HCPI 820/2013

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

PERSONAL INJURIES ACTION NO 820 OF 2013

BETWEEN

CHAN YIM WAH WALLACE Plaintiff

and

NEW WORLD FIRST FERRY SERVICES LIMITED Defendant

Before: Hon Bharwaney J in Chambers (Open to public)
Dates of Hearing: 9 January, 20 March, 1 April and 11 April 2014
Date of Decision: 8 May 2015

D E C I S I O N

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1. By writ of summons issued on 19 September 2013, the plaintiff brought a claim against the defendant for damages for personal injury sustained by her arising out of a marine accident involving First Ferry IX that occurred on 21 October 2011, at about 5:15 a.m., near Cheung Chau Pier. The plaintiff averred that the ferry was owned by the defendant and that the accident was caused

by the negligence and/or breach of statutory duty and/or breach of common duty of care on the part of the defendant, its servants and/or agents.

2. By summons issued on 19 September 2013, the plaintiff sought, pursuant to section 42(1) of the High Court Ordinance, Cap.4, and O. 24, r. 7A(2) of the Rules of the High Court ("RHC"), an order that the Director of Marine do produce for inspection by the plaintiff and her solicitors, the documents listed in the schedule thereto, in un-redacted form, which were in the possession, custody or power of the Director of Marine, and that the plaintiff and her solicitors be supplied with copies on payment of proper charges. The documents listed in the schedule were:

(1) Marine Safety Investigation (MSI) Report ("the Report") in respect of the accident that occurred on 21 October 2011 ("the Accident") together with the appendixes, affixtures and enclosures thereto;

(2) Particulars of the vessel involved in the Accident (including, but not limited to, the certificate number, identity of the owner and master of the vessel);

(3) Statements/Declarations of all witnesses taken subsequent to the Accident;

(4) Photographs taken at the Accident site; and

(5) Documents or information to show whether any prosecution was laid against any party as a result of the Accident and, if so, the particulars of and the result of the prosecution.

3. The summons was supported by the affidavit of Ms Szwina Pang of the plaintiff's solicitors in which she stated that she had been instructed that, on 21 October 2011, the plaintiff and her family boarded the ferry at Cheung Chau Pier, intending to go to Central, Hong Kong. They were all seated on board the ferry. Shortly after departing from the Cheung Chau Pier, the ferry crashed into a mooring pillar at the pier and the plaintiff sustained personal injury as a result. A letter before action was sent to the defendant on 22 December 2011 but the defendant had not admitted liability. The Accident had been investigated by the Marine Department and, on 9 November 2012, the firm wrote to them requesting production of items 1, 3, 4 and 5 of the scheduled documents. They received the reply on 13 November 2012 from the Director of Marine that the police was considering criminal proceedings against the parties involved and that the requested documents could not be released. The plaintiff's solicitor sent two more letters requesting disclosure of the documents, including item 2 of the scheduled documents, and they also gave notice of intention to apply to court for non-party discovery against the Director of Marine, if their request was refused.

4. By a letter dated 3 July 2013, Mr Kuang Zhijian, Surveyor of Ships in the Marine Accident Investigation Section, stated, on behalf the Director of Marine ("the Director"), that they had no information of any prosecution, and that they declined to release the documents requested for the reason that the Marine Department was prohibited, under Data Protection Principle 3 ("DPP3") of the Personal Data (Privacy) Ordinance ("PDPO"), from disclosing the informant's personal data for a purpose which was inconsistent with the purpose for which they were to be used at the

time of the collection of the data, without the prescribed consent of the informant, unless a relevant exemption was invoked. Mr Kuang explained that the purpose of the investigation that had been conducted was to determine the circumstances and the causes of the incident with the aim of improving the safety of life at sea and avoiding similar incidents in future. The conclusions drawn in the report aimed to indentify the different factors contributing to the incident. They were not intended to apportion blame or liability towards any particular organization or individual except so far as was necessary to achieve the said purpose.

5. Given the stance taken by the Director, the summons for non-party discovery was issued and the affidavit of Ms Szwina Pang filed in support in which she noted that the Director had not denied the existence of the requested documents, and which she concluded by asserting that the documents sought were highly relevant to the issue of liability and were necessary for disposing fairly of the cause or matter in these proceedings.

6. Subsequently, directions were given for the filing of further affidavits and the summons was adjourned for argument before me on a date to be fixed.

7. On 25 October 2013, the same Mr Kuang Zhijian made an affirmation reiterating that, with the aim of improving safety of life at sea by avoiding similar incidents in future, the Marine Accident Investigation Section of Marine Accident Investigation and Shipping Security Policy Branch of the Marine Department ("the MAI Section") had prepared the Report on 17 July 2012 in relation

to the Accident pursuant to the Merchant Shipping (Local Vessels) Ordinance, Cap. 548 ("the Ordinance"), that the Report was not intended to apportion blame or liability towards any particular organization or individual except so far as was necessary to achieve the said purpose and stating, further, that the MAI Section had no involvement in any prosecution or disciplinary action that might be taken resulting from the Accident. Being aware that the publication of a report might create a substantial risk of prejudice to a fair trial and seriously impede the due administration of justice, the MAI Section would only publish their reports on the website of the Marine Department after checking with the law courts, the Hong Kong Police Force and the Harbour Patrol Section, Marine Industrial Safety Section and the Prosecution Unit of the Marine Department that there were no pending or imminent proceedings for the marine accident case concerned. As there were likely to be imminent criminal and/or civil proceedings in relation to the Accident in question, the Director considered that it was not appropriate to disclose the Report at this stage, and had not yet published the Report on its website. For that reason, the plaintiff's request for the Report was contested.

8. The affirmation of Mr Kuang also explained the Director's stance in relation to the statements taken by the investigating officers of the MAI Section. He explained that they had exercised their powers under section 60 and 61 of the Ordinance, and that they had only taken statements from the relevant witnesses, without seeking any declarations from them. By virtue of section 60(1)(e) of the Ordinance, a person was subject to a legal obligation to supply information in connection with a marine

accident for marine safety investigation. Before interviewing the relevant witnesses, the investigating officers had informed the witnesses that they were obliged to give the statements in compliance with the relevant statutory provisions of the Ordinance but that such statements would be used only for marine safety investigation and would not be released to any third party without their consent or without a court order. Therefore, the witnesses had been assured that their identities and the information provided would be kept confidential except for the purpose of the marine safety investigation. The Director considered that the assurance to maintain confidentiality must be strictly adhered to unless there were compelling public interests reasons for doing otherwise. On balance, the Director was not satisfied that the plaintiff's interest in obtaining disclosure of the requested witness statements to assist her personal injuries claim against the defendant would outweigh the strict adherence to his duty of confidentiality towards the relevant witnesses. Hence, the Director would not disclose the requested witness statements without the consent of the statement makers or without a court order.

9. The Report and the witness statements are the only subject matter of the application before me, the Director having already disclosed the photographs that were sought and the plaintiff having accepted that the relevant particulars of the vessel involved could be obtained from the public register, so that it was not necessary for the Director to disclose the same for disposing fairly of the cause or matter or for saving costs. The plaintiff also accepted that the Director was not handling the criminal investigation of the Accident, which was the subject of investigation by the police, and

that the Director did not process direct information of the prosecution. So far as the witness statements were concerned, 8 statements had been taken, 4 from crew members and 4 from passengers. As the Director had only been able to obtain consent from one witness, whose un-redacted witness statement had already been provided to the plaintiff's solicitors, the application for discovery concerned the remaining 7 witness statements.

10. In her supplemental affidavit, sworn on 14 November 2013, Ms Szwina Pang took issue with the assertion that the disclosure of the Report would give raise to a substantial risk of prejudice to a fair trial or seriously impede the due administration of justice and she exhibited the Marine Department's summary of its investigation on its website which stated:

> "October 21, 2011
>
> The Marine Department's initial investigation into an incident in the Cheung Chau Typhoon Shelter involving high-speed catamaran First Ferry IX shows the ferry strayed outside the navigational fairway into a mooring area.
>
> The 28.84-metre-long ferry, carrying 140 passengers and four crew members, left Cheung Chau for Central at 5.10 am and struck a mooring dolphin inside Cheung Chau Typhoon Shelter.
>
> Seventy-six people – 49 men and 27 women, aged 19 to 82 – were injured.
>
> The ferry's starboard bow was significantly damaged.
>
> The department's investigation also showed a light beacon near the mooring dolphin was lit and functioning properly in accordance with the nautical chart.
>
> Special attention will be given to the ferry's speed at the time of the collision during further investigations."

Ms Pang also challenged the basis upon which the assurances of confidentiality were allegedly given.

11. At the hearing of the summons before me on 9 January 2014, I was given to understand by Ms Vienne Luk, Government Counsel of the Department of Justice, who appeared for the Director, that the Director was no longer resisting discovery by reason of DPP3, as asserted in the letter of 3 July 2013, and that the Director would only resist the application on the grounds that the duty of confidentiality arose in this case and that the disclosure of the Report would prejudice the fair trial of a possible criminal prosecution. According to Ms Luk, she had been informed by the police that they were still compiling their expert report which would be submitted to the Prosecution Division of the Department of Justice for legal advice.

12. On learning that the data protection point was no longer to be pursued, I enquired whether or not it would be appropriate to invite the Privacy Commissioner for Personal Data ("Privacy Commissioner") to intervene and to make representations to me on the impact of DPP3 on the disclosure of statements taken by investigation agencies. The extent to which DPP3 survives, and still operates, given the recent amendments to the PDPO, is a matter of general importance in the field of personal injury litigation. For the vast majority of cases, the more important point is the extent to which data protection legislation prevents the disclosure of witness statements and declarations taken by investigators, who were not doing so pursuant to legislation which made it compulsory for the person being interviewed to answer their questions. After a short

adjournment to take instructions, I was informed that the parties had no objection to my proposed course of action to invite the Privacy Commissioner to consider intervening, if so wished, in order to make representations on the relevance of the Data Protection Principles under the PDPO, and particularly the recent amendments to the legislation, to accidents resulting in personal injuries which had been investigated and, in the course of which, witness statements and declarations had been obtained which the injured persons wished to obtain for the purposes of their claims for damages. I then adjourned the hearing to a date to be fixed with costs reserved, and directed that the plaintiff own costs be taxed pursuant to the Legal Aid Regulations.

13. Thereafter, by a letter dated 14 January 2014, an invitation was sent to the Privacy Commissioner by the Civil Litigation Unit of the Department of Justice to consider intervening in the proceedings in order to make representations on the relevance of the data protection principles under the PDPO and, particularly, the new section 60B, to the present case, and informing the Privacy Commissioner that the plaintiff and the Director had no objection to the proposed course. Ms Brenda Kwok, Chief Legal Counsel for the Privacy Commissioner, responded, by letter dated 20 January 2014, that the Privacy Commissioner had duly considered the case and had decided not to intervene, for the reason that without perusal of the witness statements, the Privacy Commissioner could not possibly to determine whether the exemption under section 60B(b), i.e. “the use of the data is required in connection with any legal proceedings in Hong Kong” applies to the personal injury action, but that, more importantly, that there might be a potential conflict of interest with

his statutory functions if the Privacy Commissioner joined as an intervener in the action, explaining that, under the Ordinance, the Privacy Commissioner had the primary duty to receive complains of infringement of personal data privacy, to carry out investigations and, on determining that there was a contravention, to take enforcement action and grant legal assistance to the aggrieved data subjects to seek compensation. As only one of the eight witnesses had consented to disclose his statement, the Privacy Commissioner could not preclude the possibility that complaints and/or legal assistance applications might be lodged with his office of infringement of their personal data privacy. For these reasons, the Privacy Commissioner considered it was not appropriate to intervene or to make representations in the present action. However, in order to assist the court, the Privacy Commissioner provided his interpretation of DPP 3 and section 60B in general for my consideration.

14. I fully understand and agree with the reasons why the Privacy Commissioner does not think he can properly intervene in these proceedings. However, I am grateful for his observations on the relevant data protection principles and the new section 60B of the PDPO which I refer to below.

15. Before the resumed hearing of the plaintiff's summons, which took place on 20 March 2014, Mr Kuang made a second affirmation on 13 March 2014 in response to the supplemental affidavit of Ms Szwina Pang. He reiterated that the Marine Department was concerned that the premature disclosure of the Report might prejudice the pending and ongoing criminal investigation by the Hong Kong Police. The press release issued by

the Marine Department, which was on the Marine Department's website and which had been exhibited to Ms Pang's affidavit, did no more than state the basic neutral facts surrounding the Accident which could not in any way jeopardize further investigation or prosecution by the police. The fact that the ferry struck the dolphin (i.e. a pillar for mooring fixed to the seabed) outside the navigational fairway could readily be ascertained when one compared the location of the dolphin with the demarcation of the fairway on the relevant navigation chart; and the fact that that the light beacon (demarcating the navigational fairway) near the mooring dolphin was lit and functioning probably was readily ascertainable by any observer.

16. In answer to Ms Pang's challenge on the basis of the assurances allegedly given, Mr Kuang stated in his affirmation that it was his experience that fuller and franker answers and disclosure from witnesses would be more readily forthcoming when it was made clear that the statements were to be used solely for the purpose of the Marine Department's own inquiries into the accidents, in order to find the root causes of the accidents and prevent future recurrences. Given the terms of section 61(2) of the Ordinance, it had been the practice of the Marine Department to treat the information obtained by the exercise of power under section 61(1)(e) as confidential, and not to release the statement/declaration so obtained to third parties except with the consent of the maker or pursuant to a court order. In keeping with the practice, the investigation officers in this case would have informed the witnesses the purpose of the interview. Depending on the circumstances, individual investigating officers might or might not have referred to their power to require the person to answer the question under

section 61(1)(e) or make explicit assurance on the confidentiality of the statements. However, the omission to make an explicit assurance did not affect the confidential nature of the statement/declaration. In this case, only one of the eight witnesses gave consent, while the other witnesses expressly refused to disclose their statements to any third party. It would be in the public interest that the effectiveness of the investigation should not be undermined by any unwarranted or unnecessary disclosure, particularly where the maker had declined to give consent. The disclosure of these statements would inhibit their investigation power into future marine accidents, and would seriously frustrate full and frank disclosure by potential witnesses in the future.

The basis of the application for discovery

17. At the resumed hearing on 20 March 2014, Mr Raymond Leung appeared for the Director and Mr Ashok Sakhrani for the plaintiff, as he had on 9 January 2014. Mr Leung took pains to emphasise that the present application was brought under s.42(1) of the High Court Ordinance and O.24 r.7A(2) of the RHC. To better understand the different applications that can be made, I set out the relevant parts of ss.41 and 42 as follows:

> "41. Power of Court of First Instance to order disclosure, etc. of documents before commencement of proceedings
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> (1) On the application, in accordance with rules of court, of a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings in that Court in which a claim is likely to be made, the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the Court of First Instance to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are

directly relevant to an issue arising or likely to arise out of that claim –

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order –

(i) to the applicant's legal advisers;

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

(2) For the purposes of subsection (1), a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if –

(a) The document would be likely to be relied on in evidence by any party in the proceedings; or

(b) The document supports or adversely affects any party's case.

42. Extension of powers of Court of First Instance to order disclosure of documents, inspection of property, etc.

(1) On the application, in accordance with rules of court, of a party to any proceedings in which a claim is made, the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the Court of First Instance to be likely to have, or to have had in his possession, custody or power any documents which are relevant to an issue arising out of that claim –

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order –

(i) to the applicant's legal advisers;

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant."

I also set out O.24 r.7A(1) to (3A) of the RHC:

> "Application under section 41 or 42(1) of the Ordinance
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> 7A.(1) An application for an order under section 41 of the Ordinance for the disclosure of documents before the commencement of proceedings shall be made by originating summons (in Form No. 10 in Appendix A) and the person against whom the order is sought shall be made defendant to the summons.
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> (2) An application after the commencement of proceedings for an order under section 42(1) of the Ordinance of the disclosure of documents by a person who is not party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings other than the applicant.
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> (3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must –
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> (a) in the case of a summons under paragraph (1), state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the Court of First Instance;
>
> (b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.
>
> (3A) In the case of a summons under paragraph (1), paragraph (3)(b) shall be construed as if for the word "relevant", there were substituted the words "directly relevant (within the meaning of section 41 of the Ordinance)."

It is also necessary to have regard to O.24 r.8(2) which states:

> "Discovery to be ordered only if necessary
>
> 8.(2) No order for the disclosure of documents shall be made under section 41 or 42 of the Ordinance, unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

The application before me was not an application under s.41 of the High Court Ordinance for disclosure of documents before the commencement of proceedings, nor was it an application for discovery under the rule in *Norwich Pharmacal Co. v Customs and Excise Commissioners*[1].

18. I agree with Mr Leung and with his general proposition that non-party discovery is a relief to be granted by way of the discretionary exercise of the power vested in the Court by s.42 of the High Court Ordinance and O.24, r.7A(2) of the RHC and that there is no existing "right" or "entitlement" to discovery vested in a plaintiff (or a potential plaintiff who applied under s.41 of the High Court Ordinance and O.24, r.7A(2) of the RHC), notwithstanding the general "duty to facilitate the administration of justice" referred to by Deputy High Court Judge Seagroatt in *Chan Chuen Ping v The Commissioner of Police*[2].

19. Mr Leung was right to submit that the exercise of discretion by the Court involves the conventional considerations of "existence, relevance and necessity" under the O.24 r.7A and r.8(2) and a balancing exercise of the need for disclosure in the interest of the administration of justice and countervailing factors such as "protection of personal data" under the PDPO and "the duty of confidentiality" under common law, and other countervailing factors.

20. So far as relevance is concerned, it must be noted that the test for relevance under s.41 and O.24 r.7A(1) is narrowed to documents directly relevant to an issue arising or likely to arise, in

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[1] [1974] AC 133.
[2] [2014] 1 HKLRD 142 at §34 on p.151.

that it is likely to be relied on in evidence by any party to the proceedings in support of his case or the document supports or adversely affects any party's case. Background documents or *"Peruvian Guano"* documents are not considered to be directly relevant. The limitation of directly relevant documents, imposed on applications under s.41 and O.24 r.7A(1), does not extend to applications under s.42 and O.24 r.7A(2) for discovery from non-parties in proceedings which have already been commenced. In such applications, the test of relevance includes background documents and "chain of enquiry" documents in the *Peruvian Guano* sense[3]. However, with the advent of Civil Justice Reform, all applications for discovery, whether under s.41 or s.42, must conform to the underlying objectives in O.1A, and particularly the need to ensure reasonable proportionality and procedural economy in the conduct of proceedings.

21. Mr Leung was concerned that the recent decisions of Deputy High Court Judge Seagroatt in *Chan Chuen Ping v the Commissioner of Police*[4] and *Chan Wai Ming v Leung Shing Wah*[5] might create a misconception of the existence of a right or entitlement to non-party discovery against investigating authorities. I agree with Mr Leung that, properly understood, Deputy High Court Judge Seagroatt did not purport to create or endorse such a right or entitlement, and that he was merely emphasising that the most likely exercise of the court's discretionary power was to order discovery of documents on the application of persons who had been injured in

[3] See the decision of Bokhary J, as he then was, in *Chan Tam Sze v Hip Hing Construction Co Ltd & Ors* [1990] 1 HKLR 473.
[4] [2014] 1 HKLRD 142.
[5] [2014] 1 HKLRD 376.

accidents that had been investigated by the Police, the Labour Department, the Marine Department or other investigative agencies. In each case, the exercise of the discretionary power of the court must be based on, and originate from, the nature of the application being made.

22. In the case of an application under s.41 and O.24 r.7A(1), the application is made before the commencement of proceedings against a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings. In such a case the Court is empowered to order such a person who is likely to have or to have had in a possession, custody or power, documents that are directly relevant to an issue arising or likely to arise, to disclose the same. Clearly, as Deputy High Court Judge Seagroatt rightly found in *Chan Chuen Ping v The Commissioner of Police*, the Commissioner of Police was not likely to be a party to any proceedings to be brought by the applicant who alleged that he had been injured when he was knocked down by a wheelchair being pushed by an unknown person, an incident that had been investigated by the police.

23. Applications under s.42 and O.24 r.7A(2) are made, in proceedings which have already been commenced, for discovery of documents by a person who was not a party to the proceedings, and who appears to the court to be likely to have in his possession, custody or power documents that are relevant to an issue arising out of the claim made in those proceedings. In *Chan Chuen Ping v The Commissioner of Police*, the applicant could not commence any proceedings as he had no knowledge of the identity of the wrongdoer.

Moved by his predicament, Deputy High Court Judge Seagroatt construed s.42 in these terms[6]:

> "The terminology predicates the applicant as having commenced proceedings but this applicant has not. But the applicant cannot commence proceedings because the Police Commissioner refuses to let him have the name (and address, which is also essential) of the person against whom the proceedings can be commenced. But the court has an inherent jurisdiction to do what is fair and just and would not send an applicant in such circumstances away empty-handed and section 42 is capable of the construction which would imply the following – "On the application, of a party to any existing or contemplated proceedings in which a claim is or may be made, the court … shall have etc" in order to remedy the situation whereby that person is withholding the very information which would enable proceedings to come into existence."

Tempted as I am to agree with the learned Judge, I find myself unable to do so. In my judgment, applications under s.42 and O.24 r.7A(2) can only be brought when proceedings have already been commenced. The statute cannot be construed otherwise. A similar argument, in reliance on English Civil Procedure Rule 31.17, which is the equivalent of O.24 r.7A giving effect to s.42, was rejected by Mann J. in *Various Claimants v News Group Newspapers Ltd*[7].

24. Nevertheless, it is clear that the juridical basis of the judgment of Deputy High Court Judge Seagroatt in *Chan Chuen Ping v The Commissioner of Police* was the rule in *Norwich Pharmacal Co v Customs and Excise Commissioners*[8] which he dealt with extensively in §§20 to 29 of his judgment. In §22 of his judgment[9], he recited from the headnote of the law report of *Norwich*

[6] at §14 of his judgment on p.147.
[7] [2013] EWHC 2119 at §20 of his judgment.
[8] [1974] AC 133.
[9] at p.149.

Pharmacal Co v Customs and Excise Commissioners. The full passage reads as follows:

> "Where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a duty statutory or otherwise; and that, accordingly, *prima facie* the respondents were under a duty to disclose the information sought." *[My emphasis]*

Although the sentence I have underlined was omitted from the judgment, I have no doubt that Deputy High Court Judge Seagroatt was well aware that discovery under the *Norwich Pharmacal* principle is a matter of equitable relief to be granted by the exercise of the discretionary power of the court.

25. The freedoms we enjoy include the freedom to withhold information from fellow citizens, except to the extent that the law places a duty on us to produce documents or disclose some specific information. No obligation of disclosure arises where a person has merely witnessed a wrong. He may be called to give evidence as a witness at trial and asked on oath to divulge information but he cannot be required to provide a party with information in advance of the trial. However, the *Norwich Pharmacal* principle can be invoked to obtain discovery from a non-party if, through no fault of his own, he gets mixed up in the tortious acts of others so as to facilitate their wrongdoing. It would be unjust for a person who facilitated or was involved in a wrong against another to deny the victim the information he requires in order to seek vindication of the wrong. Although he may incur no personal liability, he comes under a duty

to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. However, the court is not bound to order disclosure merely because the applicant has fulfilled the threshold requirements of the *Norwich Pharmacal* principle. This is a discretionary jurisdiction that the court would exercise only if it is established to be a necessary and proportionate response in all the circumstances[10]. Disclosure is necessary if it would enable a person to vindicate his rights and prevent a sense of the injustice that would ensue if the court did not come to his assistance and order disclosure. Clearly, there is strong public interest in allowing an applicant to vindicate his legal rights. However, countervailing proportionality factors may also need to be taken into account such as whether or not the information could be obtained from another source, the intrusive effect of the disclosure order on the non-parties, the degree of confidentiality of the information sought and the privacy and data protection rights of the individual whose identity is to be disclosed[11].

26. The importance of the element of involvement by the person from whom disclosure sought was stressed by Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193 at §35 in these words:

> "Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement, (the reference to participation can be dispensed with because it adds nothing to the requirement of

[10] See the decision of Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193 at §36.

[11] See, in particular, the judgment of Lord Kerr in *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55 at §17 and the judgment of Ma J., as he then was, in *A. Co. v B. Co.* [2002] 3 HKLRD 111 at p. 116F to 118C.

> involvement), is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion."

In the *Norwich Pharmacal* case, the Commissioner of Customs and Excise did not become involved in the importation of the infringing goods by his own volition but became involved through the performance of his statutory duty. The infringing imported goods were in his charge until cleared, and the Commissioner could control their movement until they were cleared. On that basis, the House of Lord held that the Commissioner was under a duty to disclose the information sought. In *Various Claimants v News Group Newspapers Ltd* [2013] EWHC 2119, Mann J had to deal with an application for an order providing for disclosure by the Metropolitan Police Service ("MPS") of information relating to phone hacking activities said to have been conducted by journalists engaged by the 1st defendant newspaper. The learned Judge found that MPS had documentary material which revealed facts about individuals engaged by the 1st defendant conducting phone hacking operations and that the material was highly relevant to any civil claim that might be brought by the victims, without which the victims could not be expected to mount a claim. After making these findings, he turned to consider the question whether or not MPS had participated in, or facilitated, or been involved in the actual wrongdoing, i.e., whether it was a mere witness or metaphorical bystander, or whether its engagement with the wrong was such as to make it more than a mere witness and, therefore, susceptible to the court's jurisdiction to order *Norwich Pharmacal* relief. He found as follows:

> "55. The answer to that question is, in my view, Yes. The MPS is not like someone who happens to witness an offending act and who thereby acquires relevant information. It is someone whose duty it is to acquire information about the offending act, albeit not for the benefit of victims. That may not by itself be sufficient – I do not have to decide that. What needs to be added is the fact that the MPS has actually provided information which, if a mere witness (bystander) it would not have had to have volunteered. It did so by informing victims that they were victims, and then disclosing a limited amount of information whilst informing them that there was more. It has also indicated that it did so as a result of some sort of unspecified obligation (or feeling that it ought to) and then agreeing, in principle, that it would not resist a formal claim for the information to a greater extent and in a more durable (and reliable) form. All those factors, when combined, mean that the MPS is not a mere witness." *[My emphasis]*

Although Mann J refrained from making a finding of involvement based on the acquisition of information of a tortious act, in §24 of his judgment in *Chan Chuen Ping v The Commissioner of Police*, Deputy High Court Judge Seagroatt expressly found that:

> "Of course the Commissioner of Police is not "mixed up in the tortious acts of others so as to facilitate them". He is simply in exclusive possession of information concerning a person who may be involved in a tortious act. The principle is not thereby affected. He is in possession of information without which the potential claimant is unable to advance his claim or commence proceedings."

27. The decision of Deputy High Court Judge Seagroatt in *Chan Chuen Ping v The Commissioner of Police* related to the question of costs, the plaintiff's solicitors and the Department of Justice having submitted a consent order for the disclosure of the information which the applicant's solicitors had sought. He does not appear to have heard argument from the parties on the element of involvement and Mr Leung informs me that the Department of Justice would wish to reserve the point for argument in a future case. As I have also not heard argument on the point, I refrain from

expressing any views on it. However, on the basis that receiving a report of a tort being committed, coupled with the Commissioner's duty to investigate unlawful acts, is sufficient to "involve" the Police in the *Norwich Pharmacal* sense, I have no doubt that, on the facts of the case made known to him[12], Deputy High Court Judge Seagroatt would have been entirely right, if the application had been resisted, to grant the discovery sought based on *Norwich Pharmacal* principle.

28. I now turn to consider the present application that was brought under s.42(1) of the High Court Ordinance and O.24 r.7A(2) of the RHC. The Director only resists the application for disclosure of the Report and the witness statements on the grounds that the duty of confidentiality arose in this case and that the disclosure of the Report would prejudice the fair trial of a possible criminal prosecution[13]. I shall deal with the issue of confidentiality before considering the prejudice point. I will then deal with the submissions I received on the data protection principles.

Confidentiality

29. The application for the disclosure of the Report and the witness statements requires the court to balance two competing public interests: the public interest in preserving confidentiality and

[12] I was informed by Mr Leung from the Bar Table that the case had all the hallmarks of a "trumped up" claim: the wheelchair had been pushed by a domestic helper, the person who was bumped had no visible injury but insisted on going to hospital and on pursuing a claim. However, the police had not made this known to the learned Judge. If the application had been resisted on these facts then an order for discovery, based on equitable relief under the *Norwich Pharmacal* principle, might not have been granted.

[13] The present case is not a public interest immunity case (formerly called "Crown privilege"). The right to resist discovery on the ground that it would be injurious to public interest (whether at the national or international level) is recognized at common law, under s.24 of the Crown Proceedings Ordinance, Cap. 300, and Order 24, r.15 of the RHC.

the public interest in the proper administration of justice. In order to see how the duty of confidentiality arises in the present case, I refer first to the statutory provisions governing the investigations of marine accidents before turning to consider common law principles on the duty of confidentiality.

30. A collision involving a local vessel is a reportable incident under s.57(1) of the Ordinance[14] in respect of which certain powers to investigate are provided under ss.60 to 62 of the Ordinance. In this connection, s.61 of the Ordinance provides as follows:

> "(1) Subject to subsection (3), for the purpose of any investigation by an inspector under section 40 or by an authorized officer under section 60, an inspector or authorized officer may-
>
> . . .
>
> (e) require any person whom he has reasonable cause to believe to be able to give any information relevant to the investigation to answer (in the absence of persons other than a person nominated by him to be present and any persons whom the inspector or authorized officer may allow to be present) such questions as the inspector or authorized officer thinks fit to ask and to sign a declaration of the truth of his answers;
>
> (2) No answer given by a person in pursuance of a requirement imposed under subsection (1)(e) shall be admissible in evidence against that person or the spouse of that person in any proceedings.
>
> . . .
>
> (4) Any person who-
>
> (a) contravenes any requirement imposed by an inspector or authorized officer under subsection (1); or
>
> (b) prevents any other person from appearing before an inspector or authorized officer or from answering any question to which an inspector or authorized officer may by virtue of subsection (1)(e) require an answer,
>
> commits an offence and is liable on conviction to a fine at level 2 and to imprisonment for 6 months."

[14] Defined in §7 above.

31. I accept the evidence of Mr Kuang that, given the special provision under s.61(1)(e) which compels an interviewee to answer questions from the Marine Inspector under pain of criminal sanction and the restriction of the use of information so obtained imposed by s.61(2), the Marine Department has all along adopted the practice whereby statements/declarations taken from interviewees in exercise of the power under s.61(1)(e) would be kept confidential and would not be released to a third party unless consented to by the interviewees or pursuant to a court order. Whilst I accept that the evidence contained in the various affirmations of Mr Kuang could have been presented in a more efficient manner and at one time, rather than at various stages, I see no basis to reject his evidence or to conclude that his subsequent evidence was an afterthought. Indeed, the practice Mr Kuang speaks of is consistent with the former practice of the Marine Department as acknowledged in *"The Sunshine Island"*[15], and with international protocol for investigation of marine casualties and incidents.

32. Prior to the enactment of the Ordinance in 1999, investigations into accidents (involving any vessel, including local vessels) were governed by s.60 of the Shipping and Port Control Ordinance, Cap. 313, which is identical to s.61 of the Ordinance. In 1999, upon the enactment of the Ordinance, the words "*(except local vessels)"* were added to s.3 of the Shipping and Port Control Ordinance by way of consequential amendment[16]. There was a scheme to remove from the Shipping and Port Control Ordinance the provisions for the regulation of "*local vessels"* and put them under

[15] HCMP 1677 of 1981, 31st December 1981, Mayo J.
[16] See §8 of the Schedule to the Merchant Shipping (Local Vessels) Ordinance, Ord. 43 of 1999.

the (new) Ordinance, which came into effect in July 2007. In so far as accident investigations of local vessels are concerned, the relevant provisions of Cap. 313 were repealed and re-enacted in the Ordinance. The approach of the Court, applying s.60 of Cap. 313, is instructive on the application of s.61 of the Ordinance.

33. In *"The Sunshine Island"*, Mayo J (as he then was) took into consideration the provisions under s.60(2) of Cap. 313 and reversed the order of a Coroner for disclosure to interested parties at the Coroner's hearing of the statements taken from the crew (but not from the master) of the ship, which had come into collision with a jetty, resulting in fatalities. Mayo J paid tribute to the practice of the Marine Department then dealt with the competing public interests in the following manner[17]:

> "What is the public interest in the present litigation? The evidence relating to the public interest is contained in paragraph 15 of Captain Pyrke's affidavit which was sworn on the 17th December. The paragraph reads as follows:
>
> > "15. The most important objection to such disclosure is that it will inevitably inhibit Marine Department's investigation into future incidents whether under the provisions of the Merchant Shipping Ordinance Cap. 281 or the Shipping and Port Control Ordinance Cap. 313. Whilst I accept that under Section 60(1)(e) of the Shipping and Port Control Ordinance, Marine Department has the power to require answers to questions put (with a criminal sanction in the event of refusal) nevertheless the fact remains that we invariably obtain fuller and franker answers and disclosure when it is made clear that these statements are to be used solely for the purpose of Marine Department's own inquiries into the incidents. If it became the practice for such statements to be disclosed to all parties, I have no doubt that in a case such as this,

[17] at p.9.

> full and frank disclosure and our inquiries would be seriously frustrated. This cannot be in the public interest."

I have generally considered the scope of investigations undertaken pursuant to the provisions contained in the Shipping and Port Control Ordinance Cap. 313. There is no doubt in my mind that what is intended under the Ordinance is that the Director of Marine should be enabled to obtain swiftly all pertinent information relating to incidents which occur within his jurisdiction to ascertain the material facts surrounding the incident so as to enable him to immediately take such action as may be necessary to prevent any recurrence and take any other action which may be appropriate. It is highly desirable that the Director of Marine should not in any way be fettered in achieving these objectives. It is therefore necessary to consider what effect disclosure of the statements made by members of the crew is likely to have upon future investigations which will be undertaken by the Director of Marine. Some assistance may be derived from a passage which appears on page 637 the report of the case of *Lonrho Limited v. Shell Petrolium* [1980] 1 WLR 627:

> "Many Judges have some time in their lives had experienced of conducting official inquiries or investigations in private. Even without the Minister Certificate I should not have needed evidence to satisfy me that the likelihood of success of inquiries of this kind in discovering the truth as to what happened is greatly facilitated if persons who know what happened come forward to volunteer information rather than waiting to be identified by the inquiry itself as likely to possess the relevant information and having it extracted from them by question and answer. Nor would I need any evidence to satisfy me that without an assurance of complete confidentiality information is less likely to be volunteered; particularly where the inquiry is directed to matters that are the subject matter of a pending civil action to which the possessor of the information is a defendant."

As against this, Mr. Clarke argued that it was essential that there should be a full inquiry as to how it had been possible that a ship should run into a jetty. It was a matter of considerable importance and public interest that all of the truth should be ventilated. He also suggested that it was necessary to draw a distinction between the position of the master of the ship and members of the crew. In his ruling the Coroner had held that the

> statements made by the master of the ship should not be divulged. He did not now wish to take issue with this finding. The position of the members of the crew was entirely different. It appeared to be most unlikely that any legal proceedings would be instituted against any members of the crew and accordingly it was difficult to see how their interests could be detrimentally affected by disclosure of their statements. It would clearly be of assistance to all interested parties to have possession of the statements of members of the crew and put questions to them based on the statements when they appeared as witnesses in the Coroner's Inquiry.
>
> Mr. Clarke also argued that it was by no means certain that the statements would be used in a manner which was in any way prejudicial to the members of the crew. For example, the statements might be used to refresh their recollection of events. Surely it would be preferable for the Coroner to exercise his discretion as to the extent to which the statements might be referred to.
>
> I have attempted to perform the balancing act referred to in the cases cited. I have no doubt that the balance lies in favour of non-disclosure. All of the witnesses will be available to give evidence. The incidents occurred on the 10th October and witnesses should not encounter much difficulty in recollecting events which occurred surrounding the accident. In addition to this, Mr. Frank Wong, the Coroner's Officer does have copies of the statements available to him and he will be able to decide the extent to which the statements can assist him in putting questions to the witnesses. He would also be able to take such action as may be necessary or possible if there are conflicts between the contents of the statements and the evidence which is given at the Coroner's Inquiry. No sufficient case has been made out for disclosure to other interested parties bearing in mind the confidentiality which attaches to these statements." *[My emphasis]*

34. The Marine Department practice of preserving confidentiality is consistent with international practice pertinent to marine investigation. By way of example, the preamble of the "Code for The Investigation of Marine Casualties and Incidents", under Resolution A.849(20) adopted by the International Maritime Organization on 27th November 1997 (the "Code"), recites:

"RECOGINZING the need for a code to provide, as far as national laws allow, a standard approach to marine casualty and incident investigation with the sole purpose of correctly identifying the causes and underlying causes of casualties and incidents" *[My emphasis]*

It is provided in §1.4 thereof that:

"1.4 It is not the purpose of the Code to preclude any other form of investigation, whether for civil, criminal, administrative, or any other form of action. … Ideally, marine casualty investigation should be separate from, and independent of, any other form of investigation." *[My emphasis]*

It is stated under "Objective" in §2 thereof that:

"The objective of any marine casualty investigation is to prevent similar casualties in the future."

35. Giving effect to the underlying objective of the Code, §10 thereof gives guidance for the handling of information obtained in the course of investigation as follows:

"10 Disclosure of records

10.1 The State conducting the investigation of a casualty or incident, wherever it has occurred, should not make the following records, obtained during the conduct of the investigation, available for purposes other than casualty investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs any possible adverse domestic and international impact on that or any future investigation, and the State providing the information authorizes its release:

.1 all statements taken from persons by the investigating authorities in the course of the investigation;

.2 all communications between persons having been involved in the operation of the ship;

.3 medical or private information regarding persons involved in the casualty or incident;

.4 opinions expressed during the conduct of the investigation.

> 10.2 These records should be included in the final report, or its appendices, only when pertinent to the analysis of the casualty or incident. Parts of the record not pertinent, and not included in the final report, should not be disclosed." *[My emphasis]*

36. The practice of the Marine Department whereby, absent a court order, statements/declarations taken from interviewees in exercise of the power under s.61(1)(e) would be kept confidential and would not be released to a third party unless consented to by the interviewees and whereby, absent a court order, its accident investigation report would not be disclosed if criminal proceedings in respect of the accident are imminent, is also consistent with the practice in the UK where marine accident investigations are governed by Accident Investigation Regulations enacted under the Merchant Shipping Acts 1979, 1988 and 1995. Similar regulations have not been enacted in Hong Kong.

37. Apart from specific provisions such as that under s.61(2) of the Ordinance, the "duty of confidentiality" also arises at common law. In *Taylor v. Serious Fraud Office*[18], Millet LJ (as he then was) said[19] that:

> " … In my view: (1) The seizure or compulsory disclosure of material is an interference with the owner's privacy. The invasion of his privacy can only be justified by the public interest in ensuring that all relevant material should be available to a court of justice and that an accused person should have made available to him all material which may assist him to meet the case against him. It follows that the use to which the material may lawfully be put should be limited by the purpose for which its compulsory production is justified. (2) Persons who voluntarily supply material in confidence are entitled to have their confidence respected save only in so far as they must be taken to have consented to the use of the material. Members of the public who volunteer information to the police are entitled to expect that it

[18] [1999] 2 AC 177.
[19] At p. 198A-D.

> will be used only for the purpose of the investigation and subsequent criminal proceedings. Their expectations should be respected. (3) Nothing should be done to discourage members of the public from voluntarily assisting the police or prosecuting authorities. This applies with particular force to informers, but it is not confined to them. The risk that material which they provide will come into the public domain by being used or referred to in open court may discourage co-operation but is unavoidable. But there would be a further and unnecessary disincentive to co-operation if material of only peripheral relevance to the proceedings but disclosed by the prosecution to the accused in conformity with its duty should thereafter be freely available for use for any purpose. (4) A person who is supplied with material for a limited purpose is not entitled without the consent of the person who supplied it to use it for any other purpose." *[My emphasis]*

Further, on the appeal to the House of Lords, Lord Hoffmann explained[20] that:

> "Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected." *[My emphasis]*

In the authoritative text by R.G. Toulson & C.M. Phipps entitled "Confidentiality" (3rd Edition), Sweet & Maxwell, they explained[21] that:

> "When material has the necessary quality of confidence, equitable protection is not limited to cases in which it passes to a recipient under a consensual transaction, but is in principle available in cases in which the material is disclosed to the recipient under compulsion of law …"

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[20] In *Taylor v. Serious Fraud Office (supra)* at p.211B.
[21] At §7-008.

38. In *Frankson & Ors. v. Home Office*, Scott Baker LJ said[22]:

> "It is, in my judgment, clear beyond doubt that confidentiality attaches to what is said to the police in the course of a criminal investigation and that this applies whether the person giving the information is a suspect who is interviewed under caution or merely a potential witness. For my part I cannot see any distinction in principle. However, the point may be reached where the court has to conduct a balancing exercise between the public interest in maintaining this confidentiality and some other public interest. The weight to be attached to the confidentiality will at this point depend very much on the particular circumstances in which the material sought was obtained." *[My emphasis]*

39. Notwithstanding that an express assurance of confidentiality might not have been given to the persons from whom the statements were taken, and notwithstanding that the word "solely" did not appear in the preamble of the statement taken from one of the passengers which has been disclosed, explaining that the purpose of the interview and the investigation was to prevent similar incidents from happening again, there is no doubt in my mind that the duty of confidentiality arises in this case by virtue of the statutory provisions cited above and at common law, and requires the Director to keep confidential the witness statements and that part of the Report replicating their contents. The persons interviewed must have known that the Marine Department officers had power to conduct investigations and, for that reason, confidentiality attached to the answers they gave voluntarily to the officers exercising such powers. For the same reason, confidentiality attached to the information given voluntarily to the officers of Customs and Excise in *Alfred Crompton Ltd. v. Customs and Excise Commissioners*[23].

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[22] [2003] 1 WLR 1952 at p.1965, §35. §35 is quoted in full in §49 below.
[23] See *Alfred Crompton Ltd. v. Customs and Excise Commissioners* [1973] A.C 405 at p. 424C-G.

40. Mr Leung, however, accepts that the court has power, in appropriate cases, to override the duty of confidentiality, whether arising under statutory provisions or at common law. Given the duty of confidentiality that attaches on him and given, further, that the level of confidence in this case was high[24], I also accept that the Director has good reason to be concerned about the propriety of acceding to the request for discovery made by the plaintiff, and has rightly required the matter to be brought before me for adjudication.

41. The principles governing the exercise of discretion to disclose confidential documents were re-stated by Lord Edmund-Davies in *D. v. National Society for the Prevention of Cruelty to Children* as follows[25]:

> "In a result, I believe that the law applicable to all civil actions like the present one may be thus stated:
>
> (I) In civil proceedings a judge has no discretion, simply because what is contemplated is the disclosure of information which has passed between persons in a confidential relationship (other than that of lawyer and client), to direct a party to that relationship that he need not disclose that information even though its disclosure is (a) relevant to and (b) necessary for the attainment of justice in the particular case. If (a) and (b) are established, the doctor or the priest must be directed to answer if, despite the strong dissuasion of the judge, the advocate persists in seeking disclosure. This is also true of all other confidential relationships in the absence of a special statutory provision, such as the Civil Evidence Act 1968, regarding communications between patent agents and their clients.
>
> (II) But where (i) a confidential relationship exists (other than that of lawyer and client) *and* (ii) disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence."

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[24] As explained below.
[25] [1977] A.C 171 at p. 245 B-C.

42. The countervailing public interest to the public interest in maintaining confidentiality is the public interest in ensuring a fair trial on full evidence. In the words of Sir Nicholas Browne V.C. in *Marcel v. Commissioner of Police* [1992] Ch. 225 at p. 239F-G:

> "It is important to identify the public interests which are in conflict in this case. On the one side, there is the basic public interest in ensuring a fair trial on full evidence. Anything which prevents the full facts from coming before the court may lead to injustice through failure to protect the litigants' rights. If the [plaintiff] is not permitted to use the documents and information in his hands or in the hands of the police he will be deprived of the right to put forward his full case." *[My emphasis]*

43. Mr Sakhrani relied on the decision of Bokhary J, as he then was, in *Chan Tam Sze & Ors. V. Hip Hing Construction Co. Ltd & Ors*[26] to demonstrate that the public interest in ensuring that all relevant material ought to available to the litigant to place before the court to enable it to ascertain the truth of the matter outweighed the public interest in upholding confidence. That case concerned three appeals arising in 3 different actions, each brought by a different plaintiff. They had been heard together because they involved a common question in regard to discovery against non-parties in personal injury cases under s.42 of the then Supreme Court Ordinance, Cap. 4 and 0.24, r.7A of the Rules of the Supreme Court. Each plaintiff was a construction worker who was injured at work on a construction site and who had brought an action for damages, and each appeal was by a plaintiff from a master's refusal to order certain discovery against the Commissioner for Labour, a non-party to the 3 actions. In that case, Bokhary J stated[27]:

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[26] [1990] HKLR 473.
[27] at p. 476C-D.

"It is in interest of justice that - subject to proper safeguards of course - all material having a significant bearing on the truth be available to litigants and their advisors for them to place the same before the Court. It is true that discovery under the section is against non-parties. But, unlike discovery under the rule which is automatic, discovery under the section arises only if ordered by the Court in the exercise of its discretion. It is in this consideration, and not in any strained construction of the formula employed, that non-parties are to find their protection. In my judgment, Lord Justice Brett's statement[28] applies. Applying it, it seems to me that documents of the nature being sought in the cases now before me are, generally speaking, inherently relevant to issues of the type which commonly arise in cases such as these".

…

I think that discovery should be ordered. As far as the scope of the discovery to be ordered is concerned, the parties have put their heads together to devise an example of the sort of discovery that would normally be regarded by the Commissioner and the Director of Legal Aid as appropriate if it be right in principle that there should be discovery against the Commissioner in cases of this sort. I have decided that it is right in principle. Given that, the sort of discovery that it is felt would normally be appropriate is along these lines: There should be discovery, in relation to each construction site in question, of:

1. Notes of the factory inspector's visit during the period 12 months prior to, and 12 months subsequent to, the accident in question.

2. Correspondence with the contractor subsequent to such visits.

3. The accident report prepared by the factory inspector in respect of the accident in question.

4. Declarations by witnesses relating to the accident in question.

5. Reports prepared by the factory inspector in respect of industrial accidents occurring on the site during the period 12 months prior to, and 12 months subsequent to, the accident in question.

6. Documents relating to any prosecution brought as a result of accidents referred to in items 3 to 5.

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[28] In *Peruvian Guano* (1882) 11 QBD 55 at p. 63, where he expanded the test of relevance to include "train of enquiry" documents.

7. A list or lists of mechanical equipment on the site in question.

8. The Notification of Commencement of Construction Work in relation to the site in question.

9. A list of Responsible Persons relating to the site in question.

Where one is concerned with a factory rather than a construction site, then the reference to "mechanical equipment" in item 7 should be to "machinery" instead; and item 8 should be left out altogether." *[My emphasis]*

44. The issue of confidentiality arose in that case and Bokhary J dealt with it in these terms[29]:

"… The discovery must be on terms. The Commissioner is rightly concerned about possible contravention of the duty laid down in s.5 of the Factories and Industrial Undertakings Ordinance, Cap. 59. The section is a rather long one; but I feel that it is necessary to recite its terms. It reads:-

'(1) Save as provided in subsection (4), no public officer shall disclose to any person other than another public officer in the course of official duty, the name or identity of any person who has made a complaint alleging the contravention of any of the provisions of this Ordinance or as a result of which a contravention of such provision has come to his notice or to the notice of any other public officer.

(2) No public officer shall disclose to the proprietor of an industrial undertaking or his representative or to any other employer who is carrying on business in the industrial undertaking or his representative that a visit to the industrial undertaking was made in consequence of the receipt of any such complaint as is referred to in subsection (1).

(3) Save as provided in subsection (4), where arising out of, or in connexion with, the enforcement of any of the provisions of this Ordinance, any manufacturing or commercial secret or any working process comes to the knowledge of a public officer, such officer shall not at any time and

[29] at p. 477G-478G.

> notwithstanding that he is no longer a public officer disclose such secret or process to any person.
>
> (4) Where in any proceedings a court or a magistrate considers that justice so requires, the court or magistrate may order the disclosure of the name or identity of any person who has made any such complaint as is referred to in subsection (1) or the disclosure of any such secret or process as is referred to in subsection (3).'
>
> First of all, any order for disclosure by the Commissioner under the provisions of s.42 of the Supreme Court Ordinance should be accompanied by an order made specifically under ss.(4) of the section which I have just read, namely, s.5 of the Factories and Industrial Undertakings Ordinance. I make such an order, taking the view that justice so requires. I order that discovery under s.42 of the Supreme Court Ordinance be made notwithstanding that the making of such discovery involves, or may involve, disclosure of the name or identity of any person who has made any such complaint as is referred to in s.5(1) of the Factories and Industrial Undertakings Ordinance or the disclosure of any such secret or process as is referred to ss.(3) of that section.
>
> It is also necessary to protect complainants and the owners of any such secret or process. Making an order under ss.(4) protects those making discovery. But that is cold comfort for any complainant or owner of a secret or process. It is true that in the majority of cases there may well be no name, identity, secret or process to protect, as a matter of reality. Nevertheless, the Court should, as a matter of course, give such protection to complainants and owners of secrets or processes as can reasonably be devised.
>
> In the course of the argument, I suggested to Mr Graham, who appears for each of the plaintiffs, that some sort of undertaking in regard to the preservation of confidentiality and limited use should be given; and Mr Graham agreed." *[My emphasis]*

45. It is clear from the above that Bokhary J regarded the listed documents as discoverable, as they related to matters in question in the action, and that the public interest in ensuring that all relevant material be placed before the court to enable it to ascertain the truth of the matter and adjudicate the dispute properly

outweighed the public interest in upholding confidence which, in the cited case, arose from the statutory provisions in s.5 of the Factories and Industrial Undertakings Ordinance, Cap. 59[30].

46. A similar practice exists in England and has been described by Pill LJ in his judgment in *Frankson v. Home Office* [2003] 1 WLR 1952[31]:

> "52. Claims for disclosure such as the present could arise in many situations. There is a long standing practice, researched by Mr Owen, whereby, when the police investigate road and other accidents, statements of witnesses are disclosed to parties to subsequent civil proceedings. A working party of the Central Conference of Chief Constables produced in 1966 a statement of recommended practice. It provided, amongst other things, that "statements by witnesses in such cases should as a general rule be supplied on request to parties to proceedings, without

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[30] S.5 of the Factories & Industrial Undertaking Ordinance, Cap. 59, was repealed but has been partly replicated in the Occupational Safety & Health Ordinance, Cap. 509. See s.29, and s.24 which states:

"24. Occupational Safety Officer may request certain information

(1) An occupational safety officer may request a person to provide-

(a) information that may identify the occupier of premises that the officer reasonably believes to be a workplace; or
(b) information that may assist the officer to determine whether or not a contravention of this Ordinance is being or has been committed,

but only if the officer reasonably believes that the person has that information and cannot reasonably obtain the information from another source.

(2) A person who-

(a) without reasonable excuse, refuses to comply with a request made to the person under subsection (1); or
(b) in response to such a request, provides information that the person knows or ought reasonably to know is false or misleading,

commits an offence and is liable on conviction to a fine at level 5."

(3) A person does not have a reasonable excuse for refusing to comply with a request made under subsection (1) only because provision of the information might tend to incriminate the person. However, neither the request nor the information is admissible in criminal proceedings (other than proceedings charging the person with having committed in relation to the provision of the information an offence under subsection (2))-

(a) if, before complying with the request, the person claims that the information provided might tend to incriminate the person; or
(b) if the person's entitlement to make such a claim was not brought to the person's attention before the request was complied with.

[31] at p. 1970G-1971A.

> obtaining the witnesses' consent." The issue could also arise when the Health and Safety Executive investigate industrial accidents. I recall a practice whereby, by means of subpoena, the disclosure of material collected by the executive in the course of their inquiries was obtained. Counsel have not found a case, in either of those contexts, in which the disclosure of statements has been restrained by orders of the courts."

47. The modern approach to resolving these competing public interests is exemplified in the case of *Frankson v. Home Office* [2003] 1 WLR 1952 which was heavily relied upon by Mr Sakhrani. The claimants in that case sued the Home Office for assault inflicted on them by prison officers. They applied for an order under CPR 31.17(3) requiring the police to disclose the transcripts of interviews with the prison officers, which the police had obtained in the course of investigating the claimants' complaints. The prison officers objected on the grounds that they were interviewed under caution, in circumstances of confidentiality, and on the understanding that their answers would not be disclosed except in the event of criminal proceedings. The Court of Appeal accepted that the interviews were confidential. It also accepted that it was important to encourage persons to assist the police in their enquiries. However, it held that once the first condition of CPR 31.17(3)(a) has been established, namely, that the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, the court must proceed to consider whether disclosure was necessary in order to dispose fairly of the claim or to save costs. If there was no other route to obtain the necessary information, the court must proceed to balance the different interests. The court in *Frankson v. Home Office* had to weigh, on the one hand, the public interest in maintaining

confidentiality of those who made statements to the police in the course of a criminal investigation, and on the other hand, the public interest in ensuring that the courts should try civil claims on the basis of all the available relevant material so that it may arrive at a fair and just result. The Court of Appeal concluded that in this case the interest of enabling the claimants to prove their case outweighed the desirability of maintaining confidentiality. Finally, the Court of Appeal approved of the order made by the judge restricting the use of the disclosed interviews and their dissemination.

48. CPR 31.17(3)(a) is similar to our Order 24, r. 7A and it is instructive to quote from the judgment of Scott Baker LJ on the proper approach to take in such cases. He said[32]:

> "12. Given agreement that the interview records passed the relevance test in sub-paragraph (a), the judge had first to consider whether disclosure was necessary in order to dispose fairly of the claim or to save costs. I think it is important to bear in mind that this condition only falls for consideration when the relevant condition in (a) has been satisfied. Condition (b) must therefore be construed in that context. In my judgment this condition is focusing on the *necessity* of disclosure because third party disclosure ought not to be ordered by the court if it is not necessary to do so. Like condition (a), condition (b) is also focusing on the particular case before the court. At this point the judge has to ask himself the question whether the disclosure is needed to dispose fairly of the claim or to save costs. There may, for example, be another route to obtain the necessary information, or making an order at the particular stage the proceedings have reached may add to the costs rather than save costs.
>
> 13. The third and final stage under rule 31.17(3) is for the court to exercise its discretion whether or not to make an order. Here, wider considerations may come into play, but the court only reaches this stage if the two conditions in (a) and (b) are met. It is at this point, in my judgment, that public interest considerations fall to be taken into account and, if necessary, to be balanced. Two competing public interests have been

[32] at p. 1957C-G.

> identified in the present case, on the one hand the public interest of maintaining the confidentiality of those who make statements to the police in the course of a criminal investigation, and on the other the public interest of ensuring that as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result." *[My emphasis]*

49. Scott Baker LJ also discussed the varying degrees of confidentiality but shied away from any rigid categorisation[33]:

> "35. It is, in my judgment, clear beyond doubt that confidentiality attaches to what is said to the police in the course of a criminal investigation and that this applies whether the person giving the information is a suspect who is interviewed under caution or merely a potential witness. For my part I cannot see any distinction in principle. However, the point may be reached where the court has to conduct a balancing exercise between the public interest in maintaining this confidentiality and some other public interest. The weight to be attached to the confidentiality will at this point depend very much on the particular circumstances in which the material sought was obtained. Mr Owen suggested there are four categories of case. In the first category, at the top of the scale as it were, is the informer. Here the assumption is that there will be no disclosure; the public interest in maintaining confidentiality trumps most other circumstances[34]. The next category is where the witness is willing to make a statement but only on the basis of not giving evidence. In such a case the statement goes into the unused material. The third category is what I would call the ordinary witness statement where the witness is willing for the document to be disclosed for the criminal proceedings and is aware that it may also be used for civil or regulatory proceedings. In other words the statement may become useable for purposes beyond the criminal trial. The fourth category is where a suspect is interviewed under caution. It is difficult, submitted Mr Owen, to see why this category should entail confidentiality at all. Such confidentiality as is attracted is of a low order and easily displaced. For my part I do not think any rigid categorisation is particularly helpful; the weight depends on the circumstances of the particular case." *[My emphasis]*

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[33] at p. 1965H-1966D.

[34] See the judgment Stock VP in *HKSAR v. Agara Isaiah Bishop* CACV 354/2012, 31 December 2013, identifying the very exceptional circumstances in which the disclosure of an informant's identity in a criminal trial may be justified as the sole exception to informer privilege.

50. The reasons for the decision in *Franksen v. Home Office* were expressed by Scott Baker LJ[35]:

> "38. Tomlinson J said in the *Three Rivers* case that if disclosure of the documents in question is shown to be necessary in the interests of the litigation, then that need overrides confidentiality. However, in such a case, the court will be concerned to see whether the needs of the litigation can otherwise be satisfied, e g by considering redactions, disclosure from other sources or other appropriate means. There is to my mind no absolute rule. The public interest in ensuring a fair trial in the light of all relevant evidence is nevertheless in my judgment of the utmost importance and one that inevitably weighs heavily in any balancing exercise. However, as has been pointed out, there are circumstances in which it is overridden. Legal professional privilege, without prejudice communications and the need to protect the identity of an informer are cited as examples. Mr Havers observed that in the case of informers the underpinning factor is the desirability of maintaining a free flow of information to the police. If non-disclosure affects the integrity of a criminal trial the Crown is left with the stark choice of either disclosing the information or abandoning the prosecution. The position is different in civil cases. The trial proceeds and the judge must do his best on the information before him. The prison officers' argument is that there are already some circumstances in which the public interest of obtaining a fair trial on full evidence is overridden and that maintaining the confidentiality of interviews under caution is of such importance that it must be another. I cannot agree. In my judgment a judge should not be required to try actions by prisoners against the Home Office alleging assault by prison officers and misfeasance in public office in blinkers as to potentially critical evidence of what the prison officers said to the police when interviewed under caution. The evidence may help to establish liability or to negative it. Either way, in the present instances, it should be disclosed.
>
> 39. The court has in cases such as the present a difficult balancing exercise to perform between the two conflicting public interests. For my part, I would not put interviews under caution of suspects into any special category. It seems to me that all who make statements to, or answer questions by, the police do so in the expectation that confidence will be maintained unless (i) they agree to waive it or (ii) it is overridden by some greater public interest. The weight to be attached to the confidence will vary according to the particular circumstances with which the court is

[35] at p. 1967C-1968B.

> dealing. In the present case the countervailing public interest is one which, in my judgment, is of very great weight and one which outweighs the desirability of maintaining confidentiality. In conducting the balancing exercise the judge had clearly in mind the need to maintain the confidences as far as it was possible to do so. To that end he imposed stringent conditions on the extent and manner of disclosure. This, in my view, is a course which should always be followed in similar cases where the court decides that disclosure is required." *[My emphasis]*

51. A statement of the modern approach can be found in Zucherman on Civil Procedure, 3rd Ed.[36].

> " Although the interests of the administration of justice will normally prevail in a conflict with the right to privacy or confidentiality, the court has discretion to decide otherwise. There may be situations where the interests of the parties to a civil action to ensure that the issues are determined on the basis of all the relevant evidence are insufficient to overcome a more important private interest. Situations of this kind may be rare but they do occasionally arise. For instance, in a matrimonial dispute the issue concerned the wife's future economic prospects (*Morgan v Morgan* [1977] Fam. 122, [1977] 2 All ER 515. See also *Wynne v Wynne* [1980] 3 All ER 659, [1981] 1 WLR 69). The husband wished to call the wife's father and examine him about the extent of his assets and whether he planned to leave them to his daughter on his death. The court refused the husband's request to call his father in law, saying that "there is the question of the rights of the citizen to keep to himself details of his wealth and what he intends to do with it" (*Morgan v Morgan* [1977] Fam. 122, [1977] 2 All ER 515 at 126 and 518 respectively). Further examples are provided in relation to journalistic sources and commercially sensitive information."

Re B (Disclosure to Other Parties)[37] is another example of a case where the court did not order disclosure. Munby J. weighed on the one hand, the interests of a father, who applied for a care order in respect of his child, and who was seeking disclosure relying on his right to a fair trial under ECHR Art.6, and, on the other hand, the ECHR Art.8 rights of other related

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[36] on p. 749 at marginal note 15.89.
[37] [2001] 2 F.L.R. 1017 (Fam Div).

children to confidentiality of their care records. He noted that while the rights under ECHR Art.6 were absolute, it did not follow that the father had an absolute right to see all the documents in the case. He held that the harm which could occur due to non-disclosure was not proportionate to the effect it would have on the children's rights and refused to order disclosure. Nevertheless, he took pains to clarify that his refusal was very much an exception and not the rule[38]:

> "… It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary."

52. Finally, Pill LJ provided the counterpoint to the concerns raised by Mayo J in *"The Sunshine Island"* when he said[39] that:

> "57. … While fear of a civil action against the suspect (or his associate or employer) may sometimes deter frankness with the police, I do not regard that as a sufficient reason for hampering the fair disposal of a civil trial based on a cause of action similar in kind to, or based on the same evidence as, the potential criminal charge."

Analysis

53. The starting point of the exercise is to consider whether the documents sought are relevant to an issue arising out of the claim

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[38] At §89.
[39] at p. 1972B.

that has been made. Although the limitation of directly relevant documents imposed on applications under s.41 and O.24 r. 7A(1) does not extend to applications, such as the current one, under s.42 and O.24 r. 7A(2) for discovery from non-parties in proceedings which have already been commenced, with the advent of CJR, the applicant may find it difficult to persuade the court that background documents or "chain of inquiry" documents in the *Peruvian Guano* sense are necessary either for disposing fairly of the cause of matter or for saving costs, which must be established before the court will make an for order discovery. The need, under the CJR, to ensure reasonable proportionality and procedural economy in the conduct of proceedings is likely to inhibit the court from granting discovery against non-parties for background or "chain of inquiry" documents.

54. I have no difficulty in concluding, on the application before me, that the witness statements of the crew and the passengers and the Report are directly relevant to issues that arise in this claim. The eye witness accounts of the facts and circumstances surrounding the accident are clearly and directly relevant to the issues that arise in the claim. Although the Report was not intended to apportion blame or liability towards any particular organisation or individual, it was produced after an investigation had been conducted with the view to determine the circumstances and the causes of the accident and with the aim of identifying the factors that contributed to the accident. These are the very issues that arise in the proceedings. The Report on the circumstances and causes of the accident and the factors contributing to its occurrence is not only directly, but also highly relevant to the issues that arise in the proceeding. Although

the Report was not intended to apportion blame on liability, the maker of the Report would also do so if it were necessary in order to achieve the purpose of the investigation, which was to determine the circumstances, causes of and contributing factors to the accident, with the aim of improving the safety of lives at sea and the avoidance of future accidents.

55. The next matter for me to consider is whether the discovery of the witness statement and the Report is necessary in order to dispose fairly of the claim or to save costs. In the words of Scott Baker LJ, quoted in §48 above, this condition requires me to focus on the necessity of the third party being required to make discovery. A court ought not to order a third party to make discovery, if it was not necessary to do so. Can the information be obtained from other sources? In making an order at this stage, rather than at the later stage of the proceeding, am I adding to costs rather than saving costs?

56. Clearly, there are no other sources that contain the eye witness' accounts of the makers of the witness statements in question, nor any other source which replicates the contents of the Report, detailing the investigation conducted on the circumstances and causes of the accident, and the conclusion reached, after such an investigation, on to the causes of and factors contributing to the accident.

57. Although Mr Leung rightly pointed out that the Practice Direction on actions in the Personal Injuries List, PD18.1, did not apply to actions within the jurisdiction of the Admiralty Court, the

present action was not issued in the Admiralty Court but in the Personal Injuries List. Indeed, §12 of PD18.1 expressly states that:

> "12. An action claiming damages arising out of death or personal injury in the Admiralty List may be assigned to the PI List if the Admiralty Judge so directs."

Further, §§66 and 67 of PD18.1 expressly identify statements taken from witnesses by investigating authorities and investigation reports as relevant documents that ought to be served with the pleadings:

> "66. In order to avoid unnecessary delay and costs, the Plaintiff should additionally serve together with the Writ and Statement of Claim and documents set out in paragraph 65 hereof copies of the following documents, if they are available and not already served under the Pre-Action Protocol (see paragraphs 14 to 23 hereof) before the commencement of proceedings, and in so far as this is practicable:
>
> (1) a copy of any Statement of Facts and finding of guilt, or otherwise, arising out of any prosecution of any party in respect of the accident in which the Plaintiff was injured or the deceased was killed, together with a sketch plan prepared by and photographs taken by and/or on behalf of any investigating or prosecuting authority, and any statements made by any witnesses, including where available a Police Investigation Report or a report by the Occupational Safety Officer;
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> …
>
> (4) copies of any statements by the Plaintiff and any other person who was an eyewitness to the accident in question as to the circumstances of the accident, upon which the Plaintiff relies in support of his pleaded case, to the extent that this has not been fulfilled by (1) above;
>
> …
>
> 67. In order to avoid unnecessary delay and costs, the Defendant(s) should serve together with their Defence copies of the following documents, if they are available and not already served under the Pre-Action Protocol (see paragraphs 14 to 23 hereof) before the commencement of proceedings, and in so far as this is practicable:

> (1) Form 2 with English translation and a copy of any other record or entry of the accident in question in any statutory document including any Occupational Safety Officer's report;
>
> (2) a statement as to the current whereabouts of the machine or equipment concerned together with any brochure or manual in respect of it;
>
> (3) records of the service and maintenance of such machine or equipment for the 12-month period prior to the accident in question;
>
> …
>
> (8) copies of any statements by the Defendant(s) and any other eyewitnesses to the accident in question taken in the course of an investigation into the circumstances of such accident and of any witnesses relied upon in their pleaded case as to the system of work adopted or instructions given to the Plaintiff/deceased;
>
> (9) any photographs taken or obtained by the Defendant(s), their servants or agents, of the scene of the accident in question, the vehicles concerned, the equipment or machinery involved, and of any other relevant feature."

58. The need to serve the aforesaid documents at an early stage demonstrates not only their relevance to the issues that arise from the claim, but also that these documents are necessary in order to dispose fairly of the claim or to save costs.

59. Mr Leung also pointed out that the Marine Department had published its summary of the investigation on its website[40] based on which the plaintiff could properly plead a case against the master of the ferry and his employer in negligence, relying on the doctrine of *res ipsa loquitur* which must arise in this case in which the ferry strayed outside the navigational fairway into a mooring area and struck a mooring dolphin. However, *res ipsa loquitur* is an

[40] Set out in §10 above.

evidential tool to assist plaintiffs in cases where the evidence of the actual cause of the accident is unavailable. Where such evidence of the actual cause is available, it ought to be adduced in order to fairly dispose of the case. The early disclosure and production of these documents can lead to a substantial saving of costs, particularly in those cases where the service of these documents results in an early admission of liability. Further, the fact that the summary of the Report is available on the Marine Department's website does not obviate the need to discover the full report, since the summary does not deal with the causes of and contributing factors to the accident.

60. Having concluded that the witness statements and the Report are both relevant and necessary in order to dispose fairly of the claim or to save costs, I reach the third and final stage of the exercise, which is for me to exercise my discretion whether or not to make an order. It is at this point that public interest considerations have to be taken into account and balanced.

61. Just as in the decisions cited above, so too in the present case, there are competing public interest considerations that have to be taken into account and balanced. On the one hand, there is the public interest in maintaining confidentiality of the statements obtained by the MAI in the cause of their investigation of the marine accident and, on the other hand, there is the public interest in ensuring that all relevant material is before the court hearing the civil claim, so as to enable it to arrive at a fair and just result.

62. In the course of his judgment, Scott Baker LJ discussed various degrees of confidentiality, seemingly accepting the

submission he received that, at the top of the scale, was the informant and, below him, a witness who was willing to make a statement, but only on the basis of not giving evidence, and below him an ordinary witness who was willing for his document to be disclosed in criminal and civil proceedings, and, finally, a suspect who was interviewed under caution. However, Scott Baker LJ would not placed a suspect interviewed under caution in any special category, and he emphasised that all those who made statements to the police did so in the expectation that confidence would be maintained, unless they agreed to waive it or it was overridden by some greater public interest. In every case, the weight to be attached the confidence would vary according to the particular circumstances of the case before the court.

63. In his submissions, Mr Leung approached the subject of confidence from another angle, submitting that, in road traffic cases, the level of confidence was low and that, in those cases, the police could be expected to disclose witness statements, cautioned statements, and investigation reports, without the need for the applicant to apply for a court order for their discovery. I would add to that list the following documents: photographs, sketch plans, motor vehicle examination reports and traffic light sequence reports, and express my expectation that these documents would also be disclosed without the need for a court order.

64. Mr Leung also made the valid point that the confidentiality of the statements made to the factory inspector was not raised as a ground for objecting to their disclosure in *Chan Tam-sze & Ors v Hip Hing Construction Co Ltd & Ors*. As can be seen

from s.24 of the Occupational Safety and Health Ordinance, Cap. 509[41], a person interviewed by an occupational safety officer, who the officer believes has relevant information, is under statutory compulsion to provide that information, even if it might be incriminating. However, such incriminating information is inadmissible in criminal proceedings. Notwithstanding that the level of confidence in statements taken by occupational safety officers is higher than the statements taken by a police officer investigating a traffic accident case, Mr Leung did not suggest that those statements and the report of the occupational safety officers would only be discovered upon a court order being made. Mr Leung classified road traffic accident cases as falling within the class of case where witness and cautioned statements and the investigation reports would be disclosed without the need for a court order[42]. He did not specifically address the current practice regarding disclosure of witness statements and declarations obtained and reports made by occupational safety officers. Although the level of confidence in these statements is higher than those obtained by police investigating road traffic cases, I am not aware of any change in practice, which has prevailed since the judgment in *Chan Tam-sze & Ors v Hip Hing Construction Co Ltd & Ors*, of these statements, declarations and reports being disclosed without the need for a court order.

65. However, Mr Leung was at pains to draw a great divide between those cases and a marine accident investigation. In marine cases, the derogation of the right against self incrimination, is countered by s.61(2) of the Ordinance, which provides that no

[41] See footnote 30 above.
[42] See also the similar observations of Scott Baker LJ in *Franksen v. Home Office* at p. 1966G.

answer given "shall be admissible in evidence against that person or the spouse of that person in any proceedings". Accordingly, if the master of a vessel made an incriminating statement in the cause of a marine investigation, his statement could not be admitted into evidence in a civil action brought against him. I accept that this is far wider than the restriction contained in s.24 of the Occupational Safety and Health Ordinance, and attaches a high level of confidence to an incriminating statement taken in the cause of a marine investigation. In addition, Mr Leung submitted that a marine investigation is highly dependent on eyewitnesses' accounts of what occurred because, unlike road traffic accidents where the scene of the accident can reveal objective evidence, such as brake marks or physical evidence of damage, such objective evidence is often lacking in marine accidents. For that reason, Mr Leung submitted that investigators rely entirely on eyewitness accounts and such witnesses ought to be encouraged to volunteer information.

66. The situation may not be as dire as Mr Leung would paint it out to be as electronic data, in the form of radar records and records of signals broadcast from transponders on the vessels concerned, are available to chart the course taken by the vessels prior to the accident. Further, in collision cases where the vessels involved have not sunk, the damage sustained is readily ascertainable. Nevertheless, I accept the submission of Mr Leung that a high level of confidence attaches to the witness statements taken in the course of a marine investigation, be they be taken from the master of the vessel who had made an incriminating statement, or from other crew or passengers, such that it is right for the Director to

come to court to protect that confidence. S.61(2) of the Ordinance, which makes the answers given inadmissible in any proceedings against the maker or his spouse, does not negate the power of a court to order that the statement containing such answers be disclosed. However, in balancing the competing public interests in such cases, including this one, it is right that the court places due weight on the high level of confidence that attaches to these witness statements.

67. The other competing public interest that I must have regard to is the basic and fundamental right to have a fair trial on full evidence. The statements and the Report that had been sought are directly and highly relevant to the issues that arise in the civil action. Should the judge hearing this case sit with blinkers on, without the evidence of the eyewitness's accounts, and without the investigation report detailing the causes of and the contributing factors to the marine accident?

68. In *"The Sunshine Island"*, Mayo J. refused to order discovery of the witness statements for the reason that all the witnesses would be available to give evidence at the resumed hearing of the coroner's inquest. As the incident had occurred only a few months before then, those witnesses would have had no difficulty recollecting the events. More importantly, the coroner's officer had been provided with copies of the statements by the Marine Department and he would have been guided by those statements in framing his questions to the witnesses and he would have been able to take such action as necessary in the event of inconsistent statements being made by those witnesses.

69. Without an order of discovery for these statements, the trial judge hearing this case would not have the assistance that the coroner could receive from his officer in that case, even if Mr Leung was right to assert, (which I do not accept), that it was fortuitous that the coroner's officer had been provided with those statements. In my judgment, the countervailing public interest in ensuring a fair trial on full evidence is of very great weight and one which, in this case, outweighs even the high degree of confidentiality that attaches to the witness statements taken in the course of the marine accident investigation and replicated in the Report. I recognise that an order for discovery in cases such as the present may deter frankness on the part of persons interviewed by marine investigators in future, but that risk does not move me to refuse to make the orders sought for discovery of the witness statements and the Report, which I grant[43] as, in my judgment, the public interest requiring the disclosure of these statements and the Report replicating those statements overrides the public interest in maintaining their confidentiality. That is not to say that marine investigation officers ought not to encourage assistance by offering witnesses the assurance that their privacy and confidentiality will be respected. They will be respected subject, however, to any overriding interests of justice, as explained by Lord Hoffmann in *Taylor v Serious Fraud Office*[44].

[43] Subject to the prejudice point and the need for redaction of, or restrictions to be imposed on the use of, the disclosed materials, which are addressed below.
[44] [1999] 2 AC 177 at p.211B quoted in §37 above.

Disclosure may prejudice a criminal trial

70. The discovery of the Report was resisted on two grounds, firstly, that it reproduced the confidential information contained in the witness statements, which I have already dealt with, and, secondly, that it might prejudice the criminal trial of any prosecution that may be brought as a result of the marine accident, which I address now.

71. Mr Leung explained that marine accidents are investigated both by the MAI of the Marine Department and by the Hong Kong Police. The two sets of investigations serve different purposes and are kept separate and independent of each other. The function of the MAI is to gather all the evidence quickly and to act quickly to prevent future accidents. The practice of the Marine Department is consistent with the practice in the U.K. under the Merchant Shipping Acts, which is to withhold publication of the marine accident investigation reports until, having completed their own investigations, the police have decided not to prosecute, or until any prosecution that has been brought, or any appeal therefrom, has been concluded. Although we do not have a regulation in Hong Kong similar to r.9(2) of the Merchant Shipping (Accident Reporting and Investigations) Regulations 1994, which states that the Secretary of State may act at his discretion withhold publication[45] until either the prosecution, including any appeal, has been concluded, or it has been decided not to prosecute, the practice of the Marine Department in Hong Kong is consistent with the requirements of the law, and, in

[45] He is compelled by R9(1)(b) of the same regulation to publish the report if it will improve safety or if it relates to a serious casualty to a UK ship, unless there is good reason to the contrary or unless he exercises his discretion under R9(2).

particular, the law of contempt which prohibits publications that are intended or likely to interfere with or obstruct the fair administration of justice, including publications which are likely to prejudice the fair trial or conduct of criminal proceedings, particularly criminal proceedings before juries.

72. I accept Mr Leung's submission that there is no time limit for the police to prefer a charge by way of an indictment such as, for example, a charge of "endangering the safety of others" contrary to ss.32 and 82 of the Ordinance. However, the substantial passage of time, since the accident has occurred, must make it unlikely that a prosecution would be launched. Nevertheless, whether or not prosecutions are afoot or may be imminent is of no concern to me. Persons injured in marine accidents are subject to strict limitation periods and must act speedily to commence proceedings. With the advent of the CJR, they would need to prosecute their claims diligently. Where, as in this case, the Report of the MAI is directly and highly relevant to issues that arise in the proceedings, I would not hesitate to order its discovery to the applicant, but only upon his undertaking that, unless with the prior written consent of the Secretary for Justice or pursuant to the leave of the court, the Report, and any part thereof, should only be accessible by the parties to the proceedings, their legal representatives and experts' witnesses; and that the Report should be used solely for the purposes of the proceedings and not be disclosed to any person who is not a party to the proceedings.

Redaction of, or restrictions to be imposed on the use of, the documents order to be disclosed

73. Although I have concluded in this case that the public interest in ensuring a fair trial on full evidence outweighs the public interest in maintaining confidentiality, I am very much alive to the need to maintain confidence as far as it is possible to do so. The restrictions on the use of the Report, set down above, ought to apply equally to the use of the witness statements which I have ordered to be disclosed. I leave it to the parties to address and agree any further restrictions that may be appropriate, such as, for example, redaction of any matter covered by legal professional privilege, or personal data which it would be inappropriate to discover [46]. However, redactions should be affected in a way so as not to make the disclosable materials unintelligible. This could be done by providing a description of the nature of the redaction that has been made. I grant the parties liberty to apply in the event that the parties are unable to agree the redactions that ought to be made to, or restrictions that ought to be imposed on the use of, the discoverable materials.

Privacy rights and data protection principles

74. Mr Kuang had originally taken the stance that they could not release the documents requested for the reason that the Marine Department was prohibited under DPP3 of the PDPO from disclosing the informant's personal data for a purpose which was

[46] My observations below on the subject matter of redactions in the context of data privacy rights are relevant and ought to be considered by the parties when addressing this issue.

inconsistent with the purpose for which they were to be used at the time of the collection of the data, without the prescribed consent of the informant, unless a relevant exemption was involved. However, I was informed at the first hearing of the summons that the Marine Department was no longer resisting discovery by reason of DPP3.

75. Accordingly, my observations on the subject must necessarily be *obiter*. However I believe it is important for me to address the submissions that were made, at my invitation, as, in the vast majority of cases, the more important point is the extent to which data protection legislation prevents the disclosure of witness statements, declarations and other documents relating to accidents that have taken place. Indeed, even before this matter came before me, I had been requested by the Personal Injuries Committee of the Law Society to provide some guidance in this area where persons wishing to bring claims for damages for personal injury were finding it increasingly difficult to obtain information from investigating agencies, including the police, for the stated reason that the information sought was personal data and could not be released as the informant had not given consent.

76. Hong Kong was the first in Asia to enact data privacy legislation in the form of the PDPO which came into force in August 1996[47]. The scope of the PDPO is very broad. "Data" is defined in s.2 to mean any representation of information (including an expression of opinion) in any document[48], and includes personal

[47] For a review of the history of privacy law and the current state of personal data privacy law in Hong Kong, see my article "Personal Data Privacy in the Digital Age" in (2013) 43 HKLJ 801.
[48] "Document" is broadly defined in s. 2 to include electronic data and visual images.

identifiers[49]. "Personal data" is defined in the same section as meaning any data:

> "(a) relating directly or indirectly to a living individual;
>
> (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
>
> (c) in a form in which access to or processing of the data is practicable."

This definition is wide enough to cover photographs[50]. It protects all natural persons (known as "data subjects", who are defined in s.2 to include any individual who is the subject of the personal data) against all "data users" (those who control the collection, holding, processing or use of data). This means that strangers, big and small business, and the single largest collector of personal data, the Government, are covered by the PDPO scheme.

77. The following provisions of the PDPO are relevant to the matters under consideration:

"Use", defined in s.2(1) of the PDPO, "in relation to personal data, includes disclose or transfer the data".

S.4 of the PDPO stipulates that data users shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under the PDPO.

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[49] Defined in s.2 to mean an identifier that is assigned to a data subject by the data user to uniquely identify the data subject. It does not include the individual's personal name.

[50] *Eastweek Publisher Ltd. v. Privacy Commissioner for Personal Data* [200] 2 HKLRD 83.

The data protection principles are set out under Schedule 1 of the PDPO. DPP3 provides that personal data should not, without the prescribed consent of the data subject, be used for a new purpose and new purpose is defined, in relation to the use of personal data, to mean:

> "Any purpose other than –
>
> (a) The purpose for which the data was to be used at a time of the collection of the data; or
>
> (b) A purpose directly related to the purpose referred to in paragraph (a)."

Exemptions to these provisions are set out in Part 8 of the PDPO. S.51 provides:

> "51. Interpretation
>
> Where any personal data is exempt from any provision of this Ordinance by virtue of this Part, then, in respect of that data and to the extent of that exemption, that provision neither confers any right nor imposes any requirement on any person, and the other provisions of this Ordinance which relate (whether directly or indirectly) to that provision shall be construed accordingly."

S.58 provides as follows:

> "58. Crime, etc.
>
> (1) Personal data held for the purposes of –
>
> …
>
> (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
>
> …
>
> is exempt from the provisions of data protection principle 6 (which provides for access to personal data by data subjects) and section 18(1)(b) where the application of those provisions to the data would be likely to –
>
> (i) prejudice any of the matters referred to in this subsection; or

(ii) directly or indirectly identify the person who is the source of the data.

…

(2) Personal data is exempt from the provisions of data protection principle 3 in any case in which –

(a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and

(b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters."

Newly enacted S.60B[51] provides:

"60B. Legal proceedings etc.

Personal data is exempt from the provisions of data protection principle 3 if the use of the data is –

(a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;

(b) required in connection with any legal proceedings in Hong Kong; or

(c) required for establishing, exercising or defending legal rights in Hong Kong."

S.18 relates to data access requests and provides:

"18. Data access request

(1) An individual, or a relevant person on behalf of an individual, may make a request –

(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data."

[51] Introduced by Ordinance No 18 of 2012.

78. Having considered the submissions I have received from the parties and, particularly, the submissions of Ms Brenda Kwok, Chief Legal Counsel for the Privacy Commissioner[52], I propose to set out some broad propositions on how the PDPO affects the disclosure of witness statements, declarations and other documents relating to accidents that have taken place.

Data access requests and statements and other documents relating to accidents

79. It is important to understand at the outset that a person injured in an accident, who wishes to seek discovery of documents that are relevant to his claim for damages, must do so by a process of applying for discovery of those documents, either from parties in the course of the proceedings; or from a person likely to be a party to subsequent proceedings to be brought, pursuant to s.41 of the High Court Ordinance and O.24 r.7A(1) of the RHC; or from a non-party in existing proceedings, pursuant to s.42 of the High Court Ordinance and O.24 r.7A(2) of the RHC; or from a non-party by means of a *Norwich Pharmacal* application. The applicant cannot obtain such documents by making a data access request pursuant to section 18 of the PDPO. In *Durant v The Financial Services Authority*[53], Auld, LJ explained that:

> "27. …the purpose of section 7 [Data Protection Act 1998], in entitling an individual to have access to information in the form of his "personal data" is to enable him to check whether the data controller's processing of it unlawfully infringes his privacy and, if so, to take such steps as the Act provides, for example in sections 10 to 14, to protect it. It is not an automatic key to any

[52] See §13 above.
[53] [2004] FSR 573.

> information, readily accessible or not, of matters in which he may be named or involved. Nor is to assist him, for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties …
>
> 30. … the mere fact that a document is retrievable by reference to his name does not entitle him to a copy of it under the Act. … It cannot have been the intention of Parliament that … any document held by the FSA generated by and/or arising out of the FSA's investigation of such a complaint should itself be disclosable under section 7 …
>
> 31. … His claim is a misguided attempt to use the machinery of the Act as a proxy for third party discovery with a view to litigation or further investigation, an exercise, moreover, seemingly unrestricted by considerations of relevance …" *[My emphasis]*

80. Further, Hickinbottom, J in *Ezsias v Welsh Minister*[54] said:

> "66. … To use the provisions of the [1998] Act to seek disclosure of documents generated as a result of the applicant's own complaint, in order to further the legal claim of the applicant against a third party is a legal abuse. In Buxton LJ's words [in *Durrant v The Financial Services Authority* at §80)], such an application is misconceived." *[My emphasis]*

81. *Durant v The Financial Services Authority* was considered by *Wu Kit Ping v Administrative Appeals Board*[55]. That case concerned the compliance of a data access request made by a patient to a hospital against which she had lodged a complaint that it had incorrectly diagnosed her condition. She was supplied with 4 documents with redactions of the names of the authors and the recipients, and certain other content. Amongst the redactions was a sentence in one of the documents captioned: "Feedback on Complaint …" which contained an opinion by the maker about his

[54] [2007] AER (D) 65.
[55] [2007] 4 HKLRD 849.

professional conduct regarding her treatment. She complained to the Privacy Commissioner that the data request had not been fully complied with. The Commissioner determined that the rejection was justified and the decision was confirmed by the Administrative Appeals Board. The application for leave to apply for judicial review was dismissed by Saunders J, except in respect of the sentence in question. He noted that great care had to be taken when referring to English cases given the substantial differences between the English and the Hong Kong data protection legislation. However, on his own interpretation of the Hong Kong provisions, he reached, in broad terms, the same conclusions as the English Court did in *Durant v The Financial Services Authority*. He noted that the right of an individual to obtain data was limited to that individual's personal data and he stated:

> "31. The entitlement of a data subject is to know what "personal data" is held by the data user. By the application of the definitions, and s.18(1)(b), the data subject is entitled to a copy of any representation of information, (including an expression of opinion), relating directly or indirectly to the data subject, or from which it is practicable for the identity of the data subject to be directly or indirectly ascertained.
>
> 32. The entitlement is to a copy of the data, it is not an entitlement to see every document which refers to a data subject.
>
> ...
>
> 34. It is not the purpose of the Ordinance to enable an individual to obtain a copy of every document upon which there is a reference to the individual. It is not the purpose of the Ordinance to supplement rights of discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovering the identity of a wrongdoer under the principles established in *Norwich Pharmacal & Others v Commissioners of Customs and Excise* [1974] AC 133. "

82. In *Wu Kit Ping v Administrative Appeals Board*, the applicant was the data subject who made a data access request for

her own medical treatment records. A person injured in an accident who wishes to claim damages for personal injuries is not entitled to make a data access request from investigating agencies for sight of witness statements taken by them on the basis that the witness statement named or identified him or her as a person injured in the accident. As explained by Auld LJ in *Durant v The Financial Services Authority*, personal data (which is similarly defined in Hong Kong) is information about himself and this should be construed narrowly:

> "27. … As a matter of practicality and given the focus of the Act on ready accessibility of the information—whether from a computerised or comparably sophisticated non-computerised system—it is likely in most cases that only information that names or directly refers to him will qualify. … But ready accessibility, though important, is not the starting point.
>
> It follows from what I have said that not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity. …" *[My emphasis]*

83. A person who gives an eyewitness account to an investigating agency about an accident in which an injured person, or the injuries suffered by him, is mentioned, does not make the investigating agency a data user collecting personal data of the injured person. Neither is the eyewitness account[56] of the accident, personal data of the witness giving the account, except to the extent that it contains his personal particulars such as identity card number, addresses, telephone or mobile phone numbers and other contact details (which could be redacted) and except to the extent that he speaks of any injuries he might himself have suffered in the same accident (which could also be redacted)[57]. An investigative agency should not be astute to deny discovery of statements and documents to victims of accidents on the ground that doing so infringes DPP3, when those documents, properly redacted, do not contain personal data within the meaning of the PDPO[58].

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[56] An eye witness who says a vehicle was driven at a certain speed is expressing an admissible non-expert opinion about that speed. However, such an expression of opinion is not personal data within the meaning of s.2 of the PDPO.

[57] *Cf. Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* where the woman complainant was photographed on a public street, without her knowledge or consent, and the photo was published as part of a magazine article on the fashion sense of Hong Kong women. All those shown in the article were essentially anonymous photographic subjects. The article bearing the headline "Japanese Mushroom Head" contained unflattering and critical comments about the complainant's fashion sense and she complained to the Privacy Commissioner who found that there was a breach of DPP1. A majority of the Court of Appeal held that photographing a person did not amount to a collection of personal data within DPP1 if the person in the photograph was anonymous so far as the data user was concerned and where the data user did not intend or seek to identify the person's identity. However, photographing a person can be an act of data collection if included as part of a dossier being compiled about the person as an identified subject.

[58] In *Wong Kar Gee Mimi v. Hung Kin Sang Raymond* [2011] 5 HKLRD Harris J held that the name of an employee and his payroll records collected for the proper administration of a company could be inspected by a shareholder without infringing DPP3 as such inspection was not for a new purpose but for the purpose of verifying proper administration by the company.

Is the use of personal data contained in witness statements and other documents obtained by investigating agencies in subsequent civil proceedings "directly related" to the purpose for which the data was to be used at the time of collection?

84. In his decision in *Lily Tse Lai Yin v. Incorporated Owners of Albert House*[59], Suffiad J held, in the alternative to his primary holding that the use of the data in civil proceedings was exempted by s.58(2) of the PDPO, that the use of witness statements, taken by the police in the investigation of the canopy collapse at Albert House, in subsequent civil proceedings was a use directly related to the initial purpose. Accordingly, applying the definition of "new purpose" in DPP3, there was no infringement of DPP3. In the present case, it is arguable that the sole purpose of the investigation by MAI was to collect information to prevent a recurrence of the accident. If so, it is arguable that the use of the information, assuming that it contained personal data, in subsequent civil proceedings was a use that was not directly related to the original purpose[60]. However, I would prefer that the point is debated and decided in a case where it actually arises.

Exemptions do not create a legal basis to seek discovery or create obligations to disclose information

85. The second broad observation I make is that, as made clear by s.51 of the PDPO, the exemptions under s.58(1)(d) and (2)

[59] [1999] 1 HKC 386 at p. 393H.
[60] See also §§50 to 53 of the judgment of Godfrey Lam J in *Ng Shek Wai v. Medical Council of Hong Kong* [2015] 2 HKLRD 121 which deals with this point in the context of a Medical Council disciplinary enquiry.

and s.60B of the PDPO do not provide any legal basis or create any obligation on the part of the holder of the information to make disclosure[61]. The application for discovery must be founded upon the *Norwich Pharmacal* principle or based on ss. 41 or 42 of the High Court Ordinance and the corresponding rules of the High Court. Where the court concludes that it is equitable to order discovery applying the *Norwich Pharmacal* principle or that, as I have done in this case, that the documents sought are relevant to issues arising in the claim[62], and necessary for disposing fairly of the cause of matter, or for saving costs, the court must then exercise its discretion by balancing the public interest in ensuing a fair trial on full evidence against the public interest in maintaining privacy rights. It is only in exceptional cases that privacy rights have prevailed in this type of contest, as it did in the cases referred to in §51 above[63]. Similar sentiments were expressed by Suffiad J in *Lily Tse Lai Yin v. Incorporated Owners of Albert House* when he said[64]:

> "… It should also be noted that it was never the intention of the legislature that the Personal Data (Privacy) Ordinance would impede the administration of justice by restricting or eliminating the power of the High Court to order discovery under s 42 of the High Court Ordinance and it would be a very sad for the administration of justice in Hong Kong if that consequence came about, whether intended or not.
>
> Moreover, I have not the slightest hesitation to hold that the material sought by the plaintiffs in this application are highly relevant to the issues in this case. I should just add here that

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[61] In *Ng Shek Wai v. Medical Council of Hong Kong* [2015] 2 HKLRD 121 it was held that the fact that the exemption in s.60D(a) applied to the case did not imply that the Medical Council was obliged to make disclosure: as was clear from s.51 of the PDPO, s.60B did not confer any entitlement on the applicant to the information sought.

[62] As also found by Suffiad J in *Lily Tse Lai Yin v. Incorporated Owners of Albert House* [1999] 1 HKC 386 at p.394B.

[63] In *Ng Shek Wai v. Medical Council of Hong Kong* [2015] 2 HKLRD 121 it was held that Medical Council properly directing itself would have held that the principle of open justice required or authorised the disclosure such that, by virtue of s.60B, DPP3 became irrelevant.

[64] [1999] 1 HKC 386 at p. 394A-C.

> what evidence is or is not relevant to the issues in a personal injuries action is to be determined by the court and not by the data user as seems to have been suggested by Mr Li in his submission. That no doubt is the raison d'etre for s 42 of the High Court Ordinance."

86. Even if the court orders discovery, thereby overriding the privacy rights of the makers of the statements in question, the court may impose conditions that irrelevant personal information of the makers be redacted from those statements. In the vast majority of cases, the redaction of the personal information would render the discoverable document one which does not infringe any rights of privacy, as an eyewitness account of the accident is not personal data concerning the maker of the statement.

Exemptions only relevant when statements and other documents relating to accidents contain personal data

87. The exemptions have to be considered in the context of the voluntary, or court-ordered, disclosure of statements and documents, which, notwithstanding redactions, contain personal data the disclosure of which would infringe DPP3.

88. The broader ambit of the new s.60B will render largely otiose the narrower scope of s.58(1) and (2) of the PDPO. In his decision in *Lily Tse Lai Yin v. Incorporated Owners of Albert House*[65], Suffiad J held that, since tort was a civil wrong, the bringing of a civil claim for damages in tort amounted to the remedying of unlawful or seriously improper conduct. On that basis, he held that the use of data in a civil action claiming damages in tort

[65] [1999] 1 HKC 386 at p. 393F-G.

came within the ambit of s.58(1)(d) and was exempted from DPP3 by s.58(2). Professor Raymond Wacks has commented in Hong Kong Data Privacy Law (2nd Ed), at §15.47, that the exemption in s.58(2) only applied if a second limb under s.58(2)(b) was satisfied, namely, that the purpose concerned (i.e. the remedying of unlawful conduct) would be likely to be prejudiced if the data were not used in the proposed manner. Although Suffiad J was silent on this point, it is implicit, from his judgment and his decision that the materials sought were highly relevant to the issues in the case, that the remedying of unlawful conduct by bringing a civil suit would, indeed, be prejudiced if such highly relevant materials were not disclosed on account of DPP3. *Cinepoly Records Co. Ltd. & Others v. Hong Kong Broadband Network Ltd. & Others* [66] is another example of a case where the court held that the exemption under s.58(1)(d) and (2) applied. After satisfying himself that the applicant was entitled to *Norwich Pharmacal* relief, Deputy Judge Poon, as he then was, dealt separately with the requirements under s.58(2)(a), concerning "use and purpose", and s.58(2)(b), concerning "prejudice of non-disclosure", and concluded that both requirements were satisfied and, in respect of the latter, holding that without the data the applicant would be unable to commence any action against the infringers of his intellectual property rights and would continue to suffer from their infringing activities.

89. The final case I mention, before turning to deal with the exemption under the new s.60B, is *Kan Hau Ming v. Secretary for*

[66] [2006] 1 HKLRD 255.

Justice[67], where the claimant reported an accident that occurred involving a public bus and complained to the police, which carried out an investigation. In his police statement, the claimant specifically refused consent to disclose the same to any third party. Upon completion of their investigations, the police concluded that there was insufficient evidence to prosecute the driver. Meanwhile, the claimant issued a letter before action to the bus company and its loss adjustors wrote to the police requesting a copy of his statement, and were given a copy. The claimant then complained to the Privacy Commissioner who served an enforcement notice on the police for wrongfully releasing the statement to the loss adjustors. The claimant afterwards succeeded in his claim before the Small Claim Tribunal against the Commissioner of Police and was awarded $5,000 for "injury to feelings" for the wrongful disclosure of the statement. The tribunal rejected an argument in favour of disclosure based on s.58(1)(d) of the PDPO, holding that, despite the initial purpose of the investigation, as the police had decided to take no further action, there was no "remedying of unlawful or seriously improper conduct" to enable the exemption under s.58(1)(d) to be invoked, and, further, that no civil proceedings were on foot at the stage when the statement was provided to the loss adjustors. I have no doubt that this case was wrongly decided. S.58(1)(d) and (2) applied to exempt the operation of DPP3: the bus company's legal right to defend a false claim brought or to be brought against it comes within the ambit of "remedying of unlawful or seriously improper conduct", which would have been prejudiced if the

[67] SCTC 37866 of 2010, K.L. Shum, Esq., 3rd October 2011.

claimant's statement to the police was not disclosed to the loss adjusters on account of DPP3.

90. S.60B[68] had not been brought to the attention of nor considered by Deputy High Court Judge Seagroatt in his decisions in *Chan Chuen Ping v Commissioner of Police* and *Chan Wai Ming v Leung Shing Wah.* S.60B is modeled on s.35 of the UK Data Protection Act 1998. The omission to enact a provision similar to s.35, or its predecessor, in the PDPO created a lacuna which the Privacy Commissioner sought to remedy by introducing s.65B so as to create a new exemption from the application of DPP3 in recognition of the rights and freedom of individuals to protect or defend their own personal or proprietary rights.

91. Although s.35 of the UK Act uses the word "necessary", instead of the word "required", in respect of the second and third limbs of the exemption, a review of overseas privacy legislation showed that it was a common feature of such legislation that it exempted the use or disclosure of personal data when it was "required or authorized by law". For that reason, the word "required" was adopted for all 3 limbs of the exemption in Hong Kong. In fact, s.60B was enacted without any discussion in the Legislative Council during its scrutiny of the bill.

92. There is no material difference between s.35(1) of the Act and s.60B(a) in respect of the use of the data which is required or authorized by or under any enactment or by any rule of law or by an order of a court. The Motor Vehicles Insurance (Third Party

[68] Set out in §77 above.

Risks) Ordinance, Cap. 272, and the Employees' Compensation Ordinance, Cap. 282, both made it a condition precedent of the right to directly recover damages from the insurer concerned, that the plaintiff gives sufficient notice of proceedings to such insurer. To enable the plaintiff to do so, s.13 of the former Ordinance and s.44(A) of the latter have created a duty on the part of the insured person to give such particulars of his motor insurance policy as specified in the certificate of insurance, in the former case, and to produce for inspection the policy of insurance and all other documents relating to the policy, in the latter case. Disclosure of these insurance particulars, including the identity of the insurer, is required to be made by these statutory provisions. It is, therefore, extremely surprising to note the refusal of the Commissioner of Police and the Transport Department to disclose the identity of the insurer on account of DPP3.

93. In an affirmation made on behalf of the Commissioner of Police and filed in HCPI 17 of 2014 in answer to a summons for discovery, the Commissioner of Police explained his hesitation in supplying the documents requested on account of enforcement notices that had been received from the Privacy Commissioner in previous cases. One such case was the case of *Kan Hau Ming v Secretary of Justice*, referred to above, which resulted in an award of compensation against the Commissioner of Police in the sum of $5,000. The other case concerned an accident in which it was alleged that the complainant's vehicle was damaged by the driver of another vehicle. That driver was subsequently charged with careless driving. Upon request of that driver, the Commissioner of Police

released the complainant's particulars of insurance policy to him for the purpose of his intended civil claim against the complainant. This case occurred before s.60B was enacted. The Privacy Commissioner apparently took the view that the police should not have disclosed the insurance particulars to the complainant for the reason that, on the face of it, the driver who had been charged with careless driving had crashed into the car of the complainant and did not suffer any injury; nor did his car show any visible signs of damage. For various reasons, including the reason that the driver could have obtained the complainant's address and other particulars from the Transport Department, and the further reason that the driver could have obtained the insurance particulars pursuant to s.13 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 272, the Privacy Commissioner concluded that the exemption in ss.58(1)(d) and 58(2) were not applicable. With the enactment of s.60B(a), such a case would fall fairly and squarely within the exemption, namely, that the use of the data is required under an enactment in order to pursue the insurer of a vehicle involved in an accident. A more fundamental point is whether one's particulars of insurance, which one is compelled by law to disclose, can constitute personal data within the meaning of the PDPO. If they cannot, DPP3 is never engaged in respect of these particulars.

94. The main point to note about the exemptions contained in s.60B is that they are very wide and not limited to a case by case basis; and that there is no requirement to show prejudice created by the operation of DPP3 before the exemption can be invoked. Investigating agencies should have little difficulty concluding that

applicants seeking discovery of witness statements and investigation reports in respect of an accident are doing so because those documents are required either in connection with their contemplated legal proceedings for damages for personal injuries against the tortfeasors concerned, or are required for establishing and exercising their legal rights. In a case such as *Kan Hau Ming v Secretary of Justice*, the bus company would require such documents to defend its legal rights.

95. Both of Privacy Commissioner and the Secretary for Justice take the view that the words "required" and "necessary" are synonymous. Indeed Mr Leung has cited the case of *Dunn v Durham County Council* [69] where the court, at §21, referred to s.35 as exempting a data controller from non-disclosure provisions where discovery is "required" in the context of litigation. Our legislature has chosen the word "required" instead of the word "necessary". I am against importing notions of "necessity" when considering whether or not personal data is required, when the meaning of s.60B, in order to trigger the exemptions granted by it. The extent to which personal data is required in connection with legal proceedings must vary from case to case. The submission from the Privacy Commissioner that "required" ought to be construed as "reasonably required", is attractive but, absent further argument on the point, I refrain from making any determination on it. What is, however, clear to me is that if there is doubt as to the genuineness of an applicant's intended claim, he should be requested to apply for a court order.

[69] [2013] 1 WLR 2305.

96. But what I would say, quite emphatically, is that s.60B does not shackle or inhibit a court in the exercise of its discretion to order discovery. When a court concludes that it is equitable to order discovery, applying the *Norwich Pharmacal* principle, or that the documents are relevant and necessary for disposing fairly of the cause of matter, or for saving costs, it must then exercise its discretion by balancing the public interest in ensuring a fair trial on full evidence against the public interest in maintaining privacy rights. If the exemption in s.60B applies, then there are no countervailing privacy rights to consider. However, even if the exemption does not apply, the court is still able to order discovery if, in balancing those countervailing rights, it comes to the view that privacy rights must give way to the public interest in ensuring a fair trial on full evidence. As Suffiad J. noted in *Lily Tse Lai Yin v The Incorporated of Owners of Albert House*, it was not the intention of the legislature that the PDPO should impede the administration of justice by restricting or eliminating the power of the High Court to order the discovery

97. Investigating agencies can invoke the protection of s.60B when disclosing information containing personal data to victims of accidents. When proceedings have been commenced, the exemption in s.60B(b) can be invoked, and when proceedings are contemplated the exemption in s.60B(c) can be invoked. In accident cases where persons have been injured, investigating authorities ought to have no hesitation about making disclosure and can be confident that the relevant exemption in s.60B protects them. However, s.60B does not impose any obligation on investigating authorities to make

disclosure. Where there is doubt about the legitimacy of the disclosure application, the investigating agency being asked to disclose personal data is not to be faulted for asking the party seeking disclosure to obtain an order from court. The grant of such a court order would automatically invoke the exemption contained in s.60B(a). Hopefully, given the observations I have made above, those applications to court would be rare.

Civic duty and subpoenas

98. Once an exemption in s.60B is invoked, or a court order is made, there is no longer any need to redact personal data contained in the documents in question and, particularly, the addresses of the witnesses to the accident, as doing so would defeat the very object of the exercise which is to request or to subpoena those witnesses to come to court to give evidence. Subpoenas cannot be served personally on such persons unless their addresses are known. Although our law does not impose a duty on our citizens to act as good Samaritans and to rescue or render assistance to a person in danger or in distress, the law imposes a civic duty on our citizens to appear in court and give truthful evidence on matters relevant to the issues arising so as to enable the court to administer justice.

Costs in Cases of Non-party Discovery

99. S.43 of the High Court Ordinance provides:

> " (2) … rules of court shall be made for the purpose of ensuring that the costs of and incidental to proceedings for an order under

> sections 41 and 42 incurred by the person against whom the order is sought shall be awarded to that person unless the Court of First Instance otherwise directs." *[My emphasis]*

And O.62, r.3 of the RHC provides:

> "(12) Where an application is made in accordance with Order 24, rule 7A or Order 29, rule 7A, for an order under section 41, 42 or 44 of the Ordinance, the person against whom the order is sought shall be entitled, unless the Court otherwise directs, to his costs of and incidental to the application and of complying with any order made thereon … " *[My emphasis]*

The normal order in the cases of this kind is that the applicant for non-party documents pays the costs of the application to court to obtain those documents, which he can recover as part of the costs of the action he brings or will bring against the tortfeasor. Such applications made to court by an applicant against a non-party are not adversarial proceedings in the true sense. In this case, I had indicated to the parties that I was minded to make the usual order for the costs of the first date's hearing. Given the high level of confidence reposing in the documents in question, which I have identified above, it was reasonable for the Director, not only to require the applicant to seek an order of court for discovery but also to resist the application. I had also indicated that I would wish to make an order that there be no order as to costs for the subsequent hearings that have occurred by reason of my invitation for further submissions to be made to me in this complicated and confused area of the law. For these reasons, I hereby make an order *nisi* as to costs on the above basis.

100. As requested by Mr Sakhrani, but subject, of course, to any submission the defendant may make application in due course, I

am prepared to express my preliminary view that the costs incurred over the additional dates of hearing were properly incurred and ought to recovered as part of the costs of the action against the defendant, and, further, that insofar as they may not be recoverable, for any reason, from the defendant, that they ought to be allowed on a common fund taxation of the plaintiff's own costs pursuant to the Legal Aid Regulations, which I now direct to be done. In this event, I would hope the Director of Legal Aid would give consideration to a waiver of such costs from the scope of his first charge, as the burden of bringing this application to court, which has, hopefully, brought some clarity to this area, to the benefit of all personal injury litigants and investigating agencies, if not others, ought not to be borne solely by the plaintiff in this case.

101. I cannot conclude this decision without expressing my gratitude to counsel for the assistance they have rendered to me.

(Mohan Bharwaney)
Judge of the Court of First Instance
High Court

Mr Ashok Sakhrani, instructed by Szwina Pang, Edward Li & Co., assigned by Director of Legal Aid, for the plaintiff

The defendant was not represented and did not appear

Mr Raymond Leung, instructed by the Department of Justice, for the Director of Marine