

Protecting legal professional privilege

保護法律專業保密權

Two recent decisions of the Court of First Instance provide invaluable guidance on the topic of protecting legal professional privilege in the context of regulatory investigations, writes James Wood

對於在監管調查中保護法律專業保密權這一問題，香港原訟法庭近期作出的兩項裁決提供了寶貴的指導意見

The global financial crisis has given rise to two important and impressive decisions of the Court of First Instance (CFI) in relation to the topic of protecting the legal professional privilege (LPP) of persons under investigation by the Securities and Futures Commission (SFC).

The first decision was a judgment of the Honourable Mr Justice Barma, delivered on 19 August 2009, in *James Daniel O'Donnell (In his capacity as an investigator directed by the Securities and Futures Commission under s 182(1) of the Securities and Futures Ordinance) v Lehman Brothers Asia Ltd (In Liq) (HCMP 1081/2009, unreported) (Lehman Brothers)*. The second decision was the judgment of the Honourable Mr Justice Wright, delivered on 18 March 2011, in *CITIC Pacific Ltd v Secretary for Justice and Commissioner of Police [2011] HKCU 563 (CITIC)*.

Whilst it is understood that *CITIC* is being appealed and, accordingly, may result in new judicial pronouncements, both cases nonetheless provide invaluable guidance for legal practitioners on the topic of protecting LPP in the context of SFC investigations.

As stated by Wright J in *CITIC* at [19]: "Discussions concerning the concept, nature and purpose of legal professional privilege occupy such a prodigious number of pages of law reports in this [Hong Kong] and other jurisdictions as to render any further detailed recitation superfluous." In these circumstances, only a brief overview of the concept, nature and purpose of LPP is necessary before delving into the significance of these two recent cases.

對於在香港證券及期貨事務監察委員會(簡稱「香港證監會」)展開的調查中所涉及個體的法律專業保密權(簡稱「法律專業保密權」)這一問題，全球經濟危機引發了原訟法庭兩項重大而意義深遠的裁決。

第一項原訟裁決由鮑曼明法官於2009年8月19日作出，案情為 *James Daniel O'Donnell (以香港證監會根據《證券及期貨條例》第182(1)條指定的調查員身份) 訴雷曼兄弟亞洲有限公司 (清算中)*，案件編號HCMP 1081/2009 (未有載錄的案件) (雷曼兄弟)。第二項原訟裁決由韋毅志法官於2011年3月18日作出，案情為 *中信泰富有限公司訴律政司司長及警務處處長* [2011]，案件編號HKCU 563 (*中信泰富*)。

儘管因中信泰富被上訴而可能產生新的司法公告，但對於在香港證監會調查中保護法律專業保密權這一問題，這兩起案件都為法律從業人士提供了寶貴的指南。

如韋毅志法官在中信泰富一案中在第[19]條所言：「有關法律專業保密權的概念、性質和目的的討論在香港和其他司法管轄區的法律報告中佔據了如此龐大的篇幅，以致於再重複論述實屬多餘」。因此在深入探究這兩起近期案件的重大意義之前，只需對法律專業保密權的概念、性質和目的予以簡要概述即可。



Legal professional privilege

An overview

LPP is a long established rule in common law which has been enshrined in Article 35 of the Basic Law. Pursuant to Article 35: “Hong Kong residents shall have the right to confidential legal advice.” The importance attached to LPP was succinctly summarised by His Honour Judge Garry Tallentire in a recent District Court trial. In the words of the Judge, LPP was protected by the Basic Law and ‘it will take a lot to take it away’: see E Yau, ‘Legal professional privilege has to be protected, judge says’, *SCMP*, 19 March 2011.

In *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487 at 507, Lord Taylor CJ described LPP as ‘a fundamental condition on which the administration of justice as a whole rests’. The justification for LPP is the public policy interest in the need to facilitate the administration of justice by encouraging and enabling a client to consult his/her lawyer fully and frankly, and in complete confidence, safe in the knowledge that what he/she tells his/her lawyer will never be revealed to a third party without his/her consent: see *R v Derby Magistrates Court ex parte B (supra)* and Colin Passmore, *Privilege* (2nd ed, XPL Law, 2006).

LPP is expressly preserved in the Securities and Futures Ordinance (Cap 571) (SFO) by s 380(4), which, curiously, comes within a section entitled ‘Immunity’. Section 380(4) states: “[n]othing in this Ordinance affects any claims, rights or entitlements which would, apart from this Ordinance, arise on the ground of legal professional privilege”. This express preservation of LPP in the SFO is in contrast to the absence of other fundamental protections normally available to

法律專業保密權

概述

法律專業保密權是普通法中早已確立的規則並已規定在《基本法》第35條，第35條內容為「香港居民有權得到秘密法律諮詢」。在一起近期舉行的區域法院庭審中，鄧立泰法官已對法律專業保密權所附隨的重要性作出簡略說明。拿這位法官的話講，法律專業保密權受《基本法》保護，並且「剝奪它將頗費一番功夫」（參見2011年3月19日《南華早報》「法官稱法律專業保密權必須受到保護」，E Yau）。

在*R訴 德比地方法院 (Derby Magistrates Court) (單方 B)* [1996] 1 AC 487一案中，Taylor CJ勳爵在第507條指出，法律專業保密權是「整體司法裁判工作的根本條件。」法律專業保密權的依據是協助完成司法裁判工作所需的公共政策利益，具體方式為鼓勵並使客戶能夠全方位、坦誠布公地向律師進行諮詢，而且客戶在諮詢過程中知道諮詢內容將完全保密並受到保護，還知道未經客戶允許，諮詢內容不會透露給第三方：參見*R訴 德比地方法院 (Derby Magistrates Court) (單方 B) (見上述)* 和 Colin Passmore所著之《保密權》（2006年第二版）。

《證券及期貨條例》（第571章）的第380(4)條對法律專業保密權給予明確保護，奇怪的是，該條

a person under investigation, such as the right to silence. Unlike, for example, an investigation by the police or the ICAC, a person under investigation by the SFC has no right to silence and only a limited right against self-incrimination: ss 184(4) and 187(2) of the SFO.

Although LPP is usually claimed by lawyers on behalf of their clients, it is the client who enjoys the benefit of LPP and who has the right to forego that benefit, not the legal practitioner: *A-G v Mulholland* [1963] 2 QB 477.

Two categories of LPP

LPP falls into two categories: (i) litigation privilege; and (ii) legal advice privilege or, as is it sometimes known, solicitor-client privilege. Documents and communications falling into either category are protected from disclosure.

Litigation privilege is generally considered to be the broader of the two categories. Litigation privilege protects all documents and communications which were brought into existence for the dominant purpose of assisting a person in connection with litigation in which the person is involved, where the litigation is either underway or is reasonably in contemplation, including communications between a client and third parties.

Legal advice privilege protects all documents and communications made in confidence between a lawyer in his/her professional capacity and his/her client for the purpose of giving or seeking legal advice even at a stage when litigation is not in contemplation: *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610.

Scope of LPP

Legal advice privilege also applies to in-house lawyers

Under Hong Kong law, legal advice privilege applies equally to communications between a client and their external lawyer and their in-house lawyer, provided the in-house lawyer is acting in his/her professional capacity as a legal adviser: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 101 at 129 [A]-[F].

The protection afforded under Hong Kong law to communications made in confidence between an in-house lawyer and his/her client for the purpose of giving or receiving legal advice is in contrast to the position in the European Union (including the United Kingdom) in regulatory investigations in the area of competition law. In the EU, it has recently been decided that communications by/with in-house lawyers do *not* benefit from LPP in the area of competition law: *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* (Case C-550/07 P) [2010]. In the view of the Grand Chamber of the Court of Justice of the EU, external lawyers, not bound by an employment contract with their client, can benefit from LPP; whereas in-house lawyers cannot benefit from LPP because they do not enjoy the same degree of independence as an external lawyer and are economically dependent on and cannot ignore the commercial strategies of their employees.

Legal advice privilege only applies to lawyers

Legal advice privilege only applies to communications between

出現在標題為「豁免承擔法律責任」的章節中。第380(4)條規定「本條例不影響除本條例外可基於法律專業保密權的理由而產生的任何聲稱、權力或享有權」。與《證券及期貨條例》對法律專業保密權的這一明確保護形成對比的則是一對個體在調查中通常具備的其他根本保護（例如保持沉默權）未作規定。不同之處包括，例如在由警方或香港廉政公署展開的調查中，由香港證監會調查的個體通常無權保持沉默，並且對自證其罪只有有限的權利（參見《證券及期貨條例》第184(4)和187(2)款）。

儘管法律專業保密權通常都由律師代表客戶提出，但享受法律專業保密權利益的卻是客戶，有權放棄該等利益的是客戶而非法律從業人員（參見 *A-G v Mulholland* [1963] 2 QB 477）。

法律專業保密權的兩個類別

法律專業保密權分為兩個類別：(i) 訴訟保密權；和 (ii) 法律諮詢保密權（有時或稱為律師－客戶保密權）。屬於任一類別的文件和通信均受到不予披露的保護。

一般認為訴訟保密權在兩個類別中涉及的範圍更廣。就某個體所涉及的訴訟案件而言，無論訴訟正在進行還是處於合理預期中，主要目的係為協助該個體進行其所涉訴訟案件的一切文件和通信（包括客戶與第三方的通信）均受到訴訟保密權的保護。

法律諮詢保密權保護的則是具有專業身份的律師與客戶之間旨在提供或尋求法律諮詢意見的一切文件和保密通信，即便是在未預期訴訟的階段所形成的通信亦不例外（參見 *Three Rivers District Council 訴 英格蘭銀行 (第6號)* [2005] 1 AC 610）。

法律專業保密權的範圍

法律諮詢保密權亦適用於內部法律顧問

香港法律規定，法律諮詢保密權同等適用於客戶與外部律師和內部法律顧問的通信，但條件是內部法律顧問係以法律顧問的專業身份行事（參見 *Alfred Crompton Amusement Machines Ltd 訴 海關總監 (No 2)* [1972] 2 QB 101 at 129 [A]-[F]）。

與歐盟（包括英國）在競爭法領域對監管調查的立場相比，香港法律對於內部法律顧問與客戶之間旨在提供或獲取法律諮詢建議的保密通信的保護則有所不同。歐盟最近作出裁定，就競爭法領域而言，內部法律顧問進行的通訊或他人與內部法律顧問進行的通訊不具有法律專業保密權的利益（參見 *阿克蘇諾貝爾化學公司及 Akros Chemicals Ltd 訴 歐盟* (案件編號C-550/07 P) [2010]）。歐盟法院大法庭認

a qualified lawyer and his/her client and not to communications between other non-legally qualified professional advisers and their clients, notwithstanding that those professional advisers may be providing legal advice. In *Prudential Plc & Prudential (Gibraltar) Ltd v Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2010] EWCA Civ 1094; [2011] 1 All ER 316, a recent English case which involved a veritable who's who of the leading practitioners in the area of the law of privilege, including Sir Sidney Kentridge QC, Bankim Thanki QC and Colin Passmore, the Court of Appeal held that LPP (legal advice privilege) did not extend to advice from, and communications with, the taxpayer's accountant, even if the communications were made in confidence and related to advice about tax laws. Rather, the Court of Appeal held that LPP only extended to advice which emanates from a qualified member of the legal profession.

Fraud or illegality exception

Where communications which would otherwise be protected by LPP have been made in furtherance of a fraudulent design, a party is not entitled to assert LPP as a ground for refusing to disclose such communications in circumstances where the party seeking disclosure is able to establish a strong *prima facie* case of fraud: *The Queen v Cox and Railton* (1884) 14 QBD 153; *R v Gibbins* [2004] EWCA Crim 311. However, it should be noted that courts are generally reluctant to deprive a party of the protection of LPP and will decide each case on its facts, striking a balance between the important policy considerations on which LPP is founded and the gravity of the charge of fraud that is made.

The claims to LPP in *Lehman Brothers* and *CITIC*

Both *Lehman Brothers* and *CITIC* arose out of high profile SFC investigations commenced in October 2008, following financial

為，作為不受客戶僱傭合同約束的外部律師可以享受法律專業保密權帶來的利益，但內部法律顧問則不可以，依據是內部法律顧問與外部律師的獨立程度不同，在經濟上依賴僱員，且不能無視僱員的商業策略。

法律諮詢保密權僅適用於律師

法律諮詢保密權僅適用於合格律師與其客戶之間的通信，儘管其他無合法資格之專業顧問也可能提供法律諮詢，但法律諮詢保密權不適用於無合法資格之專業顧問與客戶之間的通信。在 *Prudential Plc & Prudential (Gibraltar) Ltd 訴 所得稅特派員及 Philip Pandolfo (皇家稅務稽查員)* [2010] EWCA Civ. 1094; [2011] 1 《全英判例彙編大全》316 (一個近期的英國案例，涉及在保密權領域乃是領軍執業者的一組名人 (包括王室法律顧問 Sidney Kentridge 爵士、王室法律顧問 Bankim Thanki 和 Colin Passmore)) 中，上訴法院認為法律專業保密權不得擴大到來自納稅人會計師的諮詢或與納稅人會計師之間的通信，即便通信是保密的而且是關於稅法方面的諮詢亦不例外。上訴法院認為法律專業保密權僅適用於合格法律專業人士的諮詢。

對於欺詐或不法行為的例外

如果本該獲得法律專業保密權保護的通信是出於欺詐的目的，那麼在尋求披露文件的一方能夠證實這是一宗表面證據確鑿成立的欺詐案件情況下，另一方無權以法律專業保密權為藉口拒絕披露該等通信 (參見 *The Queen 訴 Cox 和 Railton* (1884) 14 QBD 153 以及 *R 訴 Gibbins* [2004] EWCA Crim 311)。但應注意到法院通常不願剝奪一方在法律專業保密權項下的保護，而更傾向於依照事實對個案作出裁決，這樣就在確立法律專業保密權的重要政策考量因素與作出欺詐指控的依據之間達到平衡。

雷曼兄弟和中信泰富案件中對法律專業保密權的主張

在雷曼兄弟和中信泰富遭受數十億美元損失後，香港證監會於2008年10月對其高調展開調查。儘管雷曼兄弟和中信泰富兩案的事實背景甚為相似，但兩起案件中對於法律專業保密權是否有效的主張之結論則完全相反。

雷曼兄弟

在雷曼兄弟亞洲有限公司 (簡稱「雷曼亞洲」) 及位於全球的其他雷曼公司倒閉後，香港證監會於



losses of similar amounts in the billions of dollars. Whilst the factual backdrop of *Lehman Brothers* and *CITIC* was similar, the outcomes in the two cases, in regard to the question of whether a valid claim to LPP was available, were diametric opposites.

Lehman Brothers

In October 2008, following the demise of Lehman Brothers Asia Ltd (LBAL) and the other Lehman Brothers companies across the world, the SFC commenced an investigation under Part VIII of the SFO for the purpose of obtaining information relating to the offering of minibonds issued by Pacific International Finance Ltd. The SFC sought to determine whether the issuer of minibonds and/or LBAL or any other person had provided any false or misleading information to the investors. The demise of certain Lehman Brothers' US corporations had resulted in the collapse of the derivative arrangements and credit support underlying minibonds, which caused investors in minibonds to suffer losses of approximately HK\$16 billion in aggregate.

In connection with its investigations, the SFC requested numerous documents from LBAL, which had acted as the arranger of minibonds. The documents sought by the SFC included new product review committee briefing papers and the minutes of those committee meetings (collectively, Minibond Documents).

LBAL, which by the time of the SFC's requests for the Minibond Documents was acting at the direction of Messrs Paul J Brough, Edward S Middleton and Patrick Cowley, its joint and several liquidators (Liquidators), declined to provide the SFC with the Minibond Documents on the basis that they constituted a record of legal advice or were documents that were created for the purpose of obtaining legal advice (principally from the in-house lawyers of LBAL) and, accordingly, protected from disclosure on the basis of LPP. Whilst the Liquidators had a genuine desire to assist the SFC in its investigations, they took the view that because the Minibond Documents appeared to be protected by LPP, they would not be discharging their duties to protect and preserve the estate of LBAL if they disclosed the documents, especially in circumstances where there was pending litigation in the US by investors in minibonds. Furthermore, the Liquidators were of the view that they would be potentially exposing themselves to criticism and/or legal action by the creditors of LBAL if the disclosure of the Minibond Documents resulted in any adverse consequences to the estate of LBAL.

Although no common law case authority could be located which imposed a duty on liquidators to protect the LLP of the insolvent company over which they had been appointed, it was clear to the Liquidators and their legal advisers that any LPP in the Minibond Documents resided in them, as the current management of LBAL, and that they should exercise that right cautiously and in the best interests of the creditors of LBAL. (For a discussion of the rights of a trustee in bankruptcy to exercise LPP in corporate bankruptcies, see the instructive unanimous decision of the US Supreme Court in *Commodity Futures Trading Commission v Weintraub* 105 S Ct 1986 (1985)).

The Liquidators found themselves in the awkward position of having to balance their duties and obligations as officers of the court, which they interpreted as including (where possible) assisting the

2008年10月根據《證券及期貨條例》第七部分展開調查，旨在瞭解與Pacific International Finance Ltd發行的迷你債券有關的資訊。香港證監會希望瞭解迷你債券的發行人和/或雷曼亞洲或任何其他人士是否向投資者提供了虛假或誤導性資訊。若干雷曼兄弟美國公司的倒閉已導致迷你債券項下的衍生品安排和信貸支持垮臺，這給迷你債券的投資者造成合計約160億港幣的損失。

與該項調查有關，香港證監會要求擔任迷你債券經辦人的雷曼亞洲提供多項文件。香港證監會要求的文件包括新產品審查委員會的簡要報告文件及該等委員會會議的紀要（統稱「迷你債券文件」）。

在香港證監會要求提供迷你債券文件時，雷曼亞洲根據共同及各別清算人（簡稱「清算人」）Paul J Brough先生、Edward S Middleton先生和Patrick Cowley先生的指示拒絕向香港證監會提供迷你債券文件，依據是該等文件構成法律諮詢記錄或係出於獲取法律諮詢意見的目的而製作（主要為雷曼亞洲內部法律顧問的文件），因此應根據法律專業保密權受到不予披露的保護。儘管清算人真誠希望協助香港證監會進行調查，但他們認為迷你債券文件看上去是屬於受法律專業保密權保護的文件，因此如果清算人披露文件，特別是在迷你債券的投資者在美國有未決訴訟的情況下，那麼就不能履行其保護和保存雷曼亞洲房產的職責。進而，清算人認為，如果披露迷你債券文件對雷曼亞洲的遺產造成任何不利影響，則清算人自身將面臨雷曼亞洲債權人的指責和/或法律行動的風險。

儘管可能無法找到關於賦予清算人職責來保護其被任命的破產公司法律專業保密權的權威普通法案例，但對清算人及其法律顧問而言，顯而易見作為雷曼亞洲的現任管理層，迷你債券文件中的任何法律專業保密權都掌握在他們手中，清算人應小心行使權利並應以雷曼亞洲債權人的最佳利益行事。（有關破產案件受託人在公司破產情況下行使法律專業保密權的討論，參見美國最高法院在*商品期貨交易委員會訴Weintraub* 105 S Ct 1986 (1985)一案中作出的指導性一致裁決。

清算人發現自己處於一個尷尬境地，即不得不在其作為法院官員所擔負的職責和義務（其理解為包括（在有可能的情況下）協助監管部門履行其職能）和以符合雷曼亞洲債權人最大利益的方式行事之職責和義務間作出平衡。清算人尤其擔心的問題是，如果他們為協助香港證監會的調查而披露迷你債券文件，那麼迷你債券文件中的所有法律專業保密權將被棄權，潛在第三方對手也會獲得接觸文件

regulator in carrying out its functions, and their duties and obligations to act in the best interests of the creditors of LBAL. The Liquidators were particularly concerned that if they were to disclose the Minibond Documents in order to assist the SFC in its investigations, all LPP in the Minibond Documents may be waived and that potential third party adversaries might also gain access to the documents. In this regard, the Liquidators were particularly concerned by the 2000 decision of the Hong Kong Court of Appeal in *Rockefeller & Co Inc v Secretary for Justice* [2000] 3 HKLRD 351.

In *Rockefeller*, the plaintiff, Rockefeller & Co Inc (Rockefeller), disclosed documents protected by LPP to the SFC pursuant to a written agreement in which Rockefeller stated its intention not to waive any confidentiality or privilege in the documents. The SFC disclosed the documents to the ICAC (as the SFC was empowered to do under the predecessor legislation to the SFO) and the ICAC gave the documents to the Secretary for Justice. The Secretary for Justice eventually released the documents to an accused person in criminal proceedings pursuant to her duty to disclose 'unused material'. Rockefeller applied for injunctive relief to prevent the accused person from using the documents on the basis that the documents had only been disclosed to the SFC for a limited purpose.

Whilst the Court of Appeal in *Rockefeller* concluded that the accused person was entitled to the documents, the *ratio decidendi* of the case is unclear as each of the three justices, Godfrey VP, Rogers JA (as he then was) and Keith JA, wrote his own judgment. In particular, it is unclear from *Rockefeller* whether it is possible to partially waive LPP or whether once a document is exposed to a third party that LPP is lost in its entirety. The comments of Keith JA in relation to the issue of partial waiver of LPP were of particular concern to LBAL. Keith JA was of the view that partial waiver of LPP was 'conceptually unsound' and he did not see how it would be possible to produce documents which are protected by LPP whilst at the same time claiming that the privilege in them is not being waived: see *Rockefeller* at 371 [I]. His Lordship may have been of the view that partial waiver of LPP was 'conceptually unsound' because it would mean the relevant legal advice was no longer confidential and, in such circumstances, the protection afforded by Article 35 of the Basic Law would arguably no longer be applicable, as it protects the 'right to confidential legal advice'.

In the absence of well-established legal guidance as to whether a partial waiver of LPP was possible, in order to protect the estate of LBAL, the Liquidators acting prudently on legal advice declined to disclose the Minibond Documents to the SFC. Instead, after various rounds of correspondence between the solicitors acting for LBAL and the SFC, redacted versions of the Minibond Documents were disclosed. The redacted portions of the documents were those portions that the Liquidators reasonably believed (on the basis of senior counsel's advice) constituted a record of or request for legal advice.

The SFC did not accept that such disclosure was sufficient and it applied to the CFI under s 185 of the SFO to request that a judge review the redacted portions of the documents for the purpose of ensuring that the redacted portions were in fact protected by LPP. After inspecting the redacted portions of the Minibond Documents in the privacy of his own chambers with the assistance of the solicitor and the counsel acting for LBAL, and after considering their submissions

的途徑。對於這一問題，清算人深為香港上訴法庭在 *Rockefeller & Co Inc 訴律政司司長* [2000] 3 HKLRD 351一案中的2000裁決感到憂慮。

在 *Rockefeller* 一案中，原告 Rockefeller & Co Inc (簡稱「Rockefeller」) 根據書面協定向香港證監會披露了受法律專業保密權保護的文件，Rockefeller 在協議中申明不放棄文件中的保密權或特權。香港證監會將該等文件披露給了廉政公署 (根據《證券及期貨條例》的前身，香港證監會有權作此披露)，而廉政公署又將文件交給律政司。最終，律政司司長在某刑事訴訟程序中根據其披露「未用於檢控的資料」之義務將文件披露給被指控人。Rockefeller 則以文件僅為有限用途披露給香港證監會為依據申請禁令救濟以阻止被指控人使用該等文件。

儘管 *Rockefeller* 一案中的上訴法院認為被指控人有權獲得文件，但由於 Godfrey、Rogers JA (當時在任) 及 Keith JA 這三位法官分別寫下各自的裁決，因此針對 *Rockefeller* 的具體裁定理由卻並不清楚。尤其是對於是否有可能部分放棄法律專業保密權或文件一旦披露給第三方是否就完全喪失法律專業保密權的問題，*Rockefeller* 一案並未給出明確答案。Keith JA 對於部分放棄法律專業保密權的評語則令雷曼亞洲尤為擔憂，他認為，部分放棄法律專業保密權



as to why the redacted portions were covered by LPP and also the evidence, Barma J concluded in a judgment delivered extempore that the redacted portions of the Minibond Documents did constitute a record of legal advice or were created for the purpose of obtaining legal advice, except in a some limited respects, and that 16 of the 17 documents should remain to some extent redacted. The learned judge noted that it was: “entirely understandable that they [the Liquidators] should be concerned to ensure that no privileged documents should be disclosed when it was not necessary to do so, since under the relevant provisions of the Securities and Futures Ordinance legal professional privilege is expressly preserved”. Nevertheless, on the basis that the SFC had obtained some additional disclosure in the Minibond Documents by bringing the application, it was awarded its costs.

Immediately after Barma J’s ruling, LBAL, acting at the direction of its Liquidators, disclosed some additional portions of a few of the Minibond Documents to the SFC (ie, those portions which had been redacted, but which were not considered by the court to constitute legal advice and thus not protected by LPP). The redacted portions of the 16 Minibond Documents which were confirmed by the learned judge to be protected by LPP have never been disclosed by LBAL to the SFC or any other third party.

CITIC

In *CITIC*, the SFC sought information and documents relating to a profit warning announcement made on 20 October 2008. The announcement disclosed that CITIC Pacific, the applicant, had entered into certain AUD forward contracts resulting in an estimated loss of approximately HK\$15 billion. Following the announcement the share price of CITIC Pacific slumped 55% on the next day of trading.

On 27 October 2008, the SFC staff attended CITIC Pacific’s offices for the purposes of obtaining documents relevant to their investigation. Present at the meeting were, *inter alia*, CITIC Pacific’s general counsel (an in-house lawyer) and their external litigation lawyer (at that time). At that meeting, CITIC Pacific allowed the SFC to review approximately 30 lever arch files of records and documents, including a note prepared by CITIC Pacific’s general counsel; two board meeting minutes, which apparently contain a record of legal advice; and two letters from CITIC’s corporate lawyers, who were from a different firm than its external litigation lawyer (collectively, Surrendered Material). According to the unchallenged affidavit evidence of the SFC, the general counsel of CITIC Pacific, in the presence of its external litigation lawyer, told the SFC that CITIC Pacific would ‘fully cooperate’ with the SFC in its investigations. The general counsel added that CITIC Pacific would produce to the SFC legal advices provided to CITIC Pacific by its corporate lawyers and would waive LPP. The SFC investigator who was present at the meeting at CITIC Pacific’s offices, who was the deponent of the SFC’s evidence, did not recall whether the general counsel of CITIC Pacific mentioned any terms regarding the waiver of LPP and the investigator left the meeting believing that LPP had been waived.

Later, on 29 October 2008, various records and documents were handed over to the SFC by CITIC Pacific, including the Surrendered Material. Almost a month later the SFC asked CITIC Pacific’s external litigation lawyer for written confirmation that CITIC

「從概念上就靠不住」，而且他認為文件既受法律專業保密權的保護，同時卻又主張不放棄文件中的保密權是不可能的（參見第371 [I]條的 *Rockefeller*）。Keith JA可能認為，部分放棄法律專業保密權「從概念上就靠不住」，因這將意味著相關法律諮詢不再處於保密狀態，在該等情況下，基本法第35條賦予的保護可以說將不再適用，而其保護的恰恰就是「秘密法律諮詢權」。

在沒有是否可部分放棄法律專業保密權的既定法律指南的情況下，按照法律建議謹慎行事的清算人為保護雷曼亞洲的房產拒絕向香港證監會披露迷你債券文件。反之，經為雷曼亞洲行事的初級律師與香港證監會的反覆多次信函交流，迷你債券文件的刪節版得到披露，刪節版包括清算人（基於高級法律顧問的建議）合理認為構成法律諮詢記錄或法律諮詢要求的部分。

香港證監會並不認同該等披露乃是充分的，其根據《證券及期貨條例》第185條向原訟法庭申請要求法官審查經過改動的文件部分，以求確信該等經改動的部分是否確實受到法律專業保密權的保護。在其自己的法官室私密地查閱了經過改動之迷你債券文件部分後，鮑曼明法官在為雷曼亞洲行事的初級律師和法律顧問的協助下，以及在考慮了關於該等經改動的部分為何受到法律專業保密權保護的意見陳述以及相關證據後在即席裁決中得出結論稱，經改動的迷你債券文件部分確實構成了法律建議的記錄或為獲得法律建議之目的而創建（一些有限的方面除外），這17個文件中的16個應該依舊在一定程度上保持改動後的狀態。該博學的法官指出，鑒於根據《證券及期貨條例》的相關規定，法律專業保密權明確受到維護，他們[清盤人]應會對確保任何享有保密權的文件不會在不必要的情況下被披露表示關注，這是「完全可以理解的」。儘管如此，鑒於香港證監會通過提出申請使迷你債券文件的更多內容獲得披露，其獲判了有關費用。

在鮑曼明法官作出裁定之後，雷曼亞洲（奉其清盤人的指示行事）即另外向香港證監會披露了一些迷你債券文件中的若干部分（即已經過改動，但未被法院視為構成法律建議，從而不受法律專業保密權保護的部分）。為該博學的法官確認為受法律專業保密權保護的16個迷你債券文件的經改動部分從未由雷曼亞洲向香港證監會或任何其他第三方披露過。

中信泰富案

在中信泰富案中，香港證監會曾尋求與2008年10月



Pacific had in fact waived LPP in the Surrendered Material. In response to that request CITIC Pacific's external litigation lawyer attempted to 'bolt the stable door' (in the words the learned judge) by confirming the waiver but prefaced by the observation: "For the purposes of Commission's [SFC's] investigation only". According to Wright J, this remark 'provoked an exchange of correspondence over the ensuing weeks with the SFC making it clear that it took the view that the surrender of the documents [Surrendered Material] had been a general, unconditional surrender'.

Some time later the SFC delivered the Surrendered Material to the Secretary for Justice, who, in turn, gave the material to the Commissioner of Police. In March 2009, upon informations being laid by a number of police officers, a magistrate issued numerous search warrants authorising the seizure of specified documents and electronic devices. When the search warrants were executed, hundreds of thousands of pages of hard copy documents and more than 100 computer hard drives and items of computer hardware were seized.

In response to these events, CITIC Pacific, *inter alia*, commenced proceedings in the CFI to seek a return by the Commissioner of Police of the Surrendered Material; and the return by the Secretary for Justice of the Surrendered Material, alternatively a declaration that the Secretary for Justice was only entitled to use the Surrendered Material for the purpose of advising the SFC and that he was not entitled to deliver it or divulge its contents to any third party.

The main thrust of CITIC Pacific's claim was that 'it had the power to forego LPP in part and not only in whole'. CITIC Pacific asserted that it was able to disclose the Surrendered Material, which it claimed was protected by LPP, to the SFC with limitations as to the use to which it may be put without losing the right to invoke LPP against others or as against the SFC in respect of any usage outside the stipulated conditions. Moreover, said CITIC Pacific, the

20日作出之利潤預警聲明有關的資訊和文件。該等聲明披露稱，申請人中信泰富已訂立了某些澳元遠期合約，導致近150億港元的預估損失。該聲明作出之後，中信泰富的股價在下一個交易日下跌了55%。

2008年10月27日，香港證監會工作人員為獲取與其調查有關的文件走訪了中信泰富的辦公室。出席會晤的有中信泰富的總法律顧問（內部律師）和其外部訴訟律師（當時的）等人。在該會議上，中信泰富允許香港證監會查閱了近30個文件夾的記錄和文件，包括中信泰富的總法律顧問製備的筆記、兩份明顯含有法律建議之記錄的會議紀要和兩封來自中信泰富之公司律師的信函，該等公司律師來自與中信泰富之外部訴訟律師不同的律師事務所（共同稱作「所交材料」）。根據未產生異議的香港證監會的誓章，中信泰富的總法律顧問當著其外部訴訟律師的面告知香港證監會，中信泰富將「全面配合」香港證監會開展調查。該總法律顧問補充說，中信泰富將向香港證監會出具其公司律師向中信泰富提供的法律建議，並將放棄法律專業保密權。出席在中信泰富辦公室舉行之會議的香港證監會調查人員（亦是香港證監會之證據的作證者）未迴憶起中信泰富總法律顧問是否提到了有關放棄法律專業保密權的任何條件，且該調查人員在離開會議時認為法律專業保密權已被放棄。

後來在2008年10月29日，各種記錄和文件由中信泰富交給了香港證監會，其中包括所交材料。差不多在一個月之後，香港證監會要求中信泰富的外部訴訟律師書面確認中信泰富事實上已放棄了在所交材料中的法律專業保密權。作為對該等要求的回應，中信泰富的外部訴訟律師試圖通過確認該等放棄來「亡羊補牢」（該博學的法官的用詞），但卻以「僅為委員會[香港證監會]的調查之目的」這一語句作為開頭。據韋毅志法官稱，該語句「引發了後來幾個星期的通信往來，其中香港證監會明確表示，其認為該等文件[所交材料]的交出乃是一般性的無條件交出。」

過了一段時間，香港證監會向律政司司長交付了所交材料，律政司司長轉而將材料交給了警務處處長。2009年3月，經眾多警員提供資訊，一名裁判官簽發了大量的搜查令，授權查封指定文件和電子設備。在搜查令得到執行時，數十萬頁的列印文件和100多個電腦硬碟及電腦硬體設備被查封。

作為對該等事件的回應，中信泰富尤其其在原訟法庭提起了司法程序，尋求讓警務處處長退還所交材料，以及讓律政司司長退還所交材料或聲明律政司司長僅有權為向香港證監會提供建議之目的使用所

circumstances in which the Surrendered Material were handed over must be considered objectively from which the inevitable conclusion would be that there was, at least implicitly, only a partial waiver of LPP at the time of the disclosure of the Surrendered Material and the use of the Surrendered Material being limited only to the investigation by the SFC. The defendants' case was that CITIC Pacific disclosed the Surrendered Material to the SFC unconditionally, the result being that any privilege was lost in its entirety. In addition, the defendants contended that the Surrendered Material was subject to the fraud/illegality exception and therefore not protected by LPP.

At the hearing of CITIC Pacific's application in early March 2011, CITIC Pacific asserted that the principle of disclosure of documents for a limited purpose was 'well-established'. In considering this submission, the learned judge remarked at [23]: "Whether or not that it is so in other jurisdictions, it does not appear to be settled in Hong Kong. In this connection the only Hong Kong authority to which the parties have been able to make reference is that of *Rockefeller*". As an aside, Wright J noted at [24], and as CITIC Pacific accepted, *Rockefeller* appears to have been decided on the basis of the law of confidentiality rather than on the law of LPP (see: *PCCW - HKT Telephone Ltd v David Matthew McDonald* [2009] 2 HKLRD 274 per Lord Hoffmann NPJ for a discussion of the differences between these two areas of the law). *Rockefeller* was the same case that had concerned the Liquidators of LBAL and had caused them to resist a partial waiver of LPP in the Minibond Documents in favour of the SFC, out of fear that such course of action might result in the documents finding their way into the hands of potentially adverse third parties.

On the view taken by Wright J of the facts in CITIC, it was not necessary for him to decide, in respect of the Surrendered Material, whether it was possible as a matter of law to relinquish partially one's right to invoke LPP. As a matter of fact, the learned judge concluded, in all of the circumstances of the case, that at the meeting on 27 October 2008, CITIC Pacific agreed to hand over the Surrendered Material to the SFC unconditionally, free of any claim of LPP, and that there were no implied conditions attaching to the disclosure of the Surrendered Material. In coming to that conclusion, Wright J did not accept that both CITIC Pacific's general counsel and its litigation lawyer would have been ignorant of s 378 of the SFO, which empowered the SFC to hand the Surrendered Material to other persons, including the Secretary of Justice, for purposes of investigating other offences, notwithstanding the secrecy obligations imposed on the SFC; and s 380 of the SFO, which provided CITIC Pacific with the right 'then and there' (in the words of the learned judge) to decline to hand over the Surrendered Material to the SFC on the grounds that it was privileged.

Wright J was also satisfied, in respect of the Surrendered Material, that a *prima facie* case of the existence of both a conspiracy to defraud as well as offences pursuant to s 21 of the Theft Ordinance (Cap 210) had been made out on the papers and that the Surrendered Material was produced to facilitate those processes, and in those circumstances LPP was not available.

In light of Wright J's findings, CITIC Pacific's applications for the return by the Commissioner of Police of the Surrendered Material; and the return by the Secretary for Justice of the Surrendered Material,

交材料，其無權向任何第三方交付或洩露所交材料之內容

中信泰富之主張的要旨是，「其有權部分放棄法律專業保密權，而不僅僅是完全放棄」。中信泰富稱，其有能力向香港證監會披露其所聲稱的受法律專業保密權保護的所交材料，同時對所交材料可能的用途附加限制，而不喪失就規定條件之外的任何用途對他人或香港證監會援用法律專業保密權的權利。此外，中信泰富還稱，必須對交出所交材料的情況加以客觀考慮，而從中得出的必然結論將是，在披露所交材料之時，僅存在對法律專業保密權的部分放棄（至少是默示的），所交材料的用途僅限於香港證監會開展之調查。被告的理由是，中信泰富向香港證監會無條件地披露所交材料，結果是任何保密權全部喪失。另外，被告主張，所交材料受欺詐或不法行為的例外情況規限，因而不受法律專業保密權的保護。

在2011年3月初對中信泰富之申請進行的聆訊上，中信泰富提出，針對有限目的之文件披露原則「確立已久」。在考慮這一意見的過程中，該博學的法官在第[23]條中說道：「無論在其他司法管轄區是不是這種情況，其似乎並未在香港得到確立。關於這一點，各方能夠參照的香港權威案件是洛克菲勒案」。作為題外話，韋毅志法官在第[24]條中指出，洛克菲勒案似乎是基於保密性法則而非法律專業保密權作出的裁定，這一點也為中信泰富所接受。（參見電訊盈科 - 香港電話有限公司訴 *David Matthew McDonald* [2009] 2 HKLRD 274 per Lord Hoffmann NPJ一案，供討論這兩個法律領域間的差異）。洛克菲勒案也同樣令雷曼亞洲的清盤人感到擔憂，並導致其抵制為有利於香港證監會而部分放棄迷你債券文件中的法律專業保密權，因其擔心該等做法或造成該等文件最終落入潛在的敵對第三方之手。

根據韋毅志法官對中信泰富案件中之事實的看法，其沒有必要就所交材料裁定部分放棄行使法律專業保密權的權利在法律上是否是可能的。事實上，這位博學的法官就該案的所有情況斷定，在2008年10月27日的會議上，中信泰富同意無條件地向香港證監會交出所交材料，且不帶有對法律專業保密權的任何主張，對所交材料之披露未附加任何隱含條件。在得出該結論的過程中，韋毅志法官並不相信中信泰富的總法律顧問和其外部訴訟律師均對《證券及期貨條例》第378條和第380一無所知。第378條使香港證監會在《證券及期貨條例》對其規定了保密義務的情況下仍有權為調查其他違法行為

alternatively a declaration that the Secretary for Justice was only entitled to use the Surrendered Material for the purpose of advising the SFC and that he was not entitled to deliver it or divulge its contents to any third party, were each dismissed.

Commentary

Both *Lehman Brothers* and *CITIC* are welcome authority for the proposition that a valid claim to LPP will be upheld by the courts in context of regulatory investigations carried out under the SFO, including when the legal advice in question is produced by or sought from an in-house counsel when he/she is acting his/her professional capacity as a qualified lawyer.

Notwithstanding that LPP can be successfully claimed in the context of regulatory investigations, it would appear that there may be some reluctance by persons under investigation to exercise their constitutional and statutory rights to LPP. Such reluctance to exercise one's rights to LPP may arise out of the not irrational fear of being viewed by the SFC as being uncooperative and/or being viewed as having 'something to hide' by claiming the protection, notwithstanding the SFC's public statement that it respects valid claims of LPP: see *SFC Enforcement News* in regard to *LBAL*, 21 August 2009.

By being cooperative with the SFC, persons under investigation may reasonably believe that the SFC will be more likely to impose a lighter sanction or penalty if it ultimately concludes that there has been a breach of the SFO and/or any subsidiary legislation or guidance. Such a willingness to cooperate with the SFC may ultimately lead a person under investigation to choose to disclose material which they have a right to protect from disclosure on the basis of LPP.

Whilst a willingness to cooperate with the SFC is admirable and understandable, waiving LPP in an effort to demonstrate one's desire to be cooperative may result in privileged information being used against the person under investigation by unforeseen adversaries, as occurred in both *Rockefeller* and *CITIC*. Moreover, even if a person under investigation negotiates an express agreement with the SFC to limit its ability to disclose material which is privileged to third parties, there appears to be no legal certainty at this time as to whether such an agreement will enable the person to 'selectively' or 'partially' waive its LPP or, in other words, waive LPP as against the regulator, but retain

之目的向其他個體（包括律政司司長）交付所交材料，而第380條「當即」（該博學法官的用詞）為中信泰富提供了以所交材料享有保密權為由拒絕交出所交材料的權利。

韋毅志法官還信納，就所交材料而言，關於共謀欺詐以及基於第210章《盜竊罪條例》（第21條）的罪行而存在的表面證據成立之論據已在訴狀中提出，所交材料乃為給這些程序提供便利而出具，且在該等情況下不享有法律專業保密權。鑒於韋毅志法官的認定，中信泰富要求警務處處長退還所交材料的申請及要求律政司司長退還所交材料或聲明律政司司長僅有權為向香港證監會提供建議之目的使用所交材料，其無權向任何第三方交付或洩露所交材料之內容的申請分別遭到駁回。

評論

對於有效的法律專業保密權主張在監管機構根據《證券及期貨條例》展開之調查的情境下將得到法院支持（包括在有關法律建議乃是由以合格律師之專業身份行事的內部法律顧問出具的或向該等法律顧問徵求的情況下）的觀點，*雷曼兄弟*和*中信泰富*案均具有很好的說服力。

儘管在監管調查的情境下對法律專業保密權可成功加以主張，但似乎受調查之個體有可能不大情願行使其對法律專業保密權的憲法和法定權利。儘管香港證監會有公開聲明稱其尊重有效的法律專業保密權主張（見香港證監會2009年8月21日的涉及雷曼亞洲的執法消息），但對行使法律專業保密權相關權利的這等不情願可能出自對會被香港證監會視為不肯合作和/或通過主張保護而「欲隱瞞某些事情」的恐懼，而這種恐懼並非完全不合理。

通過與香港證監會合作，受調查之個體可能合理地認為，如香港證監會最終得出結論認為存在違反《證券及期貨條例》和/或任何附屬立法或指引之行為，則香港證監會更有可能施以從輕制裁或處罰。該等與香港證監會合作之意願可能最終導致受調查之個體決定披露其有權基於法律專業保密權加以保護，使之免遭披露的材料。

儘管協助香港證監會開展調查之意願既令人欽佩也合乎情理，但為表明合作意願而放棄法律專業保密權可能導致享有保密權之資訊為不可預見的對手所利用來對付受調查之個體，就像*洛克菲勒*和*中信泰富*案件中發生的那樣。再者，即便受調查之個體與香港證監會商定出一個明確的協議來限制其向第三方披露享有保密權之材料的能力，但該等協議是否會使該等個體能夠「有選擇性地」或「部分地」



it as against other parties. In this regard, Keith JA's statement: "I do not see how it is possible to produce documents which are privileged while at the same time claiming that the privilege which attaches to them is not being waived" resonates: see *Rockefeller* at 371[I].

Possible reform

To help alleviate any tension or angst which may be experienced by persons under investigation between wanting to cooperate with the SFC whilst at the same time wanting to exercise their right to LPP, the SFC may wish to confirm that full cooperation is possible without needing to waive LPP. This is the approach which has been adopted by the US Department of Justice (DOJ). In August 2008, Deputy Attorney-General Mark R Filip announced new DOJ 'Principles of Federal Prosecution of Business Organizations' which expressly prohibit federal prosecutors from considering, when evaluating a corporation's 'cooperation' under the charging guidelines, whether it has refused to waive its attorney-client privilege and work-product protections. These principles are commonly referred to as the 'Filip Memo'. The Filip Memo superseded previously issued guidance and reflected a dramatic shift in policy from previous DOJ charging guidelines, which had permitted prosecutors to request waivers of LPP protections when there was a legitimate need for the privileged information to fulfil their law enforcement obligations.

Conclusion

A claim to LPP is one of the few weapons that a person under investigation by the SFC has in his/her armoury and LPP should not, in any way, be overlooked or disregarded by such persons or their legal advisers. Whilst a willingness on the part of a person under investigation to assist the SFC with its investigations is both admirable and understandable, such a willingness to assist should never be made at the expense of the person's fundamental right to claim LPP.



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放棄其法律專業保密權」，或換言之，針對監管部門放棄法律專業保密權，而對其他方則保留法律專業保密權，目前似乎還不存在法律上的確定性。在這一點上，令人想起了Keith JA的「我看不出如何可能一方面出示享有保密權之文件，而另一方面同時又聲稱文件所附帶的保密權未被放棄」這一表述（見洛克菲勒案371[I]）。

可能的改革

為幫助緩解受調查之個體因既希望與香港證監會合作，同時又希望行使其對法律專業保密權之權利而可能產生的任何緊張或焦慮，香港證監會或希望確認，在無需放棄法律專業保密權的前提下充分合作是可能的。這是美國司法部已經採用的方法。2008年8月，常務副總檢察長Mark R Filip宣佈了司法部新的《聯邦商業機構起訴規則》，該規則明確禁止聯邦公訴人在根據該指控指引評估某公司之「合作」情況時考慮該公司是否已拒絕放棄其代理人-客戶保密權和工作作品保護。這些原則一般稱作「Filip備忘錄」。Filip備忘錄取代了先前發佈的指引，並反映出先前的司法部指控指引在政策方面發生的顯著變化，先前的指引允許公訴人在為履行其執法義務而對享有保密權之資訊有合法需要時要求放棄法律專業保密權保護。

結論

對法律專業保密權的主張是受香港證監會調查之個體掌握的為數不多的武器之一，法律專業保密權不應該被該等個體或其法律顧問以任何方式加以忽視或漠視。儘管受調查之個體一方協助香港證監會開展調查之意願既令人欽佩也合乎情理，但該等提供協助之意願絕不應該以犧牲該等個體主張法律專業保密權之基本權利為代價。

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作者和Adrian Bell SC在雷曼兄弟案件中代理雷曼亞洲。作者希望對Bell先生及美邁斯律師事務所的梁家妍女士和歐陽嘉燕女士提供的寶貴意見和建議表示感謝。除非另有說明，文中所述之觀點乃為作者之觀點。