154]

D CONCLUSION

As the foregoing analysis shows, contrary to the modern presumption against subsequent use enshrined in CPR 31.22(1), the universe of potentially legitimate forms of disclosure reuse is expansive. Up to five generic categories of reuse can be identified that may be legitimate, depending on the balance of competing factors at stake in given instances. By comparison, the class of inherently improper forms of reuse appears decidedly sparse.

Unlike the current, automatic presumption against subsequent use, the balancing approach and harm principle advocated in this thesis together constitute a viable analytical compass for traversing this area of law successfully, whatever novel situations future cases may throw up. As well as differentiating between inherently proper and improper forms of reuse in a theoretically defensible way, using these tools would allow judges to fashion (or parties to negotiate) subtle, case-specific protective orders where limited reuse is desirable

[153] At 847.
[154] At 851.

but valuable interests warrant some measure of confidentiality preservation.

In addition to providing concrete evidence to support the reforms recommended in this thesis, examining the seven generic forms of reuse canvassed above has generated valuable insights into how the major competing interests for and against disclosure reuse counterbalance one another in different situations. Also, it has highlighted a number of practical problems and issues relevant to reforming the law. These raise the third of the three fundamental questions of principle noted at the outset of Chapter 7—namely, what procedural choices might prove most efficacious for facilitating legitimate forms of subsequent use, while precluding illegitimate ones, all in a procedurally efficient and workable manner. This question will be considered in the course of the concluding chapter.

CHAPTER 9—CONCLUSION: TOWARDS A MODEL FOR PROCEDURAL REFORM

A INTRODUCTION

This thesis has sought to achieve two primary goals. The first, attempted in Part I, has been to demonstrate that the current English rule governing subsequent use, as enshrined in CPR 31.22, is fundamentally flawed, both in theoretical terms and in terms of its practical operation; the second, addressed in Part II, has been to generate a normative and procedural framework for its reform.

In respect of the first goal, Part I showed that the modern blanket, presumptive rule against subsequent use of disclosed documents outside the purpose of the proceedings in which they are disclosed is inherently unsound.[1] Historical analysis in Chapter 2 revealed that presumptively categorising all forms of subsequent use beyond the original litigation as 'improper' contradicts traditional authority. It also conflicts with first principles, as Chapters 7 and 8 indicated. By losing sight of the true *telos* of the law governing subsequent use—namely, to prevent unwarranted harm caused through the violation of valuable confidentiality-dependent rights and interests—the modern rule has exceeded its proper boundaries, unjustifiably barring legitimate and illegitimate forms of reuse alike. Close examination in Chapters 3–5 of the three rationales

[1] For a more detailed summary of the main conclusions from Part I, see 260–262 above.

commonly said to justify the modern rule (candour, confidentiality and compulsion) showed that none of these is adequate to the task, either alone or in combination. Again, as Chapters 7 and 8 demonstrated, a far wider and more subtle range of competing interests and factors is at stake than the existing rule and its rationales are capable of contemplating, much less balancing. Furthermore, as Chapter 6 revealed, the three recognised exceptions to the general rule in CPR 31.22(1)—including the rhetorically broad, but pragmatically restrictive, judicial discretion to allow subsequent use—are too narrow, unprincipled and unpredictable to compensate for the law's deficiencies, even at a practical level.

In respect of the second goal, Part II returned to first principles to derive a theoretically defensible account of the proper purposes and parameters of the rule governing subsequent use. It argued that the law should be reoriented around two central norms—the harm principle and the balancing approach. In addressing afresh the question of what materials should be covered, Chapter 7 concluded that only confidential disclosed information, the preservation of which is objectively valuable to avoid appreciable, legally relevant harm, should be eligible for protection under the rule governing subsequent use. Similarly, in considering when subsequent use should be curtailed, Chapter 7 concluded that only those forms of reuse likely further to undermine subsisting, valuable confidentiality (beyond the damage inflicted during the original proceedings), and thereby to trigger unwarranted prejudice or harm, should be limited or precluded. In all cases, the determining factor should be where the balance of competing benefits, harms and interests lies. Chapter 8

outlined where that balance generally might be expected to fall in relation to seven paradigmatic categories of disclosure subsequent use. In doing so, it highlighted a number of issues relevant to procedural reform.

Having laid the foundations and set the framework for reform in Chapters 2–8, by uncovering the current law's deficiencies and identifying key precepts and principles that should govern the design of a new, theoretically defensible subsequent use rule regime, one important matter remains outstanding. That is the question of how a procedural system best might be structured to realise the reforms recommended in practice, in an efficient, workable and efficacious manner. In concluding the re-evaluation of English subsequent use law undertaken in this thesis, this chapter will explore briefly how such a procedural system could be constructed. As Chapter 7 noted, formulating and testing detailed reform strategies is a project for future work. However, drawing together the lessons learned in the previous chapters, it is possible at least to sketch in outline one potentially promising pathway towards reform.

Interestingly, no attempt seems to have been made to date to justify the existing rule against subsequent use on procedural efficiency grounds. Given the emphasis on minimising cost, complexity and delay under CPR 1.1, it is curious that the CPR drafters apparently carried over the modern rule into CPR 31.22 without considering whether a blanket presumption against reuse, coupled with vague exceptions, really is the most procedurally efficient or desirable option. The simple explanation may be that, until now,

no sustained attention has been given to exposing the weaknesses in the existing law (theoretical and procedural), or to generating plausible alternatives. The fact remains that the existing regime is not procedurally economical. The *Cobra* litigation is a striking example of its potential for injustice and waste.[2] Party consent aside, at present, every time a document-recipient wishes to reuse disclosed information outside the proceedings at hand—even in subsequent litigation situations now commonly approved by judges[3]—judicial permission must be sought and obtained. Even when the need for permission stems from a 'pure technicality',[4] or reuse would involve a breach of CPR 31.22(1) of 'the most technical nature', hearings still are required.[5] Uncertainties surrounding the meaning of the 'purpose of the proceedings' at hand compound the law's unpredictability, further fuelling the need for contested applications.[6] The challenge in reforming the law is to find a better alternative—one that would achieve more just outcomes than the current regime not only in principle, but also as a matter of practice by conserving procedural resources.

[2] 222–224 above.
[3] eg, reusing search order materials to sue third party wrongdoers; bringing related contempt proceedings; supporting parallel or complementary proceedings.
[4] The *Crest Homes* case 860.
[5] *WJ Morray Engineering Ltd v Cesare* (ChD 25 April 1997).
[6] *Gibbons* 303 ff.

B ONE MODEL FOR PROCEDURAL REFORM

As Chapter 7 intimated, it may be possible to fashion a suitable replacement subsequent use rule regime for England using American practice under R26(c) Fed R Civ P as a springboard.[7] Modifications to the American model would be essential; not least to compensate for the complex social, institutional, constitutional and other structural and attitudinal differences between the two jurisdictions. Attempts should be made to obviate certain drawbacks of the American federal approach, such as the inefficiency stemming from the timing of protective order applications, and problems associated with inadequate judicial scrutiny of umbrella protective orders and private confidentiality arrangements. Also, traditional English law elements—notably, the courts' holistic understanding of the concept of 'justice' (as extending beyond the four corners of the immediate proceedings), and the flexibility intrinsic to 19th century approaches to conceptualising 'proper' and 'improper' forms of reuse—should be reinstated.

Adopting this approach, and drawing together the principal findings and conclusions from the foregoing chapters, one possible model for procedural reform may be outlined briefly as follows.

1. The current general presumption against subsequent use of disclosed documents outside the proceedings in which they are

[7] American federal practice is outlined in ch 7 above.

disclosed should be abolished. Instead, the starting point should be that legitimate forms of subsequent use are permitted unless good cause justifies restricting or preventing them in given situations. Good cause should be recognised only in respect of eligible confidential disclosed information, where the specific form of reuse proposed would be likely to lead to unwarranted, legally relevant harm.[8]

2. Document-recipients should not have a 'right' to reuse others' confidential disclosed documents for legitimate subsequent purposes. Rather, parties should be required to designate in their lists of documents[9] any documents they believe on reasonable grounds to be eligible for protection against subsequent use. Such designations should be coupled with stamps or other appropriate inscriptions made on copies of the documents furnished to document-recipients.[10] If a document-recipient or third party (for example, a similarly-situated litigant, regulatory body or journalist) wishes to reuse designated documents for a legitimate purpose,[11] it should be required to give prior notice in writing to the document-producer. Notice also should be given to any identifiable non-party whose interests are likely to be affected or

[8] As these elements are defined in ch 7 above.
[9] CPR 31.10.
[10] Where disclosure proceeds without lists, an alternative method of designation (eg, an accompanying letter) may be appropriate. Stamping documents produced during inspection would be beneficial for the avoidance of doubt, and to notify non-parties (who have no access to disclosure lists) that eligibility claims have been made.
[11] Assuming such documents have not been read or referred to in open court.

implicated by reuse. Such notice should identify the documents (or categories of documents) concerned, and indicate the specific form, nature and extent of the reuse proposed.

3. Document-producers (or others notified) should have a certain time limit (say, 14 days from receiving notice or being deemed to have received it[12]) within which to object to the reuse proposed. Absent any objection, document-recipients should be free to reuse the documents for the stated purpose. If a document-producer objects, the parties should have a duty to confer in good faith in an attempt to agree upon reuse terms acceptable to all concerned. If agreement can be reached, the parties need not notify the court. If it cannot, then the document-producer should bear the onus of applying to court for a protective order. Again, unless such an application is made within a certain time limit (say, 21 days after receiving the initial notice, or any longer period consented to by the parties), the document-recipient should be free to reuse the documents in the manner proposed.

4. The appropriate mechanism for protecting eligible information from reuse likely to result in unwarranted harm (in the absence of private confidentiality agreements precluding subsequent use, to the extent that they are legally permitted[13]) should be court-issued protective orders. The initial burden should be on

[12] The deeming provisions applicable to the various methods of service listed in CPR 6.7 and CPR, PD 6 could be applied for this purpose.
[13] See point 11 below.

the protective order applicant (the document-producer, or any other party or non-party whose interests are implicated by the reuse proposed, and who wishes to oppose reuse) to make a particularised showing that the documents are eligible for protection. If eligibility cannot be established, reuse should be permitted.

5. If eligibility is established, the burden should shift to the party proposing subsequent use (the protective order opponent, being either the document-recipient or a third party who is interested in receiving or reusing the information) to demonstrate that the information is (or is likely to be) relevant and necessary to a legitimate form of reuse proposed. If these elements cannot be shown, reuse should be precluded. If they can be shown, then the court should balance the competing rights, interests and factors at stake, to determine whether reuse should be permitted or precluded; and, if permitted, subject to what restrictions (if any). In balancing, judges should take a broad view of the competing considerations potentially implicated, including the public interest and third party concerns where appropriate. Where ECHR rights clash—in particular, under Article 6(1), Article 8 and Article 10—courts should apply the proportionality principle in accordance with Convention jurisprudence and the HRA.[14]

[14] 139 n 82 above.

6. Protective orders should be narrowly tailored. They should involve the least possible restriction over legitimate subsequent use consonant with affording the level of protection needed in the circumstances to safeguard the overriding, confidentiality-dependent interests at stake.

7. Practice directions should be drawn up to assist judges in exercising their protective order discretion, and to help litigants and others to predict the likely outcomes and consequences of making or contesting protective order applications (and thereby to avoid them wherever possible). Inter alia, such directions should identify the major forms of reuse presumptively considered legitimate and illegitimate; the principal competing rights, interests and factors typically relevant to each; their tendency and relative generic weight; where the balance might be expected to fall in the normal course; and what sorts of factors might shift that balance in a particular case and in what direction.

8. Flexible guidelines also should indicate common sorts of restrictions or conditions that judges may wish to impose (or that parties may consider negotiating) when drawing up protective orders. The guidelines should articulate as a general policy that outright prevention of legitimate forms of subsequent use should be avoided whenever lesser restrictions would suffice. Inter alia, possible conditions may include limiting who may secure access to information; allowing different levels of protection for information of varying value or sensitivity; controlling further

dissemination and reproduction of reused documents; and requiring future recipients (particularly where sharing of disclosed documents with similarly-situated litigants is sought) to observe the same conditions.[15]

9. Document-producers who unreasonably over-designate documents as being eligible when they are not, who bring weak protective order applications, or who refuse to negotiate reasonable reuse terms, should be liable to costs sanctions (including wasted costs[16]). So too should document-recipients (or other would-be reusers) who unreasonably propose illegitimate or unjustifiable forms of reuse, who fail to accept reasonable reuse restrictions requested by document-producers, or who contest protective order applications without reasonable grounds.

10. In some cases, subsequent use requests may be virtually inevitable. Where multiple claims arise from a product defect or mass disaster, for example, requests for disclosure sharing by similarly-situated litigants may be easy to anticipate. Similarly, where disputes concern matters of pronounced public interest, or attract strong media attention even before disclosure takes place, requests for publication or revelation of information to the proper authorities may well be foreseeable in advance. In such cases, parties should be expected to discuss the issue of reuse

[15] See RA Rosen 'Protective Orders and Confidentiality Agreements: New Developments in State and Federal Courts' in *Civil Practice and Litigation in Federal and State Courts* (8th edn ALI-ABA Resource Materials Philadelphia 1998) 14.

[16] CPR 44.14(2)(b).

restrictions between themselves and raise it with the court at an early stage (such as at the directions conference). In this way, the matter could be addressed in a timely, orderly and efficient manner, taking account of the full range of competing interests at stake (to the extent known at that time).

11. To avoid the need for protective order applications and hearings downstream—especially in complex cases where sophisticated, detailed or multi-tiered confidentiality arrangements are desirable—parties should be permitted to enter into private confidentiality agreements governing disclosed information, either before disclosure takes place or as part of settlement.[17] However, it should be unlawful for such agreements to preclude either disclosure sharing with similarly-situated litigants,[18] or revelation of significant wrongdoing to the proper authorities. (Having said this, courts should have power to enter protective orders preventing such forms of reuse in exceptional cases if warranted.) Parties should be required to notify the court when they enter into private confidentiality agreements covering

[17] The term 'private confidentiality agreements' here encompasses only those agreements specifically designed to protect confidential information disclosed during or under the shadow of litigation, as described in ch 7 above (at 270 above). It is not meant to encompass agreements to keep information confidential more generally.

[18] In the absence of disclosure, it may be difficult to determine whether litigants who appear to be similarly-situated really are in fact so. Special defences, for example, may not be immediately obvious. This raises theoretical and practical issues that would need to be examined carefully in reforming the law.

disclosed information.[19] All such agreements (and, indeed, court-issued protective orders) should be subject to review, modification or vacation by the court where countervailing considerations require that reuse be allowed. But, in the interests of certainty, and to safeguard document-producers who disclose highly sensitive materials in good faith in reliance on protective orders or private confidentiality agreements, a heightened standard of showing should be required to justify any alterations.

12. Where an overriding public interest arises requiring that subsequent use be permitted (for example, to facilitate subsequent litigation use, notification of wrongdoing to the proper authorities, or publication of information on matters of public concern), judges should be able to modify or vacate private confidentiality agreements or protective orders either on their own initiative or following application. Applications should be permitted both from litigants and, in the court's discretion, from third party intervenors—including public interest watchdogs, the press, and anyone else with a bona fide interest in reuse.

[19] Where documents are exchanged under pre-action protocols (as increasingly seems likely to occur), the situation is complicated somewhat. Proceedings may or may not ensue. Thus, notifying the court about private confidentiality agreements may or may not be apt. Moreover, it is unclear whether documents so divulged are covered by CPR 31.22 or not. In principle, there seems no reason why protection under the *reformed* rule (either directly or by analogy) should not extend to such documents, assuming that pre-action protocols remain accepted as a legitimate, coercive component of English civil proceedings (a debatable issue). See generally SMC Gibbons 'Protecting Documents Disclosed Under Pre-action Protocols Against Subsequent Use' (2002) 21 CJQ 254.

C FURTHER EXAMINATION OF ISSUES RAISED

The procedural model outlined above illustrates one possible, very broad, framework for reforming the rule governing subsequent use. It would appear—on paper, at least—to be consistent with, and give practical meaning and effect to, the foundational norms and principles identified in this thesis. By seeking to balance competing rights and interests—in particular, those associated with privacy, freedom of expression and procedural fairness—it would seem to be compatible with the HRA. In obviating the need for hearings in every case where reuse is proposed, and encouraging the development of clear guidelines and party co-operation, it also would appear to offer (potentially) a more procedurally efficient and economical approach than the current regime—despite dramatically expanding the ambit of permitted forms of subsequent use. Clearly, the probable procedural impact of introducing such a model cannot be predicted with any accuracy at this stage. However, prima facie, it would seem to have many built-in advantages over the current regime.

While detailed analysis of the proposed model's constituent elements, possible permutations and projected consequences is beyond present parameters, it is worth touching upon certain aspects of it briefly before concluding this thesis.

The first such aspect is the proposal that anyone with a bona fide interest in subsequent use (whether in requesting, supporting or preventing it) should have standing to be heard in respect of protective order applications, and applications to modify or

vacate protective orders or private confidentiality agreements. This presupposes that non-parties would be able to find out that relevant documents have been disclosed, and (where they themselves do not seek reuse) that someone has sought to reuse them. In certain cases, gaining such knowledge should be relatively straightforward—for example, where disputes attract significant pre-trial publicity, or where litigant support groups, lawyers, regulators or other authorities actively monitor proceedings from an early stage. Otherwise, if protecting public and third party interests in the proper flow of information is to be taken seriously, then some mechanism would need to be devised to alert non-parties to the fact of protective orders, private confidentiality agreements, and reuse applications being made.

One limited option, noted in Chapter 8 above, might be to impose ethical duties on judges, lawyers and experts to disseminate information where appropriate. A more radical option, mooted recently in New York,[20] would be to maintain a publicly accessible list of disputes in which protective orders have been sought or ordered, their modification sought or ordered, or private confidentiality agreements entered into. In England, such a list perhaps could be kept on the Lord Chancellor's Department website or the court service website.[21] Introducing such a list would have privacy and resource-related implications. These would need to be considered

[20] EDNY Committee on Civil Litigation, Memorandum Concerning Judge Weinstein's Proposal for Administering Protective Orders, 1 June 2000 (unpublished).

[21] Already, the court service publishes on its website a list of current group litigation orders made in the Queen's Bench Division: <http://www.courtservice.gov.uk/notices/queens/GLO.htm>.

carefully. Detailed rules also would need to be drawn up specifying the form in which the list should appear (including fully searchable indexes and the like). Without clear rules, there is a danger that useful information could be obscured by the form in which it appears, resulting in non-party access in theory but not in reality. If designed correctly, kept up-to-date, and reviewed regularly by the press and other public watchdogs, such a list could serve a valuable purpose.[22]

Second, the suggestions that parties should identify putatively eligible documents in their disclosure lists and by the use of stamps, and that notice should be given before reuse takes place, both are original proposals. They are intended to save document-producers from having to seek wasteful (and unduly broad) prophylactic protective orders pre-disclosure, where no question of subsequent use ever may arise—as happens routinely in the USA.[23] Because protective orders entered post-disclosure and following notice may be narrowly tailored to the specific form(s) of reuse proposed, the need for later modification also should be minimised. Further incentives could be built into the system to encourage document-producers to focus on seeking the maximum protection for the smallest universe of truly sensitive documents—the 'crown jewels', as Rosen has put it.[24] As

[22] Weinstein anticipates that the press, public officials and investigators (eg, securities analysts doing their job carefully) would review such a list: SMC Gibbons, Notes of Interview with Hon Jack B Weinstein, Senior US District Judge EDNY (Brooklyn, 28 September 2000, unpublished).

[23] 276–277 above.

[24] Rosen (n 15 above) 12. According to commentators, some US attorneys automatically seek protective orders in every case where any potential for embarrassment or harm exists, however slight: FH Hare Jr, JL Gilbert and SA Ollanik *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* (ATLA Press Washington DC 1994) 162.

noted above, unreasonably over-designating documents as 'eligible' should sound in costs sanctions, as well as orders that parties submit corrected lists. It could be recognised as a factor from which judges who later hear protective order applications may infer that eligibility claims are weak.

Sometimes, locating affected non-parties in order to notify them may prove problematic. In such cases, judges perhaps should be able to authorise notice by alternative methods, or dispense with it entirely (after ascertaining that the reuse proposed is legitimate), in keeping with their general discretionary powers regarding service of proceedings.[25] This raises the related and important issue of what provision (if any) the law should make for third parties, where reuse takes place in ignorance of their interests to preserve confidentiality, and they suffer harm as a result. Placing a duty on judges to consider whether absent third party interests may be affected, coupled with the notice requirement on would-be subsequent users, should, it may be hoped, keep occasions of collateral damage down to a minimum.

Third, the timing of protective order applications is a key issue. In America, protective orders generally must be sought before discovery takes place; otherwise, document-producers have no protection against lawful reuse of confidential information.[26] In England, orders made pre-disclosure sometimes may be desirable—for

[25] CPR 6.8(1), CPR 6.9(1).
[26] 268 above.

example, where reuse is inevitable.[27] However, it would be more procedurally efficient (and equally as protective of relevant interests, assuming that document-recipients are not accorded any 'right' of reuse) to delay protective order applications until after disclosure. Then, the content of disclosure would be known, precise form(s) of reuse positively desired and put on the table, and parties could discuss possible reuse terms in an informed manner. Meaningful judicial scrutiny then could be given to the specific documents (or categories of documents) sought, in the light of the particular circumstances at hand. Thus, it would seem sensible to allow document-producers to seek protective orders on two occasions—pre-disclosure (rarely) and post-disclosure (in the normal course). To prevent English practice simply devolving to the American style pre-discovery 'safety-net' approach, courts could use guidelines and costs sanctions to discourage document-producers from bringing protective order applications pre-disclosure unnecessarily.

Fourth, the preference for narrowly tailored protective orders could generate procedural inefficiency in cases where various forms of reuse are sought over a period of time. Where those forms of reuse differ materially from one another (either in kind or as to the documents or parties concerned), a series of narrowly tailored orders may have to be obtained. Where modifying or extending existing

[27] Also, pre-disclosure exercise of the court's ordinary powers to control disclosure (eg, by limiting those who may access disclosed information in the original case, or preventing abuse) may be appropriate in certain cases. Such powers, being addressed to disclosure in the original proceedings, do not fall under the rubric of the rule governing subsequent use.

orders is inapt, this could entail duplicative applications and hearings. In practice, this possibility should not prove unduly burdensome. Cases involving multiple occasions of reuse should be relatively uncommon. In many, the prospect may well be foreseeable and the forms of reuse the same—for example, document sharing among similarly-situated claimants in the mass injury context. By requiring parties to draw the likelihood of multiple reuse requests to the court's attention at an early stage, the model outlined above would allow judges to frame protective orders more broadly in appropriate cases. Findings as to eligibility (or non-eligibility) of given documents also could be treated as conclusive in respect of all subsequent use requests made within the context of those proceedings.[28]

Fifth, placing the onus on document-producers (or affected third parties) to show 'good cause' for restricting reuse reverses the current burden. In doing so, it restores the English law's traditional orientation.[29] If historical authority and this thesis are correct that subsequent use is not 'improper' per se, then logically it follows that the persuasive burden should be borne by the party who wishes to prevent subsequent use.[30] Under the model proposed, the more protective the relief sought or presumptively legitimate the reuse proposed, the more persuasive the good cause showing should have

[28] In comparison to subsisting English and American practice, the model proposed certainly is no less procedurally economical. Under the existing English rule, every would-be reuser must seek judicial permission individually. Similarly, under R26(c) multiple protective order modification requests also generally would be required.

[29] *Tagg v The South Devon Railway Co* (1849) 12 Beav 151, 50 ER 1017.

[30] 226 above.

to be. Employing a sliding scale could make it harder for parties to predict outcomes, thereby encouraging more contested applications. Nevertheless, it would accord with the manner in which judicial discretion customarily is exercised in other contexts.[31] Were such an approach to be introduced, several matters would need to be worked through. These would include describing and defining more clearly the respective showings required from each party in different situations, and producing clear guidelines to structure the courts' discretion and use of the balancing approach.

Ensuring adequate and appropriate judicial scrutiny is the final—and perhaps most difficult—aspect of the proposed model warranting comment. Where disclosure is voluminous or complex, judges cannot hope to review every allegedly eligible document to ascertain whether good cause justifies preventing its reuse. As Chapter 7 observed, in the USA this has led to a practice of courts approving 'umbrella' protective orders (under which document-producers effectively decide which documents are confidential) without judicial scrutiny.[32] As Chapter 8 explained,[33]

[31] For example, similar fact evidence, improperly obtained evidence, and exclusion of prosecution evidence where its 'adverse effect' outweighs its probative value (Police and Criminal Evidence Act 1984, s 78(1)). See R Pattenden *Judicial Discretion and Criminal Litigation* (2nd edn Clarendon Press Oxford 1990) 232–43, 264–88; K Grevling 'Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act' (1997) 113 LQR 667, 679–84; *Phipson* 313–5, 753–6. In practice, these sliding scale approaches have been criticised for allowing unpredictability and arbitrariness: P Mirfield *Confessions* (Sweet & Maxwell London 1985) ch 5; P Mirfield *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press Oxford 1997) 141–4; *Cross and Tapper* 187–91, 49.

[32] 274 above.

[33] 348 above.

this practice is fraught with difficulty. Document-producers' over-designations, coupled with document-recipients' disinterest in challenging them, may well result in information being suppressed—including evidence of subsisting public hazards, significant misdeeds, or governmental corruption or incompetence. Thus, umbrella protective orders may entail an abdication of judicial duty—especially to safeguard the interests of third parties (including subsequent litigants) and the public. For these reasons in particular, American practice under R26(c) does not afford an attractive template for reforming the English rule in this regard.

A key impetus behind the umbrella protective order device in America is the absence of protection against lawful reuse except under R26(c). As protective orders typically are sought pre-discovery, and the ambit of discovery there still remains extremely wide, the end result is that far more documents get classified as confidential—for the purposes of any prospective form of reuse—than need be the case. The model proposed above for England would seek to overcome this difficulty by postponing most protective order applications until after disclosure. Then, proper judicial scrutiny could be given to the precise documents (or classes of documents) over which reuse is sought (and disputed). Designations in party disclosure lists of putatively 'eligible' documents would not, ipso facto, confer any entitlement on those documents to protection under the reformed rule. Thus, unlike party designations under American-style umbrella orders, introducing such a practice should not imply any abdication of judicial responsibility.

In certain (perhaps many) cases, the range of documents sought to be reused could prove extensive. Expecting judges to scrutinise every page of every document could place an intolerable, if not impossible, strain on judicial resources. In such cases, some alternative mechanism would have to be adopted if the model proposed above were to be procedurally viable. Various options might be explored. In some instances, appointing a judicial adjunct as alternative scrutineer might work (such as a managerial judge in the mass litigation context, or a party-funded special master where warranted). Developing strategies for the categorical review of documents (for example, by type or age),[34] sampling and related statistical techniques,[35] also may well prove beneficial—not just in this context, but to facilitate future judicial management of disclosure in highly complex cases more generally.[36]

The latter option necessarily would entail departing from a strict theoretical position that eligibility and good cause should be established in relation to every document individually. In principle, such a departure would not undermine the integrity of the reforms proposed in this thesis. However, in practice, judges may not perceive there to be any great distance between undertaking categorical reviews or sampling, and rubberstamping private confidentiality agreements or entering umbrella protective orders covering documents designated

[34] FH Hare Jr, JL Gilbert and WH ReMine *Confidentiality Orders* (John Wiley & Sons New York 1988) 56; J Tidmarsh and RH Trangsrud *Complex Litigation and the Adversary System* (Foundation Press New York 1998) 1149.
[35] C Tapper 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217, 241, 244.
[36] Tapper (n 35 above) 241.

as eligible in parties' lists of documents. Indeed, under the existing rule, English courts are perfectly comfortable with preventing subsequent use without any justification for it being shown. Reversing the law's current presumption would entail a significant cultural and attitudinal change. For judges who still adhere to traditional notions of their adjudicative function, it would involve a further conceptual shift in accepting a greater duty to champion third party and public interests. Meanwhile, umbrella-style orders may appear to judges to accord with CPR 1.1.

It may be possible to avoid such a practice from developing by educating English judges in advance about its drawbacks. As well as the strong theoretical objections noted above, pragmatically speaking, umbrella orders may not possess the labour-saving virtues that their American proponents assume.[37] In many cases, they simply postpone proper scrutiny, require additional administration (to deal with later objections, modifications, non-party intervention applications and the like), or require courts to oversee duplicative discovery exercises and associated disputes in other cases (where sharing is precluded). Meanwhile, their presence within the system diminishes the incentive on document-producers to agree terms. If, in spite of any such efforts made, a practice of issuing umbrella orders still were to evolve in England, it may be possible to inject some measure of non-party and public protection into it. For example, together with maintaining a publicly accessible list of proceedings wherein protective orders

[37] *Cipollone v Liggett Group, Inc*, 785 F 2d 1108 (3rd Cir 1986) cert denied 479 US 1043, 107 S Ct 907 (1987); *MCL3*. Cf Hare *et al* (n 34 above) 19, 55, 70.

have been made, modifications sought, or private confidentiality agreements entered into, all umbrella orders could be deemed to be subject to judicial modification or vacation in the interests of justice or in the public interest.[38] While imperfect, such a step at least might go some way towards ensuring that vital interests be not sacrificed for the sake of dubious economy gains. Similar benefits could be achieved through banning private confidentiality agreements from containing provisions that would preclude disclosure sharing or the revelation of information to proper authorities—as the model outlined above recommends.

D CONCLUDING REMARKS

The brief outline set out above of one possible model for reforming the subsequent use rule leaves a great many important matters either unaddressed or substantially undeveloped. Nevertheless, it serves to demonstrate what is, for present purposes, the fundamental point—namely, that it is possible to generate at least one alternative to the current CPR 31.22 regime that would appear to be both theoretically sound and procedurally efficacious. Thus, the proposals made in this thesis for reforming English law governing subsequent use of disclosed documents would appear to be both justifiable and

[38] This practice has been pioneered in the Eastern District of New York: JB Weinstein 'Secrecy and the Civil Justice System—Secrecy in Civil Trials: Some Tentative Views' (2000) 9 J Law & Policy 53, 58. Judge Weinstein vacated an umbrella order so expressed in the *Agent Orange* litigation: *In re 'Agent Orange' Prod Liab Litig (MDL No 381)*, 104 FRD 559 (EDNY 1985) aff'd 821 F 2d 139 (2nd Cir 1987) cert denied *sub nom Dow Chemical Co v Ryan*, 484 US 522, 108 S Ct 344 (1987).

desirable as a matter of principle, and viable and realistic as a matter of practice.

Certainly, if enacted, whatever its eventual content and structure, the model outlined above would not afford a perfect solution. No procedure ever could. Document-producers and affected non-parties still would have to incur litigation costs in order to defend their privacy and property rights. Resourceful lawyers doubtless would find ways to manipulate and distort the reformed rule, thereby serving their own and their clients' interests at the expense of others. Looking to the longer term, given the increasing prevalence of highly complex, multi-jurisdictional claims involving hundreds and even thousands of parties, millions of documents, and massive amounts of computerised data, the entire disclosure system soon may need to be reconstructed if such claims are to be rendered justiciable.

In the meantime, however, after all necessary testing, fine-tuning and embellishment, the reforms proposed herein—both theoretical and procedural—may well represent the best possible compromise between the competing principles, rights and interests at stake in the context of the law governing subsequent use of disclosed documents. They would fit reasonably comfortably within the wider disclosure scheme as it stands at present. They would not depart radically from current norms or procedural arrangements regulating the scope and role of disclosure. Nor would they require judges to step outside the proper limits of their judicial function. Reversing the current general presumption against allowing subsequent use would require a marked cultural and attitudinal shift. Yet, in the light of other contemporary

legal developments—most notably, the passage of the HRA, increased recognition of privacy rights, and growing judicial willingness to seek out and to safeguard wider public interest and public policy concerns—the time seems ripe for reform.

For all of the reasons set out in this thesis, reforming the law governing subsequent use of disclosed documents in civil proceedings, as enshrined in CPR 31.22, is a matter of prime importance. The current rule is fundamentally flawed, as the evidence and arguments contained herein have shown. For the sake of restoring rationality, coherence, predictability and economy to the law, reform is imperative. Justice and fairness demand no less.

APPENDIX A
CPR 31.22

Subsequent use of disclosed documents

31.22 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made –

(a) by a party; or

(b) by any person to whom the document belongs.

APPENDIX B
Rule 26(c) Fed R Civ P

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

APPENDIX C
ECHR, Art 6(1), Art 8, Art 10 (Sch I, HRA)

Article 6(1)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

BIBLIOGRAPHY

JOURNAL ARTICLES

Aleinikoff, TA 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943

Alexy, R 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294

Allison, JWF 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 CLJ 367

Alschuler, AW 'The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel' (1982) 54 U Colorado L Rev 67

Andrews, NH 'The Influence of Equity upon the Doctrine of Legal Professional Privilege' (1989) 105 LQR 608

Angele, SM 'Rule 26(c) Protective Orders and the First Amendment' (1980) 80 Columbia L Rev 1645

Anon Note 'Developments in the Law: Discovery' (1961) 74 Harvard L Rev 940

Anon Note 'Nonparty Access to Discovered Materials in the Federal Courts' (1981) 94 Harvard L Rev 1085

Anon Note 'Procedural History of the Agent Orange Product Liability Litigation' (1986) 52 Brooklyn L Rev 335

Anon Note 'Specifying the Procedures Required by Due Process: Toward Limits of the Use of Interest Balancing' (1975) 88 Harvard L Rev 1510

Anon Note 'The First Amendment Right to Disseminate Discovery Materials: In re Halkin' (1979) 92 Harvard L Rev 1550

Bailey, DL 'Implied Undertakings' [1994] Australian Law Institute J 692

Bamforth, N 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58 CLJ 159

Bayles, MD 'Principles for Legal Procedure' (1986) 5 Law & Philosophy 33

Bell, GB, Varner, CD and Gottschalk, HQ 'Automatic Disclosure in Discovery—The Rush to Reform' (1992) 27 Georgia L Rev 1

Birks, P 'Book Review of DA Wright, *The Remedial Constructive Trust*' (1999) 115 LQR 681

Bratvold, DL 'Protective Orders and the Use of Discovery Materials Following Seattle Times' (1986) 71 Minnesota L Rev 171

Brazil, WD 'The Adversary Character of Civil Discovery: A Critique and Proposals for Change' (1978) 31 Vanderbilt L Rev 1295

Brazil, WD 'Protecting the Confidentiality of Settlement Negotiations' (1988) Hastings LJ 955

Burbank, SB and Silberman, LJ 'Civil Procedure Reform in Comparative Context: The United States of America' (1997) 45 AJCL 675

Buxton, R 'The Human Rights Act and Private Law' (2000) 116 LQR 48

Campbell, RP 'Protective Orders and the Public Right of Access to Discovery' (1988) 11 J Products Liability 199

Campbell, RP 'The Protective Order in Products Liability Litigation: Safeguard or Misnomer?' (1990) 31 BC L Rev 771

Chayes, A 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard L Rev 1281

Christie, GC 'An Essay on Discretion' [1986] Duke LJ 747

Clouse, GR 'The Constitutional Right to Withhold Private Information' (1982) Northwestern UL Rev 536

Coffin, FM 'Judicial Balancing: The Protean Scales of Justice' (1988) 16 NYU L Rev 16

Cohen, AE 'Access to Pretrial Documents Under the First Amendment' (1984) 84 Columbia L Rev 1813

Collins, H 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396

Coon, CL 'Comment: Common Law or First Amendment Right of Access to Sealed Settlement Agreements' (1988) 54 J Air Law & Commerce 577

Corboy, PH 'Court Secrecy: The Closed Circle and the Public Interest' (1991) 3(1) Maryland J Contemporary Legal Issues 1

Cortese, AW Jr and Blaner, KL 'The Constitutional Limits of Public Access' (1991) 3(1) Maryland J Contemporary L Issues 25

Davis, HA 'Protective Orders Restricting Disclosure of Discovery in Federal Civil Proceedings' (1980) 56 Chicago-Kent L Rev 943

Dennis, I 'Instrumental Protection, Human Right of Functional Necessity? Reassessing the Privilege Against Self-incrimination' (1995) 52 CLJ 342

Devlin, P 'Justice, Government and Politics' (1978) 41 MLR 501

Dockray, MS 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 LQR 120

Doggett, L and Mucchetti, MJ 'Public Access to Public Courts: Discouraging Secrecy in the Public Interest' (1991) 69 Texas L Rev 643

Dore, M 'Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process' (1978) 14 New England L Rev 1

Doré, LK 'Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement' (1999) 74 Notre Dame L Rev 283

Eagles, I 'Disclosure of Materials Obtained on Discovery' (1984) 47 MLR 284

Einar Himma, K 'Judicial Discretion and the Concept of Law' (1999) 19 OJLS 71

Elliott, M 'Privacy, Confidentiality and Horizontality: The Case of the Celebrity Wedding Photos' (2001) 60 CLJ 231

Feldman, D 'Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) CLP 41

Fenwick, H and Phillipson, G 'Confidence and Privacy: A Re-examination' (1996) 55 CLJ 447

Fiss, OM 'Against Settlement' (1984) 93 Yale LJ 1073

Fiss, OM 'The Forms of Justice' (1979) 93 Harvard L Rev 1

FitzGerald, BT 'Sealed v Sealed: A Public Court System Going Secretly Private' (1990) J Law & Politics 381

Flanders, S 'Blind Umpires—A Response to Prof Resnik' (1984) 35 Hastings LJ 505

Fleming, TM 'Propriety and Extent of State Court Protective Orders Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation' (1991) 83 ALR (4^{th}) 987

Frankel, ME 'The Search for Truth: An Umpireal View' (1975) 123 U Pennsylvania L Rev 1031

Frankel, ME 'The Search for Truth Continued: More Disclosure, Less Privilege' (1982) 54 U Colorado L Rev 51

Friedenthal, JH 'Secrecy and Confidentiality in Civil Litigation: Discovery, Settlement Orders, and Consent Decrees' (2000) 9 J Law & Policy 67

Friedman, BN 'Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protection Order' (1985) 60 NYU L Rev 1137

Fuller, LL 'The Forms and Limits of Adjudication' (1978) 92 Harvard L Rev 353

Galanter, M and M Cahill, M '"Most Cases Settle": Judicial Promotion and Regulation of Settlements' (1994) 46 Stanford L Rev 1339

Gavison, R 'Privacy and the Limits of Law' (1980) 89 Yale LJ 421

Gibbons, SMC 'Subsequent Use of Documents Obtained Through Disclosure in Civil Proceedings—The "Purpose of the Proceedings" Test' (2001) 20 CJQ 303

Gibbons, SMC 'Protecting Documents Disclosed under Pre-action Protocols against Subsequent Use' (2002) 21 CJQ 254

Gilbert, J *et al* 'The Price of Silence' [1994] Trial 17

Gobert, J and Punch, M 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2000) 63 MLR 25

Gottlieb, JE 'The Paradox of Balancing Significant Interests' (1994) 45 Hastings LJ 825

Grevling, K 'Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act' (1997) 113 LQR 667

Guénégo, JS 'Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score' (1991) 60 Fordham L Rev 541

Hare, FH Jr and Gilbert, JL 'Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding' (1989) 12 American J Trial Advocacy 413

Hare, FH Jr, Gilbert, JL and Ellenberger, MS 'Confidentiality Orders in Products Liability Cases' (1989) 13 American J Trial Advocacy 597

Hazard, G 'An Historical Perspective on the Attorney-Client Privilege' (1978) 66 California L Rev 1061

Hazard, G 'Developments in the Law—Privileged Communications' (1985) 98 Harvard L Rev 1450

Hazard, GC Jr 'Reflections on Judge Weinstein's "Ethical Dilemmas in Mass Tort Litigation"' (1994) 88 Northwestern U L Rev 569

Henkin, L 'Infallibility Under Law: Constitutional Balancing' (1978) 78 Columbia L Rev 1022

Hickinbottom, GR 'Privilege on Discovery and Inspection of Documents: Part 2' (1987) 84 LS Gaz 3565

Hodson, S 'Procedure: Scope of Implied Undertaking' (1996) 18 EIPR D331

Hoffmann, L 'Bentham and Human Rights' (2001) 54 CLP 61

Hunt, M 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423

Issacharoff, S and Lowenstein, G 'Unintended Consequences of Mandatory Disclosure' (1995) 73 Texas L Rev 753

Jack, A 'Radical Surgery for Civil Procedure' (1993) 143 NLJ 891

Jacob, J 'Discovery and Disclosure of Documents' (1987) 6 CJQ 293

Jacob, J 'The Inherent Jurisdiction of the Court' (1970) 23 CLP 23

Jacob, J 'Safeguarding the Public Interest in English Civil Procedures' (1982) 1 CJQ 312

Jenkins, N 'Patent Actions in the United Kingdom: Release from Implied Undertaking on Discovery' [1992] EIPR 434

Jolowicz, JA 'Comparative Law and the Reform of Civil Procedure' (1988) 8 LS 1

Jolowicz, JA 'On the Nature and Purposes of Civil Procedural Law' (1990) 9 CJQ 262

Jolowicz, JA 'Some Twentieth Century Developments in Anglo-American Civil Procedure' (1978) 7 Anglo-American L Rev 163

Jones, G 'Restitution of Benefits Obtained in Breach of Another's Confidence' (1970) 86 LQR 463

Joseph, GP 'Federal Practice: Civil Rules Amendments' 13 March 2000, National LJ (USA) A19

Joslin, RD 'Confidentiality Orders in Complex Litigation' (1985) 4 Review of Litigation 109

Jowell, J 'The Legal Control of Administrative Discretion' [1973] PL 178

Kahn-Freund, O 'Comparative Law as an Academic Subject' (1966) 82 LQR 40

Kiernan, JS and Huttler, S 'More Public Access to Discovery Documents?'(1991) 18(1) Litigation 19

Kommers, DP 'German Constitutionalism: A Prolegomenon' (1991) 40 Emory LJ 837

Kötz, H 'Civil Litigation and the Public Interest' (1982) 1 CJQ 237

Krause, HD 'The Right to Privacy in Germany' [1965] Duke LJ 481

Krotoszynski, RJ Jr 'Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law' [1990] Duke LJ 1398

Larner, RC 'Modification of Protective Orders Entered Pursuant to Rule 26(c), Federal Rules of Civil Procedure' (1987) 85 ALR Fed 538 (1987 & 1996 supplement)

Lawyers for Civil Justice Task Force 'Court-Approved Confidentiality Orders: A Critical Analysis of Their Need' (1990) 57 Defense Counsel J 89

Levitt, D 'Keeping Secrets Secret' (1986) 13(1) Litigation 10

Lowe, NV 'Discovering Contempt' (1982) 1 CJQ 10

Luban, D 'Settlements and the Erosion of the Public Realm' (1995) 83 Georgetown LJ 2619

Marcus, RL 'Myth and Reality in Protective Order Litigation' (1983) 69 Cornell L Rev 1

Marcus, RL 'The Discovery Confidentiality Controversy' [1991] U Illinois L Rev 457

Marshall, G 'The Right to Privacy: A Sceptical View' (1975) 21 McGill LJ 243

Mashaw, JL 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston UL Rev 885

McFadden, P 'The Balancing Test' (1988) 29 Boston College L Rev 585

McHarg, A 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671

Miller, AR 'Confidentiality, Protective Orders, and Public Access to the Courts' (1991) 105 Harvard L Rev 427

Miller, AR 'Private Lives or Public Access?' (1991) (Aug) 77 American Bar Association J 64

Moreham, N 'Douglas and Others v Hello! Ltd—The Protection of Privacy in English Law' (2001) 64 MLR 767

Morrison, AB 'Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?' (1989) U Richmond L Rev 109

Mullinex, LS 'The Influence of History on Procedure: Volumes of Logic, Scant Pages of History' (1989) 50 Ohio State LJ 803

Mullinex, LS 'Mass Tort as Public Law Litigation: Paradigm Misplaced' (1994) 88 Northwestern UL Rev 579

Muñiz, J R-Toubes 'Legal Principles and Legal Theory' (1997) 10 Ratio Juris 267

Passmore, C 'Implied Undertakings: Some Reminders' (1996) 146 NLJ 1209

Phillipson, G and Fenwick, H 'Breach of Confidence as a Privacy Remedy in the Human Rights Era' (2000) 63 MLR 660

Posner, R 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 J Legal Studies 399

Pound, R 'A Survey of Social Interests' (1943) 57 Harvard L Rev 1

Prescott, P 'Improper Uses of Discovery' (1978) 94 LQR 488

Prosser, W 'Privacy' (1960) 48 California L Rev 383

Pugh-Thomas, A 'Discovery of Documents: The Implied Undertaking' (1988) 85(2) LS Gaz 27

Raz, J 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823

Raz, J 'Free Expression and Personal Identification' (1991) 11 OJLS 303

Raz, J 'Reasoning with Rules' (2001) 54 CLP 1

Redish, MH and Marshall, LC 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 Yale LJ 455

Rendall, DJ 'Protective Orders Prohibiting Dissemination of Discovered Information: The First Amendment and Good Cause' [1980] Duke LJ 766

Reske, HJ 'Secrecy Orders at Issue' (1994) 80 American Bar Association J 32

Resnik, J 'Managerial Judges' (1982) 96 Harvard L Rev 374

Resnik, J 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 UCLA L Rev 1471

Rheingold, PD 'The MER/29 Story – An Instance of Successful Mass Disaster Litigation' (1968) 56 California L Rev 116

Rheingold, PD 'Mass Disaster Litigation and the Use of Plaintiffs' Groups' (1977) 3(3) Litigation 18

Rheingold, PD 'The Development of Litigation Groups' (1982) 6 American J Trial Advocacy 1

Ricketson, S 'Confidential Information—A New Proprietary Interest? Part I' (1977) 11 Melbourne UL Rev 223

Ricketson, S 'Confidential Information—A New Proprietary Interest? Part II' (1978) 11 Melbourne UL Rev 289

Rifkind, SH 'Are We Asking Too Much of Our Courts?' (1976) 70 FRD 96

Rosenberg, D 'The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System' (1984) 97 Harvard L Rev 851

Rubin, EL 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 Harvard L Rev 1393

Saphire, RB 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection' (1978) U Pennsylvania LR 111

Scheindlin, SA 'Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multidistrict Class Action Litigation' (1986) 52 Brooklyn L Rev 397

Schultheis, N and Bryant, A 'Unnecessary Secrecy in Civil Litigation: Combating the Threat to Effective Self-Governance' (1991) 3(1) Maryland J Contemporary Legal Issues 49

Scott, IR 'Judge's Pre-reading and Public Access to Documents' (1998) 18 CJQ 275

Scott, IR 'Pre-Action Disclosure: Legislation and Protocols' (2001) 20 CJQ 213

Scott, KE 'Two Models of Civil Process' (1975) 27 Stanford L Rev 937

Sherman, EF and Kinnard, SO 'Federal Court Discovery in the 80s—Making the Rules Work' (1983) 95 FRD 245

Silberman, L 'Judicial Adjuncts Revisited—The Proliferation of Ad Hoc Procedure' (1989) U Pennsylvania L Rev 2131

Smith, DB 'Anti-Dissemination Orders in Product Liability Suits' (1982) 5 American J Trial Advocacy 507

Smith, WJ 'A Practical Approach to Rule 26(c) Protective Orders in Aviation Litigation' (1991) 57 J Air Law & Commerce 765

Stempel, JW 'Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"' (2001) 64 Law & Contemporary Problems 197

Stevens, LL 'Discovery of Documents in Civil Litigation: The Duties of Solicitor and Counsel—Part I' [1982] New Zealand LJ 401

Subrin, SN 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U Pennsylvania L Rev 909

Sugarman, IJ 'Coordinating Complex Discovery' (1988) 15 Litigation 41

Summers, RS 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974) 60 Cornell L Rev 1

Sunstein, CR 'Problems with Rules' (1995) 83 California L Rev 955

Tapper, C 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217

Tapper, C 'Prosecution and Privilege' (1997) 1 Intl J Evidence & Proof 1

Tapper, C 'Discovery in Modern Times: A Voyage Around the Common Law World' (1992) 67 Chicago-Kent L Rev 217

Thompson, GM 'Protective Orders: Sword and Shield in the War of Discovery' (1989) 12 American J Trial Advocacy 483

Thomson, JM 'Notes' (1982) 98 LQR 337

Tur, RS 'Litigation and the Consumer Interest; The Class Action and Beyond' (1982) 2 LS 135

Vaver, D '"Without Prejudice" Communications—Their Admissibility and Effect' (1974) 9 U British Columbia L Rev 85

Wacks, R 'The Poverty of "Privacy"' (1980) 96 LQR 73

Waddams, SM 'Judicial Discretion' (2001) 1 Oxford U Commonwealth LJ 59

Wade, HWR 'Horizons of Horizontality' (2000) 116 LQR 217

Warren, SD and Brandeis, LD 'The Right to Privacy' (1890) 4 Harvard L Rev 193

Weinstein, JB 'Ethical Dilemmas in Mass Tort Litigation' (1994) 88 Northwestern UL Rev 469

Weinstein, JB 'Secrecy and the Civil Justice System—Secrecy in Civil Trials: Some Tentative Views' (2000) 9 J Law & Policy 53

Westen, P 'The Empty Idea of Equality' (1982) 95 Harvard L Rev 537

Wilson, GL 'Seattle Times: What Effect on Discovery Sharing?' (1995) Wisconsin L Rev 1055

Yablon, CM 'Justifying the Judges' Hunch: An Essay on Discretion' (1990) 41 Hastings LJ 231

Zander, M 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor?' (1997) 16 CJQ 208

Zuckerman, AAS 'Legal Professional Privilege and the Ascertainment of Truth' (1990) 53 MLR 381

Zuckerman, AAS 'Interlocutory Remedies in Quest of Procedural Fairness' (1993) 56 MLR 325

Zuckerman, AAS 'Public Interest Immunity—A Matter of Prime Judicial Responsibility' (1994) 57 MLR 703

Zuckerman, AAS 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 OJLS 353

Zuckerman, AAS 'The Undertaking in Damages—Substantive and Procedural Dimensions' (1994) 53 CLJ 546

Zuckerman, AAS 'A Reform of Civil Procedure—Rationing Procedure Rather than Access to Justice' (1995) 22 J Law and Society 155

Zuckerman, AAS 'Legal Professional Privilege—The Cost of Absolutism' (1996) 112 LQR 535

Zuckerman, AAS 'Practice and Procedure' [1997] All ER Ann Rev 336

Zuckerman, AAS 'Dismissal for Delay—The Emergence of a New Philosophy of Procedure' (1998) 17 CJQ 223

Zuckerman, AAS 'Practice and Procedure' [1998] All ER Ann Rev 330

Zuckerman, AAS 'Practice and Procedure' [1999] All ER Ann Rev 273

Zuckerman, AAS 'Practice and Procedure' [2000] All ER Ann Rev 295

Zuckerman, AAS 'Dismissal for Disobedience of Peremptory Orders—An Imperative of Fair Trial' (2001) 20 CJQ 12

BOOKS

Alldridge, P and Brants, CH (eds) *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* Oxford: Hart Publishing, 2001

Andrews, N *Principles of Civil Procedure* London: Sweet & Maxwell, 1994

Aronson, M and Hunter, J *Litigation Evidence and Procedure* (5th edn) Sydney: Butterworths, 1995

Atiyah, PS *Pragmatism and Theory in English Law* London: Stevens & Sons, 1987

Auburn, J *Legal Professional Privilege: Law and Theory* Oxford: Hart Publishing, 2000

Ayckbourn, H *The Jurisdiction and Practice of the Supreme Court of Judicature* London: Wildy & Sons, 1874

Ayckbourn, H *The Practice of the High Court of Chancery* (6th edn) London: Wildy & Sons, 1858

Ayckbourn, TH and Ayckbourn H (eds) *The New Chancery Practice* (3rd edn) London: Henry Butterworth, 1849

Babcock, BA and Massaro, TM *Civil Procedure: Cases and Problems* Boston: Little, Brown & Co, 1997

Barak, A *Judicial Discretion* New Haven: Yale UP, 1989

Barton, C *An Historical Treatise of a Suit in Equity* London: W Clarke & Son, 1786

Bayles, MD *Procedural Justice: Allocating to Individuals* London: Kluwer Academic Publishers, 1990

Bean, D *Injunctions* (6th edn) London: Longman, 1994

Best, A *Evidence in Trials at Common Law by John Henry Wigmore: 2001–2 Cumulative Supplement* Gaithersburg: Aspen Law & Business, 2002

Best, WM *A Treatise on the Principles of Evidence* London: S Sweet, 1849

Birkinshaw, P *Freedom of Information: The Law, the Practice and the Ideal* (3rd edn) London: Butterworths, 2001

Blumoff, TY, Johns, MZ and Imwinkelried, EJ *Pretrial Discovery: The Development of Professional Judgment* Charlottesville: Michie Co, 1993

Bollinger, LC *The Tolerant Society* Oxford: OUP, 1986

Bowring, J (ed) *The Works of Jeremy Bentham, Published Under the Superintendence of his Executor, John Bowring* (11 vols) New York: Russell & Russell, 1962

Bray, E *The Principles and Practice of Discovery* (1st edn) London: Reeves & Turner, 1885

Buzzard, JH, May, R and Howard, MN *Phipson on Evidence* (13th edn) London: Sweet & Maxwell, 1982

Cairns, BC *Australian Civil Procedure* (4th edn) Sydney: LBC Information Services, 1996

Cappelletti, M *The Judicial Process in Comparative Perspective* Oxford: Clarendon Press, 1989

Casson, DB and Dennis, IH *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (21st edn) London: Stevens & Sons, 1975

Chadbourn, JH (rev ed) *Evidence in Trials at Common Law by John Henry Wigmore* vol 4, Boston: Little, Brown & Co, 1972

Chandran, P *A Guide to the Human Rights Act 1998* London: Butterworths, 1999

Clayton, R and Tomlinson, H *The Law of Human Rights* Oxford: OUP, 2000

Cohen, M (ed) *Ronald Dworkin and Contemporary Jurisprudence* London: Duckworth, 1984

Cooley, TM *A Treatise on the Law of Torts* (2nd edn) Chicago: Callaghan & Co, 1888

Coppel, J *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* Chichester: John Wiley & Sons, 1999

Cornish, WR *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th edn) London: Sweet & Maxwell, 1999

Corwin, ES (ed) *The Constitution of the United States of America, Analysis and Interpretation* Washington DC: Library of Congress, 1981

Cover, RM, Fiss, OM and Resnik, J *Procedure* Westbury: Foundation Press, 1988

Coyne, TA (ed) *Federal Rules of Civil Procedure* (2nd edn) Deerfield: Clark Boardman Callaghan, 1994– (with supplements)

Cross, R *Evidence* (5th edn) London: Butterworths, 1979

Crump, D, Dorsaneo III, WV, Chase, OG and Perschbacher, RR *Cases and Materials on Civil Procedure* (3rd edn) New York: Matthew Bender, 1998

Cullen, FT and Gilbert, KE *Reaffirming Rehabilitation* Cincinnati: Anderson Publishing, 1982

Cutler, J and Griffin, EF (eds) *Powell's The Principles and Practice of the Law of Evidence* (3rd edn) London: Butterworths, 1868

Dale, CCM and Clowes, W *Seton's Forms of Decrees, Judgments and Orders* (5th edn) London: Stevens & Sons, 1891

Damaška, MR *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* New Haven: Yale UP, 1986

Davis, KC *Discretionary Justice, A Preliminary Inquiry* Urbana: U Illinois Press, 1979

Day, JCFS *The Common Law Procedure Acts* London: Henry Sweet, 1861

Denning, AT *The Discipline of Law* London: Butterworths, 1979

Denning, AT *What Next in the Law* London: Butterworths, 1982

Dessem, RL *Pretrial Litigation: Law, Policy & Practice* (2nd edn) St Paul: West Publishing, 1996

Dessem, RL *Pretrial Litigation in a Nutshell* (2nd edn) St Paul: West Group, 1998

Devlin, P *The Judge* Oxford: OUP, 1979

Dicey, AV *Introduction to the Study of the Law of the Constitution* (10th edn) London: MacMillan Education, 1959 (repr 1985)

Dickens, C *Oliver Twist* Oxford: OUP, 1999

Dickson, B (ed) *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland* London: Sweet & Maxwell, 1997

Dickerson, TA *Class Actions: The Law of 50 States* New York: Law Journal Press, 2000

Dittfurth, DA *The Concepts and Methods of Federal Civil Procedure* Durham: Carolina Academic Press, 1999

Dombroff, MA *Discovery* New York: Kluwer Law Book Publishers, 1986 (with 1990 cumulative supplement)

Dworkin, RM *A Matter of Principle* Oxford: Clarendon Press, 1986

Dworkin, RM *Taking Rights Seriously* (rev edn) London: Duckworth, 1978

Ellis, E (ed) *The Principle of Proportionality in the Laws of Europe* Oxford: Hart Publishing, 1999

Emmerson, B and Ashworth, A *Human Rights and Criminal Justice* London: Sweet & Maxwell, 2001

Endicott, TAO *Vagueness in Law* Oxford: OUP, 2000

Fawcett, JES *The Application of the European Convention on Human Rights* Oxford: Clarendon Press, 1987

Federal Judicial Center *Manual for Complex Litigation, Third* St Paul: West Publishing, 1995

Feldman, D *Civil Liberties and Human Rights in England and Wales* (2nd edn) Oxford: Clarendon Press, 2000

Field, RA, Kaplan, B and Clermont, KM *Civil Procedure: Materials for a Basic Course* (7th edn) Westbury: Fountain Press, 1997

Finnis, JM *Natural Law and Natural Rights* Oxford: Clarendon Press, 1982

Francis, P *The New Common Law Procedure under the Procedure Acts of 1852 & 1854* London: William Maxwell, 1854

Frank, J *Courts on Trial: Myth and Reality in American Justice* New York: Antheneum, 1963 (originally published 1949)

Freer, RD and Perdue, WC *Civil Procedure: Cases, Materials & Questions* (2nd edn) Cincinnati: Anderson Publishing, 1997

Friedenthal, JH, Kane, MK and Miller, AR *Civil Procedure* (3rd edn) St Paul: West Group, 1999

Galligan, DJ *Discretionary Powers: A Legal Study of Official Discretion* Oxford: Clarendon Press, 1990

Galligan, DJ (ed) *Procedure* Aldershot: Dartmouth, 1992

Gee, S *Mareva Injunctions and Anton Piller Relief* London: Sweet & Maxwell, 1998

Gerlis, SM and Loughlin, P *Civil Procedure* London: Cavendish Publishing, 2001

Ghandhi, PR (ed) *Blackstone's International Human Rights Documents* (2nd edn) London: Blackstone Press, 2000

Gibbs, H (ed-in-chief) *Halsbury's Laws of Australia* vol 20, 'Practice and Procedure' Sydney: Butterworths, 1995–

Givens, RA *Manual of Federal Practice* (5th edn) vol 2, Charlottesville: Lexis Law Publishing, 1998 (and cumulative supplement 2000)

Glannon, JW *Civil Procedure: Examples and Explanations* (3rd edn) New York: Aspen Law & Business, 1997

Glendon, MA, Gordon, MW and Osakwe, C *Comparative Legal Traditions* (2nd edn) St Paul: West Publishing, 1994

Gould Publications, Inc *Federal Civil Procedure Handbook* Longwood, FL: Gould Publications, Inc, 1986–2000

Goulding, S *Odgers on Civil Court Actions* (24th edn) London: Sweet & Maxwell, 1996

Griffith, JAG *The Politics of the Judiciary* (5th edn) London: Fontana Press, 1997

Gurry, F *Breach of Confidence* Oxford: OUP, 1984

Hailsham, QH, (gen ed) *Halsbury's Laws of England* (4th edn) London: Butterworths, 1975 (and supplements)

Hand, GJ and Bentley, DJ (eds) *Radcliffe and Cross: The English Legal System* (6th edn) London: Butterworths, 1977

Handley, KR *Spencer Bower, Turner & Handley: The Doctrine of Res Judicata* (3rd edn) London: Butterworths, 1996

Hare, FH Jr, Gilbert, JL and Ollanik, SA *Full Disclosure: Combating Stonewalling and Other Discovery Abuses* Washington DC: ATLA Press, 1994

Hare, FH Jr, Gilbert, JL and ReMine, WH *Confidentiality Orders* New York: John Wiley & Sons, 1988

Hare, S (ed) *A Treatise on the Discovery of Evidence in the High Court of Justice* (2nd edn) London: Butterworths, 1876

Hare, T *A Treatise on the Discovery of Evidence, by Bill and Answer, in Equity* London: Henry Butterworth, 1836

Harris, DJ, O'Boyle, M and Warbrick, C *Law of the European Convention on Human Rights* London: Butterworths, 1995

Harris, JW *Property and Justice* Oxford: Clarendon Press, 1996

Harrison, WH and Leach, RH (eds) *Seton's Forms of Decrees in Equity and of Orders Connected With Them* (3rd edn) London: V&R Stevens & Sons and GS Norton, 1862

Hart, HLA *The Concept of Law* (2nd edn) Oxford: Clarendon Press, 1994

Haydock, RS and Herr, DF *Discovery Practice* (3rd edn) Gaithersburg: Aspen Law & Business, 2000

Haydock, RS and Herr, DF *Discovery: Theory, Practice, and Problems* Boston: Little, Brown & Co, 1983

Haydock, RS, Herr, DF and Stempel, JW *Fundamentals of Pretrial Litigation* (3rd edn) St Paul: West Publishing, 1994

Hazard, GC Jr *Research in Civil Procedure* New Haven: Walter E Meyer Research Institute of Law, 1963

Hazard, GC Jr and Taruffo, M *American Civil Procedure: An Introduction* New Haven: Yale UP, 1993

Headlam, TE (ed) *Daniell's The Practice of the High Court of Chancery* (2nd edn) London: V&R Stevens and GS Norton, 1845

Herr, DF *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* Boston: Little, Brown & Co, 1986

Hill, T *Autonomy and Self-respect* Cambridge: CUP, 1991

Hinde, R *The Modern Practice of the High Court of Chancery* London: His Majesty's Law Printers, 1785

Hodges, C *Multi-Party Actions* Oxford: OUP, 2001

Honoré, T *Making Law Bind: Essays Legal and Philosophical* Oxford: Clarendon Press, 1987

Howard, MN (gen ed) *Phipson on Evidence* (15th edn) London: Sweet & Maxwell, 2000

Howard, MN, Crane, P and Hochberg, DA *Phipson on Evidence* (14th edn) London: Sweet & Maxwell, 1990

Imwinkelried, EJ and Blumoff, TY (eds) *Pretrial Discovery: Strategy and Tactics* Deerfield: Callaghan & Co, 1986 (and 1988 cumulative supplement)

Ingpen, AR, Bloxam, FT and Garrett, HG *Seton's Forms of Judgments and Orders* (7th edn) London: Sweet & Maxwell/Ashford Press Publishing, 1912 (reprinted 1985)

Jacob, JIH *The Fabric of English Civil Justice* (The Hamlyn Lectures, 38th ser) London: Stevens & Sons, 1987

Jacobs, FG and White, RCA *The European Convention on Human Rights* (2nd edn) Oxford: Clarendon Press, 1996

Jaffe, LL *English and American Judges as Lawmakers* Oxford: Clarendon Press, 1969

James, F and Hazard, GC Jr *Civil Procedure* (3rd edn) Boston: Little, Brown & Co, 1985

James, F, Hazard, GC Jr and Leubsdorf, J *Civil Procedure* (4th edn) Boston: Little, Brown & Co, 1992

Janis, MW, Kay, RS and Bradley, AW *European Human Rights Law: Text and Materials* (2nd edn) Oxford: OUP, 2000

Jarman, H *The New Practice of the High Court of Chancery* (3rd edn) London: W Maxwell, 1864

Jay, R and Hamilton, A *Data Protection: Law and Practice* London: Sweet & Maxwell, 1999

Jolowicz, JA *On Civil Procedure* Cambridge: CUP, 2000

Kakalik, J *et al Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data* Santa Monica: RAND, 1998

Kaplan, LS *Complex Federal Litigation: An Attorney's Guide to Management and Trial* Colorado Springs: Shepard's/McGraw-Hill, 1993 (with 1997 cumulative supplement)

Keane, A *The Modern Law of Evidence* (5th edn) London: Butterworths, 2000

Kempees, P *A Systematic Guide to the Case-law of the European Court of Human Rights 1960-1994* vols I–III, The Hague: Martinus Nijhoff Publishers, 1996

Kerr, RM *The Common Law Procedure Act 1854 with Practical Notes: An Introduction* London: Butterworth, 1854

Kerr, WW *A Treatise on the Law of Discovery* London: William Maxwell & Son, 1870

Klonoff, RH *Class Actions and Other Multi-Party Litigation in a Nutshell* St Paul: West Group, 1999

Langan, PStJ and Henderson, LDJ *Civil Procedure* (3rd edn) London: Sweet & Maxwell, 1983

Leach, RH, Williams, FGA and May, HW *Seton's Forms of Decrees, Judgments, and Orders* (4th edn) London: Stevens & Sons, 1877

Levine, JB *Discovery: A Comparison between English and American Civil Discovery Law with Reform Proposals* Oxford: Clarendon Press, 1982

Ligertwood, A *Australian Evidence* (3rd edn) Sydney: Butterworths, 1998

Locke, J *Two Treatises of Government* (M Goldie, ed) London: Everyman, 1993

MacCormick, DN *Legal Reasoning and Legal Theory* (rev ed) Oxford: Clarendon Press, 1994

Macdonald, RStJ, Matscher, F and Petzold, H (eds) *The European System for the Protection of Human Rights* Dordrecht: Martinus Nijhoff Publishers, 1993

Marcus, RL, Redish, MH and Sherman, EF *Civil Procedure: A Modern Approach* St Paul: West Publishing, 1989 (and 1999 supplement)

Markesinis, BS (ed) *Protecting Privacy* Clifford Chance Lectures vol 4, Oxford: OUP, 1999

Marshall, EA (ed) *Gill: The Law of Arbitration* (4th edn) London: Sweet & Maxwell, 2001

Matthews, P and Malek, HM *Discovery* London: Sweet & Maxwell, 1992

Matthews, P and Malek, HM *Disclosure* (being the 2nd edn of *Discovery*) London: Sweet & Maxwell, 2001

Mauet, TA *Pretrial* (4th edn) Gaithersburg: Aspen Law & Business, 1999

McCrudden, C and Chambers, G *Individual Rights and the Law in Britain* Oxford: Clarendon Press, 1995

McNaughton, JT (rev ed) *Evidence in Trials at Common Law by John Henry Wigmore* vol 8, Boston: Little, Brown & Co, 1961

McNicol, SB *Law of Privilege* Sydney: The Law Book Co, 1992

Merrills, JG and Robertson, AH *Human Rights in Europe: A Study of the European Convention on Human Rights* (4th edn) Manchester: Manchester UP, 2001

Milmo, P and Rogers, WVH *Gatley on Libel and Slander* (9th edn) London: Sweet & Maxwell, 1998

Mirfield, P *Confessions* London: Sweet & Maxwell, 1985

Mirfield, P *Silence, Confessions and Improperly Obtained Evidence* Oxford: Clarendon Press, 1997

Moore, JW *Moore's Federal Practice* (Matthew Bender 3rd edn) vol 6, New York: Lexis Publishing, 2000

Moore, JW, Vestal, AD and Kurland, PB *Moore's Manual: Federal Practice and Procedure* vol 2, New York: Lexis Publishing, 2000

Morgan, GO *Chancery Acts & Orders* London: Wildy & Sons, 1858

Newland, J *The Practice of the High Court of Chancery* (3rd edn) London: Saunders & Benning, 1830

Newman, P (ed) *The New Palgrave Dictionary of Economics and the Law* vol 1, 'Discovery', London: MacMillan Reference, 1998

Niles, EI *Federal Civil Procedure* (3rd edn) Charlottesville: Matthew Bender & Co, 2000

O'Dowd, J *The New Practice of the Court of Chancery* London: Butterworths, 1852

O'Hare, J, Browne, K and Hill, RN *Civil Litigation* (9th edn) London: Sweet & Maxwell, 2000

Ough, RN and Flenley, W *The Mareva Injunction and Anton Piller Order: Practice and Precedents* (2nd edn) London: Butterworths, 1993

Parkin, M, Powell, M and Matthews, K *Economics* (3rd edn) Harrow: Addison Wesley Longman, 1997

Passmore, C *Privilege* Birmingham: CLT Professional Publishing, 1998

Pattenden, R *Judicial Discretion and Criminal Litigation* (2nd edn) Oxford: Clarendon Press, 1990

Peile, CJ *The Law and Practice of Discovery in the Supreme Court of Justice* London: Stevens & Haynes, 1883

Pemberton, LL *The Judgments and Orders of the Court of Appeal and High Court of Justice* London: Stevens & Haynes, 1876

Phillipps, SM *A Treatise on the Law of Evidence* (9th edn) London: Saunders & Benning, 1843

Phipson, SL *The Law of Evidence* London: Stevens & Haynes, 1892

Phipson, SL *The Principles of the Law of Evidence by the late WM Best* (12th edn) London: Sweet & Maxwell, Ltd, 1922

Pickholz, MG and Schwab, DM *Federal Discovery in Complex Civil Cases: Antitrust, Securities, Energy* New York: Law Journal Seminars-Press, 1980

Platto, C (ed) *Pre-trial and Pre-hearing Procedures Worldwide* London: Graham & Trotman/International Bar Association, 1990

Pollock, CE *A Treatise on the Power of the Courts of Common Law to Compel the Production of Documents for Inspection* London: S Sweet, 1851

Rawls, J *A Theory of Justice* (rev edn) Oxford: OUP, 1999

Raz, J *The Morality of Freedom* Oxford: Clarendon Press, 1986

Redesdale, JM, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* London: W Owen, 1780

Reid, BC *Confidentiality and the Law* London: Waterlow Publishers, 1986

Rivero, J *Les Libertés Publiques* vol 2, 'Le Régime des Principales Libertés' (4th edn) Paris: Presses Universitaires de France, 1989

Robertson, D *Judicial Discretion in the House of Lords* Oxford: Clarendon Press, 1998

Ross, HP, Young, LO and McLane, A *Managing Discovery in Commercial and Business Litigation: Tools, Techniques and Strategies* Chicago: American Bar Association, 1993

Ross, RE *The Law of Discovery* London: Butterworth & Co, 1912

Sanders, A and Young, R *Criminal Justice* (2nd edn) London: Butterworths, 2000

Scott, IR (ed) *International Perspectives on Civil Justice* London: Sweet & Maxwell, 1990

Segal, D *Survey of the Literature on Discovery From 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* Washington DC: Federal Judicial Center, 1978

Seton, HW *Forms of Decrees in Equity* (1st edn) London: Saunders & Benning, 1830

Sichel, WS and Chance, W *The Law Relating to Interrogatories, Production, Inspection of Documents and Discovery* London: Stevens & Sons, 1883

Sime, S *A Practical Approach to Civil Procedure* (3rd edn) London: Blackstone Press, 1997

Sime, S *A Practical Approach to Civil Procedure* (4th edn) London: Blackstone Press, 2000

Simpson, RW *Civil Discovery and Depositions* (2nd edn) New York: Wiley Law Publications, 1994 (and 1998 cumulative supplement)

Simpson, SD, Bailey, DL and Evans, EK *Discovery and Interrogatories* Sydney: Butterworths, 1984

Sinclair, K *Sinclair on Federal Civil Practice* (3rd edn) New York: Practising Law Institute, 1999

Smith, JW *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill by John Mitford, Esq (the late Lord Redesdale)* (5th edn) London: V&R Stevens and GS Norton, 1847

Spence, G *The Equitable Jurisdiction of the Court of Chancery; Comprising its Rise, Progress, and Final Establishment* London: V&R Stevens and GS Norton, 1846

Starkie, T *A Practical Treatise on the Law of Evidence* London: J&WT Clarke, 1824, 1833

Stephen, J *Lush's Practice of the Superior Courts of Common Law at Westminster* (2nd edn) London: Butterworths, 1856

Stephen, HJ *New Commentaries on the Laws of England (Partly Founded on Blackstone)* London: Henry Butterworth, 1845

Stephen, JF *A Digest of the Law of Evidence* London: Macmillan & Co, 1876

Style, C and Hollander, C *Documentary Evidence* (6th edn) London: FT Law & Tax, 1997

Sutton, DStJ, Kendall, J and Gill, J (eds) *Russell on Arbitration* (21st edn) London: Sweet & Maxwell, 1997

Tapper, C *Computer Law* (4th edn) London: Longman, 1989

Tapper, C *Cross and Tapper on Evidence* (8th edn) London: Butterworths, 1995

Tapper, C *Cross and Tapper on Evidence* (9th edn) London: Butterworths, 1999

Tapper, C *Cross and Wilkins: Outline of the Law of Evidence* (6th edn) London: Butterworths, 1986

Taylor, JP *A Treatise on the Law of Evidence, as Administered in England and Ireland* London: A Maxwell & Son, 1848

Taylor, JP *A Treatise on the Law of Evidence, as Administered in England and Ireland* (6th edn) London: W Maxwell & Son, 1872

Taylor, JP *A Treatise on the Law of Evidence, as Administered in England and Ireland* (7th edn) London: A Maxwell & Son, 1878

Teply, LL and Whitten, RU *Cases and Problems on Civil Procedure: Basic and Advanced* Littleton: Rothman & Co, 1997

Thompson, CM (ed) *Cyclopedia of Federal Practice* (3rd edn) vol 7, 1992 rev, Wilmette: Callaghan & Co, 1992 (with 2000 cumulative supplement)

Tidmarsh, J and Trangsrud, RH *Complex Litigation and the Adversary System* New York: Foundation Press, 1998

Toulmin, SS *The Modern Practice in Chancery* London: S Sweet, 1853

Toulson, RG and Phipps, CM *Confidentiality* London: Sweet & Maxwell, 1996

Travers, TE (man ed) *Federal Procedure: Lawyers Edition* vol 10, Rochester: Lawyers Co-operative Publishing Co/San Francisco: Bancroft-Whitney Co, 1988

Tribe, LH *American Constitutional Law* (2nd edn) Mineola: Fountain Press, 1988

Twining, W *Theories of Evidence: Bentham and Wigmore* London: Weidenfeld & Nicolson, 1985

Twining, W and Miers, D *How to Do Things With Rules* (4th edn) London: Butterworths, 1999

van der Wolf, WJFM (ed) *Human Rights: Selected Documents* The Netherlands: Global Law Association/W Gaunt & Sons, 1994

van Dijk, P and van Hoof, GJH *Theory and Practice of the European Convention on Human Rights* (3rd edn) The Hague: Kluwer Law International, 1998

Wacks, R (ed) *Privacy* Aldershot: Dartmouth, 1993

Wacks, R *Personal Information: Privacy and the Law* Oxford: Clarendon Press, 1993

Waldron, J *The Law* London: Routledge, 1990

Watson, A *Legal Transplants: An Approach to Comparative Law* (2nd edn) Athens: U Georgia Press, 1993

Weinstein, JB *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* Evanston: Northwestern UP, 1995

Westen, P *Speaking of Equality* Princeton: Princeton UP, 1990

Westin, AF *Privacy and Freedom* London: Bodley Head, 1967

Wigram, J *Points in the Law of Discovery* Philadelphia: John S Littell (from the London edn), 1836

Wigram, J *Points in the Law of Discovery* (2nd edn) London: A Maxwell, 1840

Willging, TE, Shapard, J, Stienstra, D and Miletich, D *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases* Washington, DC: Federal Judicial Center, 1997

Wright, CA *Law of Federal Courts* (5th edn) St Paul: West Publishing, 1994

Yeazell, SC *From Medieval Group Litigation to the Modern Class Action* New Haven: Yale UP, 1988

Yeazell, SC *Civil Procedure* (5th edn) Gaithersburg: Aspen Law & Business, 2000

Yeazell, SC *Federal Rules of Civil Procedure with Selected Statutes—2000* Gaithersburg: Aspen Publishers, 2000

Zander, M *The State of Justice* London: Sweet & Maxwell, 2000

Zuckerman, AAS (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* Oxford: OUP, 1999

Zuckerman, AAS and Cranston, R (eds) *Reforming Civil Procedure: Essays on 'Access to Justice'* Oxford: Clarendon Press, 1995

ESSAYS IN BOOKS, TITLES IN SERIES

Andrews, NH 'Civil Procedure' in PBH Birks (ed) *English Private Law* vol 2, Oxford: OUP, 2000

Barendt, E 'Freedom of Speech in an Era of Mass Communication' in PBH Birks (ed) *Pressing Problems in the Law Volume 1: Criminal Justice and Human Rights* Oxford: OUP, 1995

Barendt, E 'Privacy as a Constitutional Right and Value' in P Birks (ed) *Privacy and Loyalty* Oxford: Clarendon Press, 1997

Bentham, J 'Principles of Judicial Procedure, with the Outlines of a Procedural Code' in J Bowring (ed) *The Works of Jeremy Bentham, Published Under the Superintendence of his Executor, John Bowring* vol 2, New York: Russell & Russell, 1962 (orig publ 1837)

Bentham, J 'Rationale of Judicial Evidence, Specially Applied to English Practice from the Manuscripts of Jeremy Bentham' in J Bowring (ed) *The Works of Jeremy Bentham, Published Under the Superintendence of his Executor, John Bowring* vol 6, New York: Russell & Russell, 1962 (orig publ 1827)

Brindle, M and Dehn, G 'Confidence, Public Interest and the Lawyer' in R Cranston (ed) *Legal Ethics and Professional Responsibility* Oxford: Clarendon Press, 1995

Cairns, BC (title ed) *Civil Procedure* vol 5 in JA Riordan (ed-in-chief) *The Laws of Australia* Melbourne: The Law Book Co, 1994–

Cane, P 'Consequences in Judicial Reasoning' in J Horder (ed) *Oxford Essays in Jurisprudence* 4th series, Oxford: OUP, 2000

Davies, O 'Self-incrimination, Fair Trials and the Pursuit of Corporate and Financial Wrongdoing' in B Markesinis (ed) *The Impact of the Human Rights Bill in English Law* Oxford: OUP, 1998

Dufort, TM 'Canada' in C Platto (ed) *Pre-trial and Pre-hearing Procedures Worldwide* London: Graham & Trotman/International Bar Assn, 1990

Feldman D 'Privacy-related Rights and their Social Value' in P Birks (ed) *Privacy and Loyalty* Oxford: Clarendon Press, 1997

Finlayson, C and Shepherd, F *Discovery* in Sir Robin Cooke (ed-in-chief) *The Laws of New Zealand* Wellington: Butterworths, 2000

Gardner, J 'Freedom of Expression' in C McCrudden and G Chambers (eds) *Individual Rights and the Law in Britain* Oxford: Clarendon Press, 1995

Gearty, C 'Tort Law and the Human Rights Act' in T Campbell, KD Ewing and A Tompkins *Sceptical Essays on Human Rights* Oxford: OUP, 2001

Golding, MP 'On the Adversary System and Justice' in R Bronaugh *Philosophical Law: Authority, Equality, Adjudication, Privacy* London: Greenwood Press, 1978

Hawkins, K 'The Uses of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins (ed) *The Uses of Discretion* Oxford: Clarendon Press, 1992

Hohfeld, WN 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (Pt I) in WW Cook (ed) *Fundamental Legal Conceptions As Applied in Judicial Reasoning and Other Legal Essays* New Haven: Yale UP, 1923

Issacharoff, S 'Should There Be Rules of Procedure?' in BS Markesinis (ed) *The Clifford Chance Lectures Volume I: Bridging the Channel* Oxford: OUP, 1996

Ligertwood, A and Odgers, S (title eds) *Evidence* vol 16 in JA Riordan (ed-in-chief) *The Laws of Australia* Melbourne: The Law Book Co, 1994–

Livingstone, S 'Prisoners' Rights' in D Harris and S Joseph (eds) *The International Covenant on Civil and Political Rights and United Kingdom Law* Oxford: Clarendon Press, 1995

Mahony, P 'Emergence of a European Conception of Freedom of Speech' in PBH Birks (ed) *Pressing Problems in the Law Volume 1: Criminal Justice and Human Rights* Oxford: OUP, 1995

Marcus, RL 'Déjà Vu All Over Again? An American Reaction to the Woolf Report' in AAS Zuckerman and R Cranston (eds) *Reforming Civil Procedure: Essays on 'Access to Justice'* Oxford: Clarendon Press, 1995

Michael, J 'Privacy' in C McCrudden and G Chambers *Individual Rights and the Law in Britain* Oxford: Clarendon Press, 1995

Mill, JS 'On Liberty' in G Himmelfarb (ed) *On Liberty* Harmondsworth: Penguin Books, 1996 (orig publ 1859)

Neill, B 'Privacy: A Challenge for the Next Century' in BS Markesinis (ed) *Protecting Privacy* Clifford Chance Lectures vol 4, Oxford: OUP, 1999

Pedowitz, L 'Obtaining the Right Protective Order in Litigation with Private Parties and the Government, and Blocking Disclosure of Confidential Information to the Government' in J Glekel and L Pedowitz (eds) *First Annual Civil Litigation Practice: All You Need to Know, But Weren't Taught in Law School* New York: Law Journal Seminars-Press, Inc, 1982

Pollock, CE 'A Treatise on Inspection and Discovery' in HT Holland and T Chandless, Jr *The Common Law Procedure Act 1854* London: S Sweet, 1854

Roberts, P 'Privacy, Autonomy and Criminal Justice Rights' in P Alldridge and CH Brants (eds) *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* Oxford: Hart Publishing, 2001

Rosen, RA 'Protective Orders and Confidentiality Agreements: New Developments in State and Federal Courts' in *Civil Practice and Litigation in Federal and State Courts* (8th edn) Philadelphia: ALI-ABA Resource Materials, 1998

Scott, IR 'Caseflow Management in the Trial Court' in AAS Zuckerman and R Cranston (eds) *Reforming Civil Procedure: Essays on 'Access to Justice'* Oxford: Clarendon Press, 1995

Stoll, H 'The General Right to Personality in German Law: An Outline of its Development and Present Significance' in BS Markesinis (ed) *Protecting Privacy* Clifford Chance Lectures vol 4, Oxford: OUP, 1999

Tapper, C 'Trends and Techniques in the Law of Evidence' in PBH Birks (ed) *Pressing Problems in the Law Volume 1: Criminal Justice and Human Rights* Oxford: OUP, 1995

Zuckerman, AAS 'Privilege and Public Interest' in CFH Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* London: Butterworths, 1981

Zuckerman, AAS 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in AAS Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* Oxford: OUP, 1999

LAW REFORM REPORTS

Law Commission *Breach of Confidence* (Law Com No 110, Cmnd 8388) London: HMSO, 1981

Law Commission *Legislating the Criminal Code: Misuse of Trade Secrets—A Consultation Paper* (Law Com No 150) London: HMSO, 1997

Lord Chancellor's Department *Emerging Findings—An Early Evaluation of the Civil Justice Reforms: A Report* London: HMSO, 2001

Woolf, H *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* London: HMSO, 1995

Woolf, H Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales London: HMSO, 1996

Woolf, H *Access to Justice: Draft Civil Proceedings Rules* London: HMSO, 1996

DIGESTS OF CASES

Anon *A General Abridgment of Cases in Equity* (5th ed) London: Whieldon & Butterworth, 1793

Bridgman, RO *Thesaurus Juridicus: Containing the Decisions of the Several Courts of Equity* London: E&R Brooke and J Rider, 1799

Bridgman, RO *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity* London: Henry Butterworth, 1824

Chambers, M (ed) *Analytical Digest of the Cases Published in the Law Journal Reports 1835–1840* London: EB Ince, 1843

Clarke, SW (ed) *Butterworths' Ten Years' Digest of Reported Cases 1898 to 1907* London: Butterworth & Co, 1908

Jagoe, J *An Index to the Reported Cases in Equity* London: Butterworths, 1851

Jones, WF and Hirst, HE *Chitty's Index to all the Reported Cases Decided in the Several Courts of Equity and Bankruptcy in England and Ireland* (4th edn) London: Stevens & Sons; H Sweet; W Maxwell & Son, 1883

Stickland, P, Dolling, Y, Holman-Hirst, L (rev compilers) *The Digest: Annotated British, Commonwealth and European Cases* vol 18 (1989 2nd reissue) 'Discovery, Inspection and Interrogatories' London: Butterworths, 1989

Stone, AP (ed) *The Law Reports Digest of Cases and Statutes from 1865 to 1890* London: William Clowes & Sons, 1892

Various (eds) *An Analytical Digest of the Cases Published in the Law Journal and in All the Reports of Decisions in the Courts of Common Law and Equity, 1822–1905* London: JW Paget; Stevens & Sons; Sweet & Maxwell, 1831–1906

RULES OF COURT AND COMMENTARIES

Gregory, RCL (ed) *The County Court Practice 1997* London: Butterworths, 1997 ('The Green Book')

Jacob, IH (gen ed) *The Supreme Court Practice 1976* London: Sweet & Maxwell; Stevens & Sons; Butterworth & Co, 1975

May LJ (gen ed) *Civil Procedure 2001* (Autumn 2001) London: Sweet & Maxwell, 2001

Plant, C (ed-in-chief) *Blackstone's Civil Practice 2001* London: Blackstone Press Ltd, 2000

Scott, R (ed) *The Supreme Court Practice 1997* London: Sweet & Maxwell, 1996 ('The White Book')

Supreme Court of the United States *Amendments to Federal Rules of Civil Procedure*, 106th Congress, 2nd session, HD 106 228, together with Report of Advisory Committee on Civil Rules set out in *Supreme Court Reporter* (2000) vol 120, no 16, St Paul: West Group, 2000

Thompson, PKJ (gen ed) *The Civil Court Practice 2001* (October reissue) London: Butterworths, 2001

Wright, CA, Miller, AR and Marcus, RL *Federal Practice and Procedure* (2nd edn) vols 7A, 7B & 8 St Paul, MN: West Publishing Co, 1994 (and 2000 supplement)

UNPUBLISHED MATERIALS

Brooklyn Law School Journal of Law and Policy, Transcript of Panel Discussion from *Trager Symposium: Secret Justice Behind Closed Doors* held on 7 April 2000 (unpublished)

Eastern District of New York Committee on Civil Litigation, Notes of Meeting held on 6 August 2000 (unpublished)

Eastern District of New York Committee on Civil Litigation, Memorandum concerning Judge Weinstein's proposal for administering protective orders, 1 June 2000 (unpublished)

Gibbons, SMC Notes of Interview with Hon Jack B Weinstein, Senior US District Judge Eastern District of New York, Brooklyn, 28 September 2000 (unpublished).

Gibbons, SMC Notes of Interview with Hon Steven M Gold, US Magistrate Judge, Eastern District of New York, Brooklyn, 28 September 2000 (unpublished)

Gibbons, SMC Notes of Interview with Hon Timothy S Ellis, III, US District Judge, Eastern District of Virginia, Alexandra, 29 September 1998 (unpublished)