

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCM2019/0001

IN THE MATTER OF AN APPLICATION BY LMN FOR AN ORDER FOR NON-DISCLOSURE OF THE PROCEEDINGS PURSUANT TO PART 11.12(4) AND PART 26.1(2)(w) OF THE CPR; FOR NORWICH PHARMACAL/BANKERS TRUST RELIEF AND FOR FURTHER OR OTHER INJUNCTIVE RELIEF

BETWEEN

LMN

APPLICANT

AND

QRS

RESPONDENT

Appearances:

Mr. Mikhail Charles with him Mr. Chevanev Charles for the applicant.
Respondent absent and unrepresented.

2019: Aug. 6
Aug. 14

DECISION

BACKGROUND

- [1] **Henry, J.:** The applicant LMN has applied to the court for a number of interim reliefs against the respondent offshore bank QRS ('the bank'). LMN alleges that the bank is doing business with an individual 'OP' who allegedly defrauded 4 entities G, H, I, J, K, ('the injured parties') who have assigned their claims to LMN. LMN claimed that OP and three other implicated persons ('AB', 'CD' and 'EF') are believed to have diverted

significant sums of money belonging to the injured parties and derived from such wrongful conduct. LMN alleged that OP, AB, CD and/or EF have deposited those monies into accounts held at the bank.

- [2] LMN has applied without notice to the bank, for orders directing the bank to disclose the nature of any monetary transactions it has engaged in with OP, AB, CD and EF, or underlying beneficial owners, which was potentially derived from the alleged wrongful conduct. LMN's application is supported by two affidavits outlining the background to the application. The affiants have supplied evidence which does not support all aspects of the claim for the disclosure orders. The application for discovery is granted in part with a return date to be fixed by the Registrar in consultation with the parties. Due to the unusual and belated manner in which this matter came to the court's attention, it was proceeded with in QRS' absence to seek to resolve the issues with dispatch. A return date is to be fixed as soon as possible by the Registrar to enable QRS to make any necessary application or submissions.

ISSUES

- [3] The issues are whether LMN should be granted a:
1. Norwich Pharmacal order? and/or
 2. Bankers Trust order?

PRELIMINARY NOTE

- [4] When originally filed, the parties' names were provided in the application. LMN has made an application for these proceedings to be sealed and that the parties' identities be obscured. It is appropriate and desirable that such orders be made. It is accordingly ordered that the applicant be identified throughout the proceedings as LMN, the bank as QRS, the alleged principal wrongdoer as OP, and the other alleged wrongdoers as AB, CD, and EF respectively. The 'injured parties' are referred to as G, H, I, J and K respectively. A table indicating which initial is ascribed to which person is attached to and forms part of this judgment. The Registrar is directed to provide each party with the table at the time of service of this order. The Registrar is further directed to seal these proceedings until further order.
- [5] LMN applied for preservation orders and freezing injunction. They are set out at paragraphs 14, 15 and 16 of the notice of application. It is convenient to rehearse them in the decision for completeness. They state respectively:

'Preservation Order or Freezing Injunction

14. The Applicant seeks an order freezing any money found to be diverted by any/or all of the Entities to any account(s) held at [F] (Saint Vincent and the Grenadines) as part of the Entities' fraudulent conduct.
15. The reason why this freezing order is being sought, is that the Applicant fears that unless restrained from doing so, the Entities will dissipate or conceal their assets held with the Respondent to prevent any order for payment from being effectively enforced.
16. Further, if the Entities are given notice of this Application, or hears about the Application before they are served with or given notice of any Order which this Honourable Court may make, they will embark upon the dissipation or concealment of their assets.'

[6] LMN signaled on the hearing date¹ that it was no longer pursuing its application for a freezing order. In the premises, its application for preservation or freezing orders in terms of paragraphs 14, 15 and 16 of the referenced *ex parte* Notice of Application is dismissed.

ANALYSIS

Issue 1 – Should LMN be granted a Norwich Pharmacal Order?

- [7] LMN outlined 14 grounds on which it brings the application against QRS. Among them it averred that an order for disclosure is 'needed to enable it to bring an action against known and unknown defendants/wrongdoers if (it) is to be able to fully particularise any potential claims it may wish to bring to vindicate (its) rights' and the rights of persons whose interest it represents and 'to identify assets belonging to the wrongdoers/defendants'. The other grounds emerge from the background as described in the affidavit testimony. I therefore refrain from setting them out verbatim.
- [8] Mr. L.C.M. B is the self-professed attorney-at-law for LMN. He provided the main affidavit in support of this application. He deposed that access to the information being sought from the bank, will give it (LMN) the necessary information to assist in ongoing civil proceedings in the Netherlands, 'without which it would be difficult or even impossible ... to make a proprietary claim for the money fraudulently diverted'. He contended that the information being sought is not a fishing expedition and 'is necessary to establish that the wrongdoing has been committed and to identify the wrongdoer.'

¹ August 6th 2019.

[9] Mr. B averred that OP has intimated in official interviews with the Dutch police that he is using the money as a sort of bargaining chip to obtain indemnity 'to ensure that the injured parties do not proceed against him in a civil claim. Mr. B attached a copy of the referenced official interview to his affidavit². They were each 2 pages in length, in Dutch and were not accompanied by corresponding English translation. It appears from the cover page that they were recorded in March 2016. Mr. B supplied no explanation why no translation was supplied. Ms. H deposed that she was informed by counsel and believes that, out of an abundance of caution English particulars were requested, however the cost of obtaining the translation of all Dutch documents was prohibitive.

[10] LMN has provided no details regarding any ongoing civil proceedings between it and OP, AB, CD or EF or between the 'injured parties' and OP, AB, CD or EF. Mr. B averred that he believes that:

1. OP, AB, CD and EF diverted large sums of money derived from their fraudulent or otherwise wrongful conduct to one or more accounts held at QRS bank; and
2. OP, AB, CD and EF still have access to those monies and are using them as a 'bargaining chip' to achieve a settlement with the injured parties in ongoing civil proceedings in the kingdom of the Netherlands.

[11] Mr. B attested that to the best of his knowledge information and belief, OP:

1. was a Director of some of the injured parties, or otherwise had control of them or access to their funds;
2. used his position to perpetrate fraud, deceit, and breach of fiduciary duties, breach of contract by misrepresentation and other wrongdoings to the detriment of the injured parties; and
3. unjustly enriched himself, along with AB, CD and EF, through his unlawful conduct.

[12] Mr. B averred that the present application flows from his belief that OP, AB, CD and EF have been intimately involved in numerous fraudulent schemes, the proceeds of which are highly likely to be held at the bank, in accounts over which they retain control. Mr. B deposed that the information outlined in his affidavit are within his knowledge and are true to his knowledge and belief unless stated otherwise. He indicated that where he refers to information provided by others he has identified the source of such information. He

² LCMB 21 to LCMB 22

provided certain background which was advanced as facts. For good order and ease of reference, they are outlined by reference to wrongdoing allegedly perpetrated against each injured party.

Alleged Wrongful conduct over I's Affairs

- [13] Mr. B deposed that LMN was the sole director of G while OP was a director of I and G. No documents have been presented to the court which expressly demonstrate that OP had such relationships with I or G. Mr. B produced a copy of a document³ he described as a Letter of Wishes which purportedly confirms the existence of a relationship between OP and F – a Foundation. Mr. B averred that he was informed and believes that OP formed a foundation ('F') in respect of which he was the ultimate beneficial owner ('UBO') and that after his death AB and his children would replace him as the UBO. It does not purport to be signed by OP, but instead contains three signatures of persons who are not named in these proceedings and purportedly signed by them as F's Foundation Council. The document is dated May 27th 2015.
- [14] The document is authenticated by the signature and notarial certificate of Mr. KS and an Apostille. Mr. KS certified that he is a civil law notary in Amsterdam, Netherlands and that the referenced document was downloaded to his computer 'from the electronic court system in which' the proceedings between LMN as claimant and OP, AB, CD and EF as defendants are registered.' He certified that the document is a correct and complete printout from the downloaded document.
- [15] Mr. B did not state when the referenced court proceedings were initiated, the cause of action or the issues joined between the parties. The probative value of this document is doubtful in the absence of details about its origin, the related documents regarding how it was introduced in the referenced pending court proceedings and by whom. There is a lot of room for speculation. The court is not at liberty to supply missing information.
- [16] Mr. B averred that OP instructed I to issue loans of respectively \$173,146.68, €925,359.57, €1,014,323.26, €1,095,725.05, €1,403,152.13 and €4,438,560.01, to G's 5 subsidiaries. Mr. B deposed further that OP instructed G to; and used falsified assignment documents to assigned the loans to F. Mr. B attested that this is confirmed by copies of official interviews 'conducted by Dutch Police with OP on 3 March 2016 and

³ LCMB 12.

25 May 2016, respectively. The copies of those official records do not assist the court as they are in the Dutch language.

- [17] Mr. B averred that OP instructed I to depreciate the loans to nil which it did, although it had not received any consideration for the loan. Mr. B opined that the money paid to F by G was diverted to the bank. He stated that this is 'intimated by the confession contained in the official interview'. The court does not have the benefit of this confession as it has not been translated to English.

Alleged Wrongful Conduct over K's and G's Affairs

- [18] Mr. B asserted that he believed that monies were fraudulently received from K by OP and/or F and diverted into accounts at the bank. He averred that there is compelling evidence that, OP used a credit card supplied to him by K, and without K's permission withdrew large sums of cash between the period September 2015 to January 2016. He alleged further that there is also evidence that K did not have sufficient liquid funds to absorb the withdrawals, and as a result OP used his position at LMN and unlawfully caused G to transfer the required amounts to K.
- [19] Neither Mr. B nor Ms. H (the other affiant) have alluded to any professional or personal relationship between OP and K which would necessitate the surrender of a credit card for business or personal reasons. LMN has not described adequately the background surrounding the delivery of a credit card by K to OP or tendered evidence of any unauthorized charges as alleged, other than Mr. B's say so.
- [20] Mr. B asserted that evidence exists that OP 'withdrew money' from K through false invoices which he instructed F to issue to K in January 2016 for amounts of up to €200,000. Mr. B attached copies of 5 such invoices which were authenticated by Mr. KS in a similar manner as described earlier. The invoices are labeled LCMB 28 through LCMB 32 respectively and were purportedly issued to K. The first 4 appear to be on CD's letterhead and are for sums ranging from €14,500.00 to €50,000.00.⁴ The invoice dates are from August 2015 through January 2016⁵ and seem to be bills for 'consultancy work lcv trading of horse products, solar products and light'.
- [21] The 5th invoice is on what appears to be F's letterhead. It is dated 20.01.2016 for the sum of €200,000.00 and stated to be in respect of 'transactions 2011-2015' for consultancy and assistance regarding sales and

⁴ €15,000.00, €17,500.00, €14,500.00 and €50,000.00 respectively.

⁵ 17.06.2015, 01.08.2015, 01.10.2015 and 01.01.2016.

purchases. It sets out certain payment details including an account number of the payee, at QRS bank identified as the beneficiary bank.

[22] LMN has not proffered any satisfactory evidence which establishes on a *prima facie* basis that OP was a director of K, had effective or other control of K or had the authority to or did authorize the payment by K of any of the invoices. There is also no evidence that any of the invoices were in fact paid from K's finances. None of K's banking or company records were supplied to support the assertion that OP received those funds as alleged. Presumably, K would most likely have provided LMN the necessary records to at the very least substantiate those assertions, particularly in the absence of any allegations that OP, AB, CD or EF had personally secreted or destroyed or caused such records to be secreted or destroyed.

[23] Mr. B averred further that there is compelling evidence that OP caused G to make out false invoices in the sum of €500,000.00, in F's name with vague references to work done. Mr. B asserted further that OP used his position of control, and fraudulently claimed travel expenses of €508,941.00 from various injured parties, including for:

1. the same travel expenses 2 or 3 times which totaled €508,941.00;
2. expenses for future air travel, scheduled for after he resigned from his positions with the injured parties in January 2016;
3. non-business-related expenses, such as hiring sports cars and ordering wine and roses in his hotel room;
4. travel expenses for non-business-related trips luxury holidays with AB; and
5. AB's travel expenses when she accompanied him on trips for personal reasons.

[24] LMN has not presented any of the referenced false invoices issued by G in F's name unless Mr. B was referring to LCMB 32, in which case there is nothing linking G with that invoice except Mr. B's *ipsi dixit*. That is not enough to establish a *prima facie* averment and certainly not a good arguable case against Op or the other alleged wrongdoers. Mr. B did not link his assertions of fraudulent claims by OP for travel and associated expenses to any documentation presented in this case. He made only bald averments in this regard. By placing reliance on this testimony LMN has failed to establish an arguable claim against OP, AB, CD, EF or anyone in that regard.

[25] Mr. B averred further that OP stopped working with the injured parties in January 2016 when he resigned. Mr. B charged that there is evidence that OP nonetheless continued to claim advance management fees

amounting to €212,997.44, which he was not entitled to claim. Mr. B explained that OP purportedly claimed those amounts based on work supposedly done for the injured parties by CD. He implied that they were honoured by one or more of the injured parties, but no evidence of this was tendered.

- [26] Mr. B alleged that there is also evidence that at the end of January 2016, OP instructed G to make an advance payment of €16,233.00 to LGP for a holiday cottage. He asserted that G made the payment although it was unauthorized. Mr. B averred that this is confirmed by the copies of official interviews conducted by Dutch Police with OP on 14 March 2016 and 30 June 2016, respectively. The Dutch versions were attached to his affidavit and marked **LCMB 40 - 41** for identification. They comprise a total of 4 pages. They are unintelligible to the court and do not constitute confirmation, without more.
- [27] Mr. B claimed that there is evidence that OP used his position to instruct G to sign and provide a non-arm's length loan of €1.3 million to CD at a 0% interest rate, with no repayments for the first 10 years and a 40 year repayment period. Mr. B averred that the loan amount was used to purchase a house for OP's and AB's benefit. He exhibited a copy of the loan agreement as LCMB 45⁶. It was purportedly signed by OP on behalf of the borrower and one WS on behalf of the lender. Apart from the very favourable loan terms and conditions, the agreement appears to be genuine. It contains provision for the parties to take legal action in respect of any matter arising from it. WS is not named or identified by LMN as a party to any legal proceedings in this matter or a player in the alleged fraud or wrongdoing.
- [28] Mr. B deposed further that there is evidence that OP caused G to pay off €216,617.00 to a person who tried to blackmail him, as well as an investigator and another entity. Mr. B stated that this is confirmed by a copy of the official interview conducted by Dutch Police with OP on 31 March 2016. A copy of a document⁶ was exhibited as **LCMB 46** and described by Mr. B as a copy of the referenced interview. It comprised 2 pages, is in Dutch and therefore not helpful to the court
- [29] Mr. B reasoned that in view of the foregoing, he believed that OP, AB, CD and EF diverted large sums of money derived from the referenced fraudulent and unlawful activities to an account at the bank. He averred that this was done to evade recovery of the embezzled money, and stymie the claims that the injured parties have against F, CD and others in ongoing civil proceedings in the Netherlands. He asserted that the

⁶ It is authenticated by Mr. KS as are the other documentary exhibits.

bank has therefore, become mixed up in OP's, AB's, CD's and EF's wrongdoing. No records of such proceedings or related documents were presented to the court.

[30] Ms. H is a clerk employed at the law firm in Saint Vincent which represents LMN in these proceedings. She deposed that she is informed and believes that the matter at bar contains sizable exhibits numbered LCMB 1 through LCMB 47, some of which are in Dutch. She averred that Counsel informed her and she believes that the police interviews mentioned by Mr. B resulted in a further detailed charge document which was sent by way of an attachment to an email⁷, and is affixed to her affidavit as LK2⁸ (sic). Ms. H averred further that Counsel has informed her that he is under a duty of full and frank candour and should assist the Court in all instances. She stated that she has provided the charge document to assist the court. The bundle of exhibits presented to the court consisted of copious documents in Dutch and some in English. The filled large binder and consist of no less than several hundred pages.

[31] The charge document appeared to be a photocopy and was not authenticated as the earlier referenced documents or otherwise certified to have been translated by a trained or skilled translator. It is not signed. On each page towards the bottom right hand corner a stamp is endorsed on the document which states 'Translation P. O. Box 119098 Dubai U.A.E'. It consists of 7 pages and is accompanied by a 10 page document which appears to be in Dutch. I infer that the larger document is the Dutch version.

[32] The translation seems somewhat elementary as can be demonstrated by outlining sections of it for purposes of illustration. On the first and second pages it states in part:

'Claim for further description of indictment Article 314a of the Dutch Code of Criminal Procedure ...

Whereas, in that summons, the description given in the detention order is sufficient for the purpose of the statement of the offense;

Considers that the indictment should be read as follows: That

1. First

It is:

⁷ From Stefan Campans, a Junior attorney at the Dutch Firm of 'BB' to Mikhail Charles, of Counsel at Baptiste & Co. Law Firm, on the 28th day of February 2019.

⁸ The referenced document was actually marked LH2.

On or around the period from 9 March 2015 to 27 January 2016, in ... and or elsewhere in the Netherlands and/or Norway and/or Cyprus and/or Switzerland and/or Dubai

Together and in association with (an) other(s), at least alone, more than once, at least once,

Considering one or more of the following invoice(s):

-an invoice from [F] dated 1 January 2016, bearing the invoice number ...

-an invoice from [F] ...

(each) being a document that was intended to serve as proof of any fact – falsely made /and/or falsely/ has caused /has /have been distorted and /or has / have altered, such (each time) with the intention of using that /that writing (s) as genuine and unadulterated or by having one or more other(s) used,

After all, have he / she, suspect, and / or the co-perpetrator(s) falsely, or intentionally in violation of the truth, in that [F] fact(s), state or have mentioned that [F] established and / or an office in Cyprus and / or provided one or more service(s) to or one behalf of the addressee(s) of that invoice(s) and / or that such addressee(s) with regard to the service(s) described in that invoice, the amount owed in said invoice(s) was / were due,'

- [33] The rest of the document is similarly constructed and renders comprehension difficult and even impossible in parts. I infer that the translator is not certified and in the circumstances would not be accepted as an interpreter for the purposes of translation of documents from Dutch to English and English to Dutch in proceedings in this court. I have refrained from setting out the document in its entirety as I am of the view that the representative sample rendered above demonstrates that while ideas are being conveyed, the document is not reliable for present purposes. I therefore ascribe no weight to it regarding the charges which have been purportedly laid against OP or any other person. I am bolstered in this conclusion by the absence of an Apostille or other certification or authentication markings on it.

Analysis – Norwich Pharmacal Jurisdiction

- [34] The Eastern Caribbean Court of Appeal has considered several cases dealing with applications for exercise of the Norwich Pharmacal jurisdiction. Among them is the case of A, B, C, D v E⁹ in which it carefully enunciated the applicable principles. It was cited by LMN in support of its case. LMN

⁹ AXAHC VAP2011/0001 at para. 11.

acknowledged that the learning in that case captures the established legal position in respect of Norwich Pharmacal applications. In a judgment written by Webster JA (Ag.), the court declared 'the Norwich Pharmacal jurisdiction is available to a litigant where a wrong has been committed against him and a third party has become mixed up in the wrongdoing, innocently or otherwise, and the third party has information which the claimant needs in order to pursue a claim against the wrongdoers.'¹⁰

[35] The Court of Appeal noted that the principles were originally expounded in **Norwich Pharmacal Co. and Others v Customs and Excise Commissioners**¹¹ and subsequently developed in a line of cases including **Mitsui & Co, Limited v Nexen Petroleum UK Limited**¹². The Court pointed out that the jurisdiction is now available in cases involving tortious and contractual wrongdoing and even where the wrongdoer's identity is not known¹³; and in tracing claims.

[36] The Court highlighted the applicable principles to be considered when deciding whether to make an order for discovery pursuant to the Norwich Pharmacal jurisdiction. It declared that an applicant must establish an arguable case that:

- '(a) a wrong has been committed against him;
- (b) the respondent became mixed up in the wrongdoing; and
- (c) the information is necessary to establish that a wrong has been committed or to identify the wrongdoers.'

[37] LMN submitted that it has been as specific as possible in its requests and is willing to pay reasonable expenses to the bank for compliance with any order made for discovery. It submitted further that the bank is not a wrongdoer, and its offer to pay the expenses is made to assist in lessening the impact of the intrusion on the bank should the Court rule in its favour.

[38] LMN contended that it has a good arguable case that OP, AB, CD and EF have committed a wrong against G, H, I, J and K; and that the bank became mixed up in the wrongdoing, even if innocently; and there is

¹⁰ At para. 11 of the A, B, C, D v E case.

¹¹ [1974] AC 133

¹² [2005] EWHC 625 (Ch).

¹³ As illustrated respectively in P v T Ltd [1997] 4 All ER 200; [1997] 1 WLR 1309; and Carlton Film Distributors Ltd v VCI Plc [2003] EWHC 616.

enough evidence to make out a *prima facie* case of wrongdoing. It argued that delay in granting the order may lead to dissipation of the money held at the bank. LMN contended that there is a real prospect that the information or documents of which it is seeking disclosure would lead to the location of the money and the identity of the wrongdoers.

- [39] LMN submitted that OP allegedly defrauded LMN, holds accounts with the bank into which he and other parties have diverted significant sums of money funds over the past 5 or so years. LMN submitted that the court should have regard to correspondence from OP to AH dated 18 June 2015, 29 June 2015 and 4 October 2015 instructing the latter to transfer €1.403.152,13, €1.095.725,05 and €1.539.682.83 and USD \$173.148,68 respectively to F at the bank. Neither Mr. B nor Ms. H testified about those documents. The court will therefore have no recourse to them.
- [40] LMN argued that the instant application is in aid of foreign proceedings and no substantive matters are contemplated within the jurisdiction. It submitted that OP was arrested, charged with fraud and that interviews with the police confirm that he instructed that certain loans be assigned to F through G which was paid into a bank account held at the bank. Although copies of the referenced interviews were provided they were in Dutch. The court is unable to verify their contents. Moreover, neither Mr. B nor Ms. H testified that OP was arrested and charged with fraud. They have not indicated with what exactly he is charged or for what he was arrested if at all.
- [41] Significantly, very little details were given of the pending proceedings in the Dutch criminal or civil courts. The information provided is inadequate for the court to determine or have a reasonable idea of the nature of those proceedings or the claims which LMN, G, H, I, J and/or K have or intend to pursue against OP, AB, CD or EF. The details of the intended prosecution are just as nebulous having regard to the unhelpful translation of the police interview(s).
- [42] In view of the testimony provided by Mr. B and Ms. H, no evidence has been presented to this court which established an arguable case that OP, AB, CD or EF or any unknown party has committed a wrong against K. Mr. B expressed a belief that K had been defrauded by OP through the unauthorized use of a credit card. He did not state the source of such belief. He alluded to the existence of evidence that K did not have sufficient funds and that OP unlawfully caused G to transfer monies to K. Such evidence was not presented. Mr. B's assertions that that OP presented invoices to K was not supported by evidence that the

referenced invoices were honoured by K or anyone else or that monies passed from K to OP. No explanation is given as to why such evidence was not forthcoming. These bald assertions do not establish an arguable case without more, particularly in respect of the first 4 invoices. Accordingly, I am not satisfied that LMN has established an arguable case that OP, AB, CD, EF or any unknown person has defrauded K as alleged in respect of those 4 invoices.

[43] I note that the 5th invoice contains details which may conceivably connect OP with the bank (when considered in light of the Letter of Wishes) by way of the specific account details. Although there is no supporting documentation that the invoice was honoured, and no explanation provided why this was not tendered, it is arguable that the invoice establishes an arguable case that such payment might have been made. It is clear that the bank might have become involved in such wrongdoing. Its name is on the document and a specific account number is noted on its face.

[44] The name of the account holder is missing. While it is permissible to infer that the payee is the person named as the one issuing the invoice, it is possible that it was someone else or that there is more than one account holder. It would be in LMN's interest to learn the identity of any additional account holders. It is apparent that in view of the circumstances surrounding the issuance of that invoice as alleged and as illustrated on the document, that in that singular instance, the requirements for the issuance of a discovery order are all satisfied. I am therefore prepared to grant the discovery order in respect of the sum outlined in that invoice. In doing so, I take into consideration that LMN's interest in obtaining this information outweighs the bank's confidentiality obligations to its customers who might be affected by the order.

[45] In respect of the alleged issuance of loans from I to G's 5 subsidiaries and their subsequent assignment to F, once more LMN has relied largely on Mr. B's exclusive 'say so'. His account amounts to nothing more than bald assertions. No underlying documents to support them were exhibited and no explanation given for their absence. Moreover, LMN has not provided even a small, helpful extract from the referenced police interviews in English. I am puzzled that the cost of doing so was considered prohibitive in view of the sums involved in the alleged fraud and wrongdoing. Furthermore, LMN relies on Mr. B's 'belief' that those monies were diverted to the bank, as its basis for seeking the discovery order.

[46] I am puzzled that LMN has not produced bank statements or other records from I to G's 5 subsidiaries reflecting the related debits, withdrawals or payments or explained why (if such is the case) they are unavailable. In all the circumstances, I am not satisfied that LMN has established an arguable case of

wrongdoing by OP, AB, CD, EF or any unknown person in respect of the referenced loans and 'unlawful assignments'. I make no disclosure order in relation thereto.

- [47] Mr. B's allegations of wrongful conduct by OP with respect to the false invoices for €500,000.00 and travel expenses of €508,941.00 were again instances of bare allegations. Further, LMN did not assert that the invoices were honoured by it or G, H, I, J or K. LMN has therefore not established an arguable case of tortious or contractual wrongdoing against it by OP, AB, CD, EF or any other person in relation to those assertions.
- [48] LMN's claims that OP fraudulently billed for advance management fees of €212,997.44 on CD's behalf is not referable to any documentary exhibits and is not supported by independent tangible or credible data. Again, LMN has relied on Mr. B's bald statements. Mr. B did not testify how he came to have this information. It can perhaps be inferred that this was communicated to him by his clients. This is not enough. Something more is necessary to establish an arguable case. An applicant has to supply the court with the evidence to establish its case. The court can never be expected to arrive at conclusions through conjecture.
- [49] LMN accused OP of directing G to make a payment for a holiday cottage which it did. The official interviews on which this claim is hinged were not helpful since they were not available in English. LMN did not provide any other corroborating evidence. In my opinion this is not sufficient basis to establish a *prima facie* case of wrongdoing by OP or anyone else. It is just Mr. B's account of what allegedly happened. Mr. B's testimony is all in English. Surely, he has the ability to supply data based on his knowledge and understanding of pending proceedings.
- [50] The agreement¹⁴ allegedly entered into by G and OP speaks for itself. It establishes a *prima facie* case that OP received the loan as alleged. It is no part of LMN's case that the proceeds from that loan were ever deposited into an account at the bank, but rather used to buy a house. A discovery order is therefore not necessary in respect of those sums. As stated by the Court of Appeal in the **A, B, C, D v E** case,
- '... one thing is clear: the jurisdiction cannot be used as a fishing expedition to enable a claimant to decide whether or not to sue where the identity of the wrongdoer is known. If it is possible to plead a case without the information then the *Norwich Pharmacal* jurisdiction is

¹⁴ Contained in LCMB 45.

not available: **Axa Equity and Law Life Assurance Society v National Westminster Bank**.¹⁶ *[1998] P.N.L.R. 433*.¹⁵

- [51] Mr. B's allegations that OP caused G to pay off individuals who tried to blackmail him are grounded in the police interviews. LMN failed to provide the court with an intelligible version of that record. Mr. B's averments by themselves do not make for an arguable case. Similarly, his belief that OP, AB, CD, EF or others diverted large sums derived from such fraudulent and wrongful activities to accounts at the bank does not make an arguable case for present purposes.
- [52] For the foregoing reasons, a discovery order is made limited to documents within the bank's control which contain information relating to banking transactions of OP, I and/or other persons individually or jointly, in connection with transactions emanating from or to bank numbered 15355871; or any other account held by OP or other person and/or persons related thereto between 20th January 2016 to present.
- [53] The bank shall disclose to LMN such details including clear information on the recipient account, name, number, bank address and other related details as available; details of all deposits and transfers into and from any account of the named persons or other persons including clear information on the payor and payee accounts respectively, name, number, bank address and other related details; details of beneficial owner and signatories of every account held at the bank by the named persons with copies of identification document of such persons. LMN shall pay to the bank all charges and expenses related to compliance with this discovery order which shall remain in force for 3 months from today's date unless carried or discharged.

Issue 2 – Should LMN be granted a Banker's Trust Order?

- [54] The Court of Appeal also addressed and articulated the criteria for the grant of the bankers trust relief in the **A, B, C, D v E** case. It stated that an applicant must satisfy the court that:
- '(a) there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of his money;

¹⁵ At para.35 of the **A, B, C, D v E** case; see also *The President of the State of Equatorial Guinea and Another v The Royal Bank of Scotland Limited (a company incorporated in Jersey) and Others* [2006] UKPC 7 at para. 16 per Lord Bingham of Cornhill (also considered in the **A, B, C, D v E** case).

- (b) there is good reason to believe that the money now or previously held by the discovery defendant belongs to the applicant;
- (c) delay may lead to dissipation of the funds;
- (d) there is a real prospect that the information or documents sought may lead to the location or preservation of the assets to which the applicant is making a proprietary claim (per Hoffmann J in **Arab Monetary Fund v Hashim (No. 5)**¹⁶; and
- (e) the documents will be used only for tracing what happened to the applicant's money.

In addition the applicant must provide the usual undertakings in damages and to pay the expenses of the discovery defendant in providing the information.¹⁷

Compelling evidence of fraud or wrongdoing

[55] LMN accepted those to be the guiding principles for the grant of a bankers trust order. It submitted that the Bankers Trust Order requirements are met in this instance. As indicated above there is insufficient evidence in this case in respect of the several allegations of fraud. I have found only one instance where LMN has made out a *prima facie* case of wrongdoing (i.e. in relation to the invoice for €200,000.00). I would not characterize it as 'compelling' evidence of fraud or wrongdoing. It is merely arguable that sums were billed which might have been paid to a person who was not entitled to receive such payment. It certainly does not establish a compelling case that anyone was wrongfully deprived of their money.

Evidence that the defendant held the money at some point

[56] While it is arguable that the bank could have received the money as a conduit on behalf of one of its customers during the course its business, there is no hard or credible evidence that it did. The existence of the invoice raises a possibility, nothing more. I would not elevate that possibility to the level of 'good reason' to believe. I do not think that it is necessary to consider the other criteria. I am satisfied that LMN has failed to meet the requirements of the first two criteria. I find that it is not just and equitable to make a bankers trust order in LMN's favour. That aspect of the application is dismissed.

Costs

[57] LMN has accepted that a costs order is not appropriate in the instant proceedings. I make no order

¹⁶ [1992] 2 All ER 911 at 918.

¹⁷ At para. 19 of the A, B, C, D v E case.

as to costs.

ORDER

[58] It is declared and ordered:

1. The applicant is to be identified throughout the proceedings as LMN, the bank as QRS, the alleged principal wrongdoer as OP, and the other alleged wrongdoers as AB, CD, and EF respectively. The attached table indicates which person is represented by the respective initials. It forms part of this judgment.
2. The Registrar is directed to provide each party with the table at the time of service of this order.
3. LMN's application for Bankers Trust relief is dismissed.
4. LMN's application for preservation orders and freezing injunction is dismissed.
5. LMN's application for Norwich Pharmacal relief is allowed in part.
6. A discovery order is made limited to payments, debit advices or transfers made into account numbered 15355871 ('the referenced bank account') or any other account by I or OP from 20th January 2016 to today's date – August 14th 2019.
7. The bank shall on or before 4th September 2019 by 3.00 p.m. or by a later date agreed in writing with LMN, serve on LMN's legal practitioner or disclose to LMN in writing and certified by a responsible and authorized officer of the bank, all documents within the bank's control which contain information relating to banking transactions of I, OP and/or other persons ('associated persons') individually or jointly, in connection with the referenced account, between 20th January 2016 and today's date – August 14th 2019, not limited to:
 - (i) all details of banking records related to the referenced account, including all bank account statements, with clear information on the recipient account, name, number, bank address and other related details as available;
 - (ii) all details of all deposits and transfers into any account of OP and all associated persons including clear information on the payor account, name, number, bank address and other related details;

- (iii) all details of all withdrawals and transfers out of any account of OP and all associated persons including clear information on the payee account, name, number, bank address and other related details;
 - (iv) all details of beneficial owners and signatories of every account held at the bank by OP and all associated persons, with copies of identification document of such persons; and
 - (v) all details of any money standing to the credit of OP and all associated persons in any such bank account including the amount of any cheque drawn on such account which has not been cleared.
8. The bank shall not itself or by its directors, officers, employees or agents or in any other way alter, deface, dispose of or otherwise damage or destroy the documents referred to in this Order.
9. The bank shall not until September 15th 2019 (or such other date approved by the court, or agreed in writing with LMN):
- a) notify any person or entity of these proceedings, who is not a party, or described as an injured party in this decision; or
 - b) inform any person or entity who is not a party, or described as an injured party in this decision, that it is required to disclose the documents or other information directed in this order;
- Provided that the bank may consult with and instruct its legal practitioners in respect of further proceedings in this matter or related matters including giving instructions to initiate and continue any associated proceedings.
10. The Registrar is to fix a return date as soon as possible in consultation with the parties.
11. LMN shall pay to the bank all reasonable charges and expenses related to and arising from compliance with this discovery order (including photocopying, scanning and or de-archiving costs).
12. LMN shall file and serve an undertaking on or before August 16th 2019 by 2.00pm.:
- a) To comply with any Order this Court may make as to damages, in case this Court shall consider that the bank or any party or other affected person has sustained any damage as a consequence of this Order which the Court considers that LMN ought to pay. Liberty to LMN to apply.

- b) Not to, without the permission of the court, use any documents or information obtained as a result of this order, except for the purposes of:
 - (i) Commencing civil proceedings anywhere in the world, for the same or related subject matter of these proceedings or against any person concerning the alleged wrongdoing (in respect of which this order is made); or
 - (ii) Tracing the proceeds of the said wrongdoing.
 - c) To swear, file and serve an affidavit as to the status and outcome of the proceedings in the Kingdom of the Netherlands, within three calendar months from the granting of this Order, and every three months thereafter until further order.
 - d) To apply to this Honourable Court upon the culmination of the proceedings in the Kingdom of the Netherlands for the discharge of this Order.
 - e) Not to seek to enforce this Order in any country outside Saint Vincent and the Grenadines without the permission of this Honourable Court.
13. The Registrar is directed to seal the instant and all associated proceedings and all records related to them until further order of the court.
14. No order as to costs.

[59] I am grateful to counsel for their helpful written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar