

DOCUMENTARY  
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Eleventh Edition

CHARLES HOLLANDER Q.C.

SWEET & MAXWELL

# Documentary Evidence

*Eleventh Edition*

**Charles Hollander Q.C. M.A. (Cantab.)**

*Brick Court Chambers*



**SWEET & MAXWELL**



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***To Heather***

## Preface to the Eleventh Edition

This edition represents the most significant rewrite since the introduction of the CPR. The book is positively teeming with new chapters.

There is now a chapter on electronic disclosure, the single most important reason for the increase in the cost of high court litigation in recent years, and where the courts often continue to be open to criticism for betraying their Woolfian inheritance and failing to rein in the parties' enthusiasm to spend each other's money on disproportionate disclosure. Electronic disclosure has given rise to new issues on destruction of documents, the "litigation hold" and the drawing of adverse inferences against those who fail to retain their electronic documents. In this regard the United States is well ahead of us, and classy expressions such as "predictive coding" are beginning to be with us. The chapter on destruction of documents has been rewritten. The author's competition to find the first English lawyer to obtain disclosure of Twitter entries still has no prize winner, but the Tennessee judge who became an online "friend" of a party to access Facebook content must deserve at least a special commendation.

The *Imerman* decision attracted huge attention when it was decided. It raises (albeit on strong facts) another issue spawned by electronic disclosure: how to deal with a mixed body of material which comes into your possession, some of which is your property and some of which is not, or where some of it is confidential or privileged to the other side. The stakes are raised where the client believes that some of the other side's material may have been created in furtherance of fraud. There is consideration of the problems raised, the solutions, and a new chapter on exclusion of documentary evidence.

There is a chapter on access to court records, where even the recent amendment to the rules has proved inadequate to satisfy the courts' emphasis on open justice, so that the courts are filling the gaps with reference to their inherent jurisdiction.

The chapters on privilege have been reorganised and in part rewritten. The *Pandolfo* case on privilege for accountants (or lack of it) has focused attention on the sort of professionals and lawyers with whom you can communicate under the protection of privilege. Are your communications privileged if it turns out that the person you thought was a lawyer has been struck off? There is an important case on whether litigation privilege applies in competition investigations.

Most significant is a new chapter on "limited, selective and implied waiver". The Court of Appeal decision in the *Berezovsky* litigation on limited waiver has largely gone unnoticed but builds on previous authority to open a door that was previously merely ajar, and is suggested to be more significant than so far appreciated. It is for consideration whether it will have the effect of largely

## PREFACE TO THE ELEVENTH EDITION

making redundant the use of common interest privilege as a shield. The other part of the common interest privilege chapter, previously referred to as its use “as a sword,” has been renamed given the disparate nature of the cases grouped under that head, and there is new authority on when a company’s privilege is jointly held by the company and directors or senior executives also concerned in the legal advice.

Otherwise there are a range of new jurisdictional issues raised by the ever-expanding *Norwich Pharmacal* principle. It is unlikely that when the House of Lords revived the antique remedy in the *Norwich Pharmacal* case itself, it contemplated that it would be used in a series of torture and rendition cases against the UK Government. There are interesting cases on disclosure from one-man companies, on whether funding documents are privileged, whether a lawyer can be required to reveal his client’s address, and new disclosure perils if you change your expert.

Thanks in particular for assistance from Tom Adam QC, Judge Simon Brown QC, Judge Paul Grimm, Janice Brabyn and Andrew Moir.

There is yet another Supreme Court case on without prejudice privilege but the award for the greatest contribution to the law in that area must go to the commercial court judge who said:

“I must confess to surprise that the arbitrators should have regarded the acronym ‘wp’ as meaning in this context ‘without prejudice’. Drawing on my own experience I would have regarded it as likely to have been intended to mean, in this context, ‘weather permitting’.”

**Charles Hollander Q.C.**  
Brick Court Chambers

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