

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM No: BVIHC (COM) 2021/0068

BETWEEN:

(1) FEDERAL REPUBLIC OF NIGERIA
(2) ABUBAKAR MALAMI,
ATTORNEY-GENERAL OF THE FEDERAL
REPUBLIC OF NIGERIA

Claimants

and

(1) NERINE TRUST CO (BVI) LTD
(2) TRIDENT TRUST CO (BVI) LTD

Defendants

FORMERLY ANONYMISED AS:

(1) EGE (2) HLM v (1) NERINE TRUST CO LTD (2) TRIDENT TRUST CO LTD

Appearances:

Mr. Philip Riches QC with him Ms. Claire Goldstein and Mr. Christopher Pease of
Harney, Westwood & Riegels LP for the Claimants

Ms. Corine George-Massicote and Ms. Greenwood for the Second Defendant

Ms. Colette Corea for the Attorney-General of the Virgin Islands as *amica curiae*

The First Defendant did not appear

2021 July 22
July 27

JUDGMENT

[1] **JACK, J [Ag.]**: On 15th April of this year, I granted an *ex parte* application for a seal
and gag order as a precursor to an application for **Norwich Pharmacal** relief.¹ The

¹ Norwich Pharmacal Co Ltd v Commissioners for Customs and Excise [1974] AC 133.

claimants said the first claimant (“Nigeria”) had been the victim of a substantial fraud committed by Process and Industrial Developments Ltd (“P&ID”) and various people and companies associated with it. The two registered agents, who were defendants to the action, had been innocently mixed up in the fraud. I wrote a short judgment² to explain that the fact that I had granted the seal and gag order did not mean that I had reached even a preliminary view on whether to grant **Norwich Pharmacal** relief. I anonymised Nigeria as EGE and the second defendant, Mr. Malami, Nigeria’s Attorney-General as HLM. There seemed no need to anonymise the defendants.

- [2] The background can be seen from a judgment of Sir Ross Cranston, sitting as a judge of the English High Court in **Federal Republic of Nigeria v Process and Industrial Developments Ltd**,³ on an application by Nigeria to extend the time for challenging an arbitral award:

“2. These challenges and the enforcement application concern arbitral awards by a London Tribunal relating to a gas processing contract (‘the GSPA’) between Nigeria and [P&ID] dated 11 January 2010. The Tribunal’s Final Award of 31 January 2017 ordered Nigeria to pay P&ID damages of US\$6.6 billion, as well as pre- and post- judgment interest at 7 percent. The current outstanding amount is some US\$10 billion.

3. Nigeria’s case for an extension of time is that the GSPA, the arbitration clause in the GSPA and the awards were procured as the result of a massive fraud perpetrated by P&ID, and that to deny them the opportunity to challenge the Final Award would involve the English court being used as an unwitting vehicle of the fraud. P&ID’s case is that the awards date back some three to five and a half years and it would be unprecedented to grant the extensions. Speed and finality are essential features of London arbitration and the case that there has been any fraud (which is denied) is at best weak.”

- [3] The judge decided that there was a *prima facie* case of fraud against P&ID and extended the time for challenging the arbitration award. A trial of the fraud

² EGE and another v Nerine Trust Co Ltd and another [2021] ECSCJ No 526 (15th April 2021).

³ [2020] EWHC 2379 (Comm).

allegations (which are hotly disputed by P&ID) is listed for hearing in the Commercial Court in London in January 2023.

- [4] It is in order to obtain further evidence of the alleged fraud that the claimants make the current application for **Norwich Pharmacal** relief. Detailed orders have been made in respect of disclosure in the English proceedings. The claimants say, however, that they need **Norwich Pharmacal** relief in order to make a wider case of fraud than is possible in the current English proceedings.
- [5] The substantive **Norwich Pharmacal** application was issued on 15th April 2021 with an initial return date of 29th April 2021. On that date the claimants appeared represented by Mr. Philip Riches QC and Ms. Claire Goldstein. The first defendant (“Nerine”) was represented by Mr. Shane Donovan and the second defendant (“Trident”) by Ms. Corine George-Massicote. On that occasion I indicated that I had two concerns about the substantive application: firstly, whether it was legally permissible (and if so whether it was appropriate) to make a **Norwich Pharmacal** order in support of foreign criminal proceedings, and secondly whether it was appropriate to make such an order if other remedies were available, such as under the various treaties for international mutual legal assistance.
- [6] As is usual on these applications, the registered agents had (so long as their costs and expenses were paid) no interest in whatever the Court might decide and no interest in arguing these two points. I therefore adjourned the matter in order that the BVI Attorney-General might consider whether to appoint an *amicus curiae*.
- [7] In the meantime, on 19th May 2021 P&ID issued an application to inspect the documents on the Court file in this current matter pursuant to CPR 3.14(1)(d) and 26.1(2)(w). How, one might ask, did P&ID come to know of the **Norwich Pharmacal** application, given that I had made a seal and gag order? It appears that Kobre & Kim, P&ID’s legal advisors, carry out regular searches of the e-Litigation Portal to see what claims have been issued. This is, I believe, a fairly common practice

among law firms who want to drum up business. They find parties who are named as defendants and offer to represent them.

- [8] It seems that, due to some software glitch, the type of search carried out by Kobre & Kim throws up the real names of the parties, even where the Court has anonymised a case. Kobre & Kim were P&ID's lawyers in the London proceedings. By checking the action number, they were able to identify my judgment of 15th April 2021 and therefore the nature of the application.
- [9] I used 25th May to give directions both in the **Norwich Pharmacal** application and on P&ID's inspection application. On that day, Mr. Andrew Stafford QC and Mr. Merrick Watson of Kobre & Kim appeared for P&ID. Mr. Riches QC and Ms. Goldstein appeared as before for the claimants. The Solicitor-General, Ms. Jo-Ann Williams-Roberts, and Ms. Colette Corea of the Attorney-General's Chambers, appeared as *amicae curiae*. I am very grateful to the Solicitor-General and Ms. Corea and to the Attorney-General, Ms. Smith, for their assistance.
- [10] Harneys had complained about the means by which Kobre & Kim had acquired knowledge of the **Norwich Pharmacal** application. They suggested that Kobre & Kim had used illegitimate means to access the Portal and indeed that they were attempting to bilk the Registry of court fees which they would otherwise have to pay to inspect the list of actions brought. These were obviously serious allegations. Kobre & Kim strongly denied them. At the hearing I said that if the claimants wanted to pursue the allegations, then they needed to particularise precisely what it was said Kobre & Kim had done, so that Kobre & Kim could answer them.
- [11] Nothing further was done about that. This Court starts with the presumption of innocence. Unless and until a case is made to the contrary, it is to be presumed that Kobre & Kim acted perfectly properly in their clients' interests once they discovered as a result of an innocent error on the part of the e-Litigation Portal the fact of the **Norwich Pharmacal** being brought.

[12] Notwithstanding that the claimants had declined my invitation to particularise any wrong-doing alleged, so that I could adjudicate on the matter, Mr. Riches QC thought it appropriate on 17th June 2021 to tell Richard J in the Grand Court of Cayman:

“[A]ll [P&ID] knows what has happened is that somehow it discovered the fact of that **Norwich Pharmacal** application and we have made extensive submissions in the BVI about this and our firm view is that that was achieved through wrongful use by P&ID’s lawyers, Kobre & Kim, of the online filing system in the BVI court and essentially bypassing the route by which a payment must be paid to the BVI court for accessing documents and essentially going in through the back door and discovering the case number and party names and then matching that to the facts that it already knew, namely the name of its registered office provider, and also a judgment of Mr. Justice Jack which was anonymised but which of course had the case number and, putting a number of things together, it surmised that this application was being made, but it does not know any more than that.”

[13] It will be a matter for the Grand Court as to what view they take of this presentation.

[14] At the hearing before me on 25th May, the Solicitor-General indicated that there were confidential matters which she thought it her and the Attorney-General’s duty to bring to the Court’s attention. She requested that I hear what she had to say *in camera* without any other parties present. This is of course very unusual, but similar situations do sometimes occur. In criminal trials, there is a well-established procedure in relation to police informers. Where it appears that the identity of a police informer may be relevant to the defendant’s defence, the prosecution sees the judge *in camera* in the absence of defence counsel. He or she reveals the relevant information to the judge. The judge then considers whether it is necessary to ensure a fair trial that the identity of the informer be revealed to the defence, a decision which is kept under review during the whole of the trial. (If the judge considers disclosure is necessary, the prosecution will invariably offer no further

evidence, so as to protect the informer's identity, and the defendant will be acquitted on the judge's direction.)⁴

- [15] At any rate, no one objected to my seeing the Solicitor-General in this way. I indicated that in deciding the claimants' application I would ignore any matters which could not be revealed to the parties. I heard the Solicitor-General and Ms. Corea of the Attorney-General's Chambers on 31st May via Zoom. The Solicitor-General revealed a number of matters from a number of sources, but I only place reliance in the current proceedings on one matter, which she is willing should be disclosed.
- [16] This matter is the fact that on 25th November 2019, Mr. Malami, acting on behalf of Nigeria in his capacity as Attorney-General, made a request for mutual legal advice to the Attorney-General of the British Virgin Islands in respect of P&ID. The MLAT request was received on 18th December 2019.
- [17] I have seen a colour photocopy of the document. It purports to be signed by Mr. Malami personally and to be initialled by him on each page. Mr. Malami has a distinctive signature. The signature on this document looks very similar to the signatures Mr. Malami placed on his three affidavits in these proceedings. The initials on each page appear to be in the same hand as the signature. They are very similar, but not identical, to each other. There is no evidence of the signature or the initials being affixed electronically. I am not a handwriting expert, but if the signature and initials are forged, then the forgeries are sufficiently sophisticated to fool a non-expert.
- [18] A transcript of the hearing on 31st May was obtained. The Attorney-General's Chambers made extensive redactions to the document, such that, it is fair to say, very little information indeed would be imparted to the reader. I had my assistant write to Harneys on 8th June as follows:

“Justice Jack has asked me to pass the attached redacted transcript to you. I am not passing the transcript to Kobre & Kim at present.

⁴ See generally Archbold Criminal Pleading Evidence and Practice (2021 Ed) at para 12-30.

Justice Jack asks me to explain that he has had no part in the redacting process. He has neither approved nor disapproved the redactions made by the Attorney-General's Chambers. As he understands the matter, the Solicitor-General is concerned that there are various matters confidential as between our Attorney-General and the Attorney-General of Nigeria which she does not consider it appropriate to reveal to you.

The judge comments that this is obviously an unusual position, since you as Nigeria's legal representative would normally be privy to any matters of confidence. However, this is an unusual case. He suggests that you explore the issues with your client and the Solicitor-General and that you see what the way forward is.

If he needs to make a ruling about the redactions and their appropriateness, then of course he will do so.

The judge does not want to leave the outstanding application for a **Norwich Pharmacal** order outstanding indefinitely. He asks that you report back by noon on Friday 18th June, so that any hearing can be listed."

[19] There was subsequently correspondence between Harneys and the Attorney-General's Chambers, some of which was copied to the Court. There was also a meeting by Zoom on 6th July at which the Solicitor-General revealed that Nigeria had made the MLAT request.

[20] Our Attorney-General's position throughout has been that she owes duties of confidentiality to Nigeria and Mr. Malami in international law, arising out of the various treaties on mutual legal assistance. These duties cannot, she considers, be overridden at the behest of a domestic law firm, even though that firm is acting for Nigeria and Mr. Malami. Accordingly, she says she cannot provide a copy of the MLAT request to Harneys. The appropriate course, she considers, is for Mr. Malami to correspond with our Attorney-General through the diplomatic route.

[21] Now the Attorney-General may or may not be right about her duty of confidentiality in international public law. There may also be a question as to whether this Court has jurisdiction to determine this issue of international law. The answer to either of these questions, I suspect, is not straightforward. However, the procedural way

forward was straightforward. As I told Harneys in the email of 8th June: issue an application and seek a ruling. That was never done.

[22] On 21st June 2021, I had an email sent to Harneys saying:

"I have referred your email to the judge. He will of course hear whatever application you issue. He points out, however, that your client, Mr. Malami, will know what documents he has sent to the Attorney-General here in this Territory.

Given that the Solicitor-General feels constrained from lifting confidentiality in the documents, you may find that a more effective route to obtaining sight of them. The judge at present has doubts as to whether the duties of confidentiality which the United Kingdom owes the Federal Republic of Nigeria are justiciable by this Court. If those doubts are justified, he may have no power to order that an unredacted transcript be provided to you."

[23] That course was not followed. Instead at the hearing on 22nd July, Mr. Riches QC, no doubt seeing the way the wind was blowing, asked to make an oral application for disclosure of the MLAT. I refused that request. It was wholly inappropriate to deal with a complicated issue at the interface of international and domestic law on the hoof without any skeletons or bundles of authorities and without giving Ms. Corea any notice of the application.

[24] The existence of the MLAT request to the BVI Attorney-General was not revealed by Mr. Malami when the **Norwich Pharmacal** application was first made. At para 85 of his first affidavit he says:

"Although the FRN has managed to uncover a significant amount of information about the fraudulent Scheme through the EFCC investigation [conducted by a specialist Nigerian agency], the police investigation and the section 1782 application [in the United States under 28 USC § 1782], there are still some significant pieces of information that are missing and it appears that the only way in which the FRN will be able to discover this information is through this application for **Norwich Pharmacal** relief."

[25] In his second affidavit of 21st May 2021, he says at para 19: “The present position... is that no MLAT request has been made to the BVI.”

[26] In his third affidavit of 16th July 2021, he says:

“6. In para 19 of my second affidavit I also stated that no MLAT had been issued in the BVI. I understand that, as a result of discussions between Ms. Claire Goldstein from Harneys and the Solicitor-General and Ms. Correa from the Attorney-General’s Chambers on 6 July 2021 (which I understand are otherwise confidential and have not been disclosed to me) that the BVI Attorney-General is in possession of an MLAT that was purportedly issued by the FRN to the BVI. I understand that this conversation took place as a result of a private hearing which the Solicitor-General attended before Justice Jack on 8 June 2021⁵ at which confidential information (which has not been disclosed to me) was apparently put before Justice Jack.

7. In light of this information, I instructed my staff to undertake further extensive searches to identify whether in fact an MLAT request has been issued to the BVI. Those investigations have not identified any MLAT request that has been submitted to the BVI. I can confirm therefore that if an MLAT has been submitted, that was done without my authority or knowledge which would have been required under the Mutual Legal Assistance Treaty between the FRN and the BVI. In any event, I confirm that any MLAT request purportedly submitted to the BVI will be withdrawn and should be treated as such.”

[27] I have a number of observations on this. Firstly, Mr. Malami gives no details of how the issuance of MLATs is organised in his office. Presumably there is a specialist team which deals with them. There must also be some form of filing system. No details are given of the “extensive searches” which were carried out, or how a “rogue” MLAT could come to be issued. Secondly, if the MLAT to the BVI was unauthorised, then, as Mr. Riches QC seems to accept, the signature and initials on the MLAT must be forged. That must give rise to major national security concerns in Nigeria. It necessarily implies that someone in Mr. Malami’s office (and it may well be someone quite senior) is forging documents with the Attorney-General’s signature and initials and then passing them off as genuine. Yet Mr. Malami gives

⁵ In fact it was 31st May 2021. 8th June was when the redacted transcript was sent to Harneys.

no indication of any security investigation having been carried out. Thirdly, the MLAT was delivered through FedEx with reply through the diplomatic services of Nigeria and the United Kingdom. There must be a documentary trail showing the transmission of the document and the response to it. The documentary trail may also show how a “rogue” MLAT came to get into the system. The obvious step of looking at the documentary trail has not been taken, but no explanation is given as to why that has not occurred. Fourthly, Mr. Malami has taken no steps to inspect the MLAT. The obvious first step would be to ask for a copy of the MLAT from our Attorney-General through diplomatic channels. This has not been done and again no explanation for the failure is provided.

[28] When dealing with matters where no oral evidence is to be adduced, I have necessarily to make a determination of facts just on the papers. I am afraid I find on balance of probabilities that Mr. Malami’s assertion that he never issued an MLAT to the Attorney-General of this Territory is untrue.

[29] If the second affidavit stood on its own, there may be scope for excusing the error. Mr. Malami is not just the Attorney-General of Nigeria; he is also the minister of justice. Covering two major branches of Government in a country the size of Nigeria must require almost superhuman powers. It would not be surprising if he had forgotten that he had made an MLAT request to the BVI.

[30] However, instead of admitting he made a mistake, in his third affidavit he has doubled down on his position. I have set out four considerations above for doubting Mr. Malami’s account. Standing back and looking at the evidence overall, it is in my judgment not credible that some interloper has created an MLAT request, forged Mr. Malami’s signature and initials on it and then succeeded in passing it off as a genuine request. Further there is no plausible reason, that I can see, for someone to want to forge an MLAT in this way.

[31] The principles on which the Court acts where there is material non-disclosure on an *ex parte* application are well known. I set them out In **Great Panorama**

International Ltd v Qin Hui and others,⁶ with citation of the well-known passage in **Brink's Mat Ltd v Elcombe**⁷ and other local authorities.

- [32] Even where there has been deliberate non-disclosure of material factors, the Court still retains a discretion to make or reimpose an order. However, here Mr. Malami is in my judgment continuing to rely on an untruth in support of his application for **Norwich Pharmacal** relief. That is in my judgment a serious breach of a litigant's duties to the Court. The Court depends on the veracity of applicants, particularly where there is in reality no opposition to applications. If an applicant is not playing with a straight bat, that is in itself enough for the Court to exercise its discretion against granting injunctive relief.
- [33] The MLAT was a relevant document which should in my judgment have been disclosed as a matter of full and frank disclosure. There is always a question on a **Norwich Pharmacal** application as to whether the information can be obtained in some other way. If the claimants were unable to obtain the evidence they needed through an MLAT, then the Court would be obliged to inquire as to the reason for that.
- [34] Further the Court is likely to be assisted in deciding the application by knowing what view the person receiving the MLAT request has taken. In the current case, for example, as part of his full and frank disclosure Mr. Malami says at para 115 of his first affidavit that "[t]here have been suggestions that the witnesses who have been interviewed by the EFCC have not been afforded due process and have not been treated well in custody and that threats have been made against them and their families." He denies those suggestions, but it would be useful to know what view has been taken on this sort of issue by our Attorney-General in response to the MLAT request made to her.

⁶ [2020] ECSCJ No 278, BVIHC (COM) 2019/0180 (determined 13th August 2020).

⁷ [1988] 1 WLR 1350 at p 1356.

[35] Mr. Riches QC points out that Mr. Malami has undertaken not to use any materials acquired by the **Norwich Pharmacal** in any criminal proceedings. However, that would not necessarily prevent Nigeria using the information disclosed under the **Norwich Pharmacal** to acquire evidence in some other way for use in criminal proceedings. The Americans would describe this as “fruit of the poisoned tree” and thus inadmissible, but it is unclear whether that doctrine applies in Nigeria. (It does not in this Territory.) I would need to hear submissions as to the adequacy of the undertaking.

[36] In my judgment there was deliberate non-disclosure. The seal and gag order stands to be set aside. This is not a case in which it is appropriate for me to exercise my discretion to continue (or reimpose) the seal and gag order. In the exercise of my discretion, I refuse to grant the **Norwich Pharmacal** order.

Postscript

[37] After completing the above judgment, but before circulating it, I was sent some supplemental submissions on behalf of the claimants. They essentially asked for more time to seek a copy of the MLAT from the Attorney-General of this Territory. As can be seen from the chronology above, the claimants have known since 8th June that there was a problem. They could have pursued the diplomatic channels in good time, but for reasons which are wholly unclear to me they did not. Instead they continued to press through their BVI counsel for sight of the MLAT, but (and this to my mind is a critical consideration) without ever issuing an application in this Court for that purpose. As to the point on *audi alteram partem*, I have not relied on the contents of the MLAT. The sole matter on which I have relied is the existence of the MLAT and its signature and initialing. Mr. Riches QC was able to address me on these.

[38] The supplemental submissions point to the potential damage to Mr. Malami’s professional reputation. I am afraid I have to determine this application on the evidence as I see it. The application for **Norwich Pharmacal** relief was issued over three months ago. P&ID have not been able to have their application to inspect the

Court file heard until this **Norwich Pharmacal** application is disposed of. Given the large number of applications in other jurisdictions where this judgment and the evidence lodged by the claimants may be material, it would be an injustice to P&ID to delay this matter until after the long vacation.

- [39] The claimants also point out that there is no formal evidence on the Court record of the matters set out in paras [16] and [17] of this judgment. This is correct. In order to correct this technical defect, I have respectfully invited our Attorney-General to have someone in her chambers swear an affidavit confirming the matters set out in those two paragraphs of this judgment. As I understand it from Ms. Corea's submissions, the affidavit is in the course of being sworn. I shall direct that the order I make shall not be sealed until that affidavit is filed, but shall again express my thanks for the assistance of the Attorney-General's Chambers.

Post-postscript

- [40] In further submissions, received at the same time as the corrections to this judgment as distributed in draft, the claimants ask for a stay of execution of the discharge of the seal and gag order. A seal and gag order has two elements. Firstly, it anonymizes the proceedings. Secondly, it prevents disclosure of information and documents. As to the first element, P&ID are now aware of the names of the parties. Since they were the only target of the anonymity order, there is no reason to keep that part of the order, even if an appeal is brought.
- [41] So far as the second element of a seal and gag order, it is important to note the limited access which a non-party has to the Court record. CPR 3.14, so far as material provides:

“(1) On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of any of the following documents filed in the court office, namely—

- (a) a claim form;
- (b) a notice of appeal;
- (c) a judgment or order given or made in court; and
- (d) with the leave of the court, which may be granted on an application made without notice, any other document.

(2) Nothing in paragraph (1) prevents a party in any proceedings from searching for, inspecting and taking a copy of any affidavit or other document filed in the court office in those proceedings or filed before the commencement of those proceedings but with a view to its commencement.”

[42] In the current case, there is no claim form. Any notice of appeal will be part of a separate file. The only documents to which P&ID can have access under CPR 3.14 are the judgment of 15th April 2021 (which they already have) and the orders (which contain nothing the claimants might wish to have kept secret). Accordingly, there is no need to make any orders in relation to access to the Court file.

[43] The claimants are, however, correct that lifting the gag part of the order against the two registered agents would permit the agents to disclose the documents, including the affidavits, served on them by the claimants. I shall thus stay until P&ID’s application for access to the Court records is determined the lifting of that limited part of the gag order which currently enjoins the two respondents from disclosing documents.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar