

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.AXAHCV 0063/2010

BETWEEN:

CLAIMANTS A,B,C and D

Applicants

And

RESPONDENT E

Respondent

Before: The Hon. Madame Justice Louise Blenman

Appearances:

Mr. Gerhard Wallbank and Mr. Harry Wiggin for the Claimants/Applicants
Mr. J Alex Richardson and Ms. Ayodeji Bernard for the Defendant/Respondent

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2010: November 22
December 30
2011: January 26
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REASONS FOR DECISION

- [1] **BLENMAN, J:** This application is one that is mired in secrecy and, based on the request of the applicants, has been sealed by the court.
- [2] The court delivered its oral decision in this matter on the 30th December 2010. It has now become necessary to give reasons for the decision. I hereby do so.
- [3] Due to the secrecy which surrounds the application even though the court gave an oral decision, it is appropriate to give full reasons for that decision, being mindful, nevertheless, of the need to protect the identities of the parties.

Background

- [4] The applicants in this matter A, B, C and D are defendants and counterclaimants in another matter. In fact, in that matter they have filed quite an elaborate amended Defence and Counterclaim in which they allege that the claimants, referred to as F, are guilty of several wrongs.
- [5] The applicants A, B, C and D in the present application, (before the court) seek the assistance of the court in order to obtain what is referred to as a **Norwich Pharmacal/Bankers Trust Co v Shapira Order**. They say that the bank E has information which should form the basis of a Norwich Pharmacal Order. They are seeking to obtain from respondent E (the bank E) information in relation to accounts held by F.
- [6] In their affidavits in support of the application, A, B, C and D, have provided the court with several allegations of F's wrongdoings and point to several related matters/claims most of which are speculative in nature. They say that other persons or entities are involved with F, in the wrongdoings that allegedly have been committed.
- [7] The applicants A, B, C and D say that they need the information which may well assist them in pressing their Defence and Counterclaim, in the other matter.
- [8] Also, the applicants say that the defendant F has denied the allegations and they are uncertain about the full extent of the defendant's wrongdoing. Unless they are able to obtain the payment records from respondent E, who they say is a third party that is mixed up in the defendant's wrongdoing, they would not be able to discover the extent of the defendant's wrongdoing. In fact, they say that the information they seek in this application is to enable them to press their Defence and Counterclaim, in the main action or to bring any future or related proceedings.
- [9] In fact they have placed before the court quite a lot of material. To say the least, the net has been drawn very wide and most of the matters referred to may have very little relevance to any contemplated proceedings. The court proposes to address this matter in greater detail, very shortly.

[10] It is appropriate to say that the applicants A,B,C and D are seeking the following order:

All bank account records and all communications concerning the transfer from accounts held by the defendant F and any other account over which that defendant or its directions or officers have signing authority, in favour, or to the order of and certain entities from 1st January 2005 to date.

There are 18 other named entities or persons in relation to whom the applicants A,B,C and D seek to have similar orders apply to insofar as they may have either communicated, held accounts or had monies transferred to them.

[11] A,B,C and D also seek to obtain information of a similar nature: communication, account records that F may have dealt with in relation to the named 18 persons or entities.

[12] It is noteworthy to emphasize that A,B,C and D (the applicants) have filed a Defence and Counterclaim in which they allege that F defendants together with others have obtained bribes and unlawfully paid secret commissions to others. They allege that defendant F obtained value from them by fraud. They say that the defendant F and its affiliates maintained accounts at the respondent E's bank.

[13] The applicants contend that the court has jurisdiction to grant the Orders and that in the present application it is just that the Orders be granted.

[14] For obvious reasons, the application was served on respondent E with strict orders that respondent E was not to bring it to the attention of F or any of its agents or solicitors.

[15] The bank, Respondent (E) opposed the application on the following grounds-

- (a) The application amounts to a mere fishing expedition since the applicants have indicated in their Defence and Counterclaim who are the persons that have wronged them and have clearly stated the full extent of the alleged wrong.
- (b) The information which the applicants seek can be obtained by the means of discovery in the main action and therefore the court ought not to lend its assistance.
- (c) The bank E, cannot be properly compelled to disclose the information since to do so would be to override its duty of confidentiality. See ***President of the State of Equatorial Guinea v Royal bank Scotland*** [2006] UKPC 7; ***Bankers Trust v Shapira*** [1980] WLR 1274. See also ***Richard Rowe, Mark Secrist v St. Kitts Nevis and Anguilla National Bank*** a decision of the High Court of St. Kitts and Nevis.

Court Analysis and Conclusions

- [16] The court has reviewed the very lucid and helpful submissions of both learned counsel Mr. Gerhard Wallbank for the applicants and learned counsel Ms. Ayodeji Bernard for the bank. The court has carefully considered the applications and the affidavits that have been filed in support and in opposition.
- [17] The locus classicus is ***Norwich Pharmacal Co v Commissioners of Customs & Excise*** [1974] AC 133 in which it was held that a person who was innocently mixed up in the wrongdoing of another, so that he was more than a “mere witness” could be compelled to disclose the identity of the actual wrongdoer, in order that proceedings can be taken by the victim against the appropriate defendant. As it emerged the jurisdiction to order discovery in the above circumstances came to be referred to as the Norwich Pharmacal jurisdiction.
- [18] The court takes cognizance of ***Mohammed (on the application of Binyan Mohammed) v Secretary of State for Foreign and Commonwealth Affairs*** – in which it was made clear that the jurisdiction could not be used to provide a general right of discovery. It was pointed out that the Norwich Pharmacol orders in relation to tracing claims, required banks to give “full information”

relating to the customer's account, if the circumstances demanded it". In the above case, the court accepted that, in the normal case information beyond the identity of the wrongdoer might not be appropriate, but the instant case was exceptional, and the jurisdiction sufficiently flexible to permit more extensive information to be provided.

[19] In ***Arab Satellite Communications Organisations v Saad Al Faqih*** [2008] EWHC 2568 QB Underhill J refused to make an order at all because of the potential wrath. He said Norwich Pharmacol *"did not give the claimant a general licence to fish for information that would do more than potentially assist them in identifying a claimant or defendant"*.

[20] See ***Mercantile Group (Europe) AG v Aiyela the English Court of Appeal*** stated:

"the jurisdiction to order disclosure against a third party exists when two conditions are satisfied. First, the third party must have become mixed up in the transaction concerning which discovery is required. Secondly, the order for discovery must not offend against the mere witness rule".

[21] To put it succinctly, three conditions must be satisfied in order for the court to exercise its power to order Norwich Pharmacol relief. These are:

- (a) There must be an apparent wrong carried out by an ultimate wrongdoer;
- (b) There must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
- (c) The person against whom the order is sought must (a) be mixed up so as to have facilitated the wrongdoing, and (b) be able or likely to be able to provide the information necessary for the ultimate wrongdoer to be sued.

[22] The law has evolved and the court has granted relief even in the absence of an arguable case that a wrong has been committed.

- [23] The court accepts the principle enunciated in ***P v T Ltd*** namely: where justice required the granting of relief, the court would make an order for discovery to assist a prospective plaintiff to obtain the information and documents necessary to bring an action in tort against a third party, notwithstanding that without such information, the plaintiff could not ascertain whether the unidentified third party had in fact committed a tort against him. Moreover, it was not necessary that the tort of which the plaintiff complained be criminal in nature. In the instant case, it was not possible for the plaintiff to know for certain whether he had a viable cause of action against the informant without discovery, justice therefore demanded that he should be placed in a position to clear his name if the allegations made against him were without foundation. An order for discovery to enable the plaintiff to determine whether any action lay against the informant would accordingly be made.
- [24] The threshold test for the grant of a disclosure order is that applicants A,B,C and D must disclose a good arguable case that a wrong has been committed. See ***Bankers Trust Co v Shapira*** *ibid*.

The Application at Bar

- [25] It is of assistance to state the background to this matter in a little bit more detail.
- [26] The applicants, A,B,C and D filed a without notice of application in which they seek discovery the focus of which is the basis of this decision. The court, having heard the application together with the supporting affidavits/documents ordered that the documents be served on the respondent E (the bank E), the respondent E is the discovery respondent. The matter was fixed for further hearing.
- [27] The discovery respondent E appeared at the further hearing and sought and obtained leave to file an affidavit in opposition to the application. In the opposition, the bank E sought to persuade the court not to grant the disclosure order. The applicants have filed a further affidavit in support of their application.
- [28] At the hearing between the parties, there was strenuous objection taken by the bank E to the discovery order being granted.

- [29] In order to determine the reasons for the reliefs being sought, the court turns to examine L's affidavit in support of the application. When the court examines L's affidavit the reasons for seeking the discovery can be gleaned: there are three bases on which the Order is sought in aid of the main or the Anguillian Defence and Counterclaim; second and thirdly in respect of any claims that have been brought or may be instituted abroad.

Anguillian Defence and Counterclaim (Main Anguillian Claim)

- [30] The court proposes to, firstly examine whether the discovery order should be granted in relation to the Anguillian claim or the Defence and Counterclaim.

Arguable Case

- [31] The first issue that the court needs to ascertain is whether there is an arguable case. On the pleaded Defence and Counterclaim and based on the affidavit in support of the present application the court is satisfied that applicants A, B,C and D have established an arguable case that a wrong has been committed.

- [32] Accordingly, applicants A, B,C and D have satisfied the first condition of the Norwich Pharmacal Relief.

Whether the bank has become involved or participated in the wrong.

- [33] In accordance with the principles in ***Norwich Pharmacal Co v Commissioners of Customs and Excise***, the court has the jurisdiction to compel a third party to disclose information in its possession to enable a party to establish the identity of its wrongdoer.

- [34] The Norwich Pharmacal jurisdiction of the court is discretionary and equitable. The discretion must be exercised judicially. It is the law that a person who was innocently mixed up in the wrongdoing of another, so that he was more than a "mere witness" could be compelled to disclose the identity of

the actual wrongdoer, in order that proceedings could be taken by the victim against the appropriate defendant. See **Ashworth Hospital Authority v MGN Ltd** [2002] 1 WLR 2033.

- [35] The Norwich Pharmacal remedy is flexible and it has been used not only to identify the wrongdoer but also in order to obtain full information required for the purpose of determining what the wrongdoer has done with his assets.

Is there the need for the Court's Intervention?

- [36] The court must now move on to consider whether the order is necessary. The rationale for the order must be based on the involvement or participation of the respondent E. The need to justify what would otherwise be an unjustifiable intrusion upon an innocent third party must always be borne in mind.
- [37] As stated earlier, on the evidence presented, the court is satisfied that it is arguable that the bank E has become innocently mixed up. Even if that requirement is satisfied, that is not the end of the matter. It is only a threshold requirement to the exercise of a discretionary jurisdiction. Its satisfaction merely "*triggers*" the jurisdiction. The fact that there is involvement enables the court to consider whether it is appropriate to make the order sought. The jurisdiction is an "*exceptional one*" which is only to be exercised by the court when it is satisfied that it is necessary that it should be exercised. See Lord Woolf in **Ashworth** *ibid* at 2049 F.
- [38] In the main Anguillian claim (the Defence and Counterclaim), the applicants have pleaded quite extensively about the alleged fraud that F has committed. It has even stated the names of the other parties who are allegedly implicated. It is evident to the court, based on the pleaded case, in its Defence and Counterclaim that, the applicants A,B,C and D know who the alleged briber is and to whom the monies are alleged to have been paid.
- [39] Therefore, the court is not of the considered view, as urged by Mr. Wallbank that the applicants need the information sought in order to be able to press their case. The applicants A, B, C and D have pleaded quite an elaborate scheme in which they seek to implicate the bank E by saying that

the monies were deposited into the bank. The scheme which they say was unlawful is referred to in the L's affidavit that has been filed in support of the application. The applicants A, B,C and D make allegations against approximately 18 persons or entities and in quite some detail.

[40] The court is of the considered view that since the applicants were able to plead their case in such great detail and without the sought after information, the Norwich Pharmacal jurisdiction is not available. The court has carefully perused the amended Defence and Counterclaim that the applicants have filed. Their pleadings are very elaborate and detailed and they make discrete allegations. Further, the applicants can obtain the information required through the disclosure procedure that is provided by CPR 2000.

[41] The court has no doubt that the applicants know the identity of the alleged wrongdoers and the persons to whom the alleged bribes were paid. They are not, however, seeking the information through the court order to plead their case but in order possibly to see what the actions they may be able to pursue, generally. The applicants seem to have all of the information that is required in order to press their Defence and Counterclaim.

[42] Accordingly, the court is not of the view that the applicants need any additional documents or information which would enable them to ascertain whether an action would have reasonable prospects of success. They have already filed their Defence and Counterclaim and have provided the court with far reaching allegations against so many wide ranging entities and individuals.

[43] In addition, the court is of the view that there is nothing to prevent the applicants A,B,C and D from joining the other parties against whom the allegations are made, as defendants.

[44] It bears repeating that in the Defence and Counterclaim, applicants A, B, C and D say that they require the information in order to trace their equitable proprietary rights in relation to substantial sums of money they say that they gave to F and in relation to which F has committed a fraud. Applicants A,B,C and D do not need to discover the names of the relevant persons since they have named them in their Defence and Counterclaim filed in the main Anguillian action. Further, they have stated in a very detailed manner the allegations they make against the defendant F.

[45] In **Norwich Pharmacal** ibid case Lord Reid stated as follows:

“They (the authorities) seem to suggest to me to point to a very reasonable principle that if through no fault of his own, a person gets mixed up in the tortuous acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in fighting the wrong if he unwillingly facilitated its perpetrator and so obtain the evidence they require.”

[46] The court reiterates that it has no doubt that the information that applicants A,B,C and D seek is not only for the purpose of “*pressing*” their Defence and Counterclaim in the main Anguillian Defence and Counterclaim, as they would have the court believe. The information is so far reaching and covers in excess of fifteen persons/entities, the court is ineluctably driven to conclude that, as argued by learned counsel Ms. Bernard, the application amounts to a fishing expedition. On their pleaded case the applicants A,B,C and D have the information to press their amended Defence and Counterclaim. It is clear that they intend to explore the possibility of obtaining any information generally which may be of assistance to them in relation to any litigation possible. This can hardly be a valid basis for obtaining the court’s assistance.

[47] The court says all of the above being very mindful that the Norwich Pharmacal disclosure is not one of last resort.

[48] Mr. Wallbank told the court that given the short time frame that applicants A,B,C and D have under CPR 2000 in which to file their witness statements, applicants A,B,C and D are of the view that this procedure is required in the best interest of justice, also the urgency of the matter necessitates the filing of the present application for disclosure. Applicants A,B,C and D are concerned that they may

seek the ordinary disclosure under CPR 2000 only to find at the end of it that F does not furnish them with the information required.

- [49] The court has carefully considered this argument and holds the view that this can hardly be a valid reason, without more, for invoking this exceptional jurisdiction of the court. The applicants A,B,C and D have not persuaded the court that the order sought is necessary to prove their case in the Defence and Counterclaim in the main action. Neither is the court satisfied that the requisite information could not be obtained in ordinary discovery process in the main Defence and Counterclaim through the procedure provided by CPR 2000.
- [50] In **Ashworth**, Lord Woolf said that the disclosure sought had to a necessary and proportional response in all the circumstances.
- [51] Further, learned counsel Mr. Wallbank on behalf of the applicants say that even though the applicants A,B,C and D have accused F of being a briber, they do not have the information to back it up. This is the reason they are seeking to obtain discovery from the court against respondent E, the bank in relation to any accounts or communications that it had in relation to F .
- [52] The court agrees that in order to obtain the relief sought the applicants A,B,C and D must satisfy the court that the application is necessary in order to obtain the information.
- [53] The court is required to carefully examine all of the circumstances of the case and seek to determine whether the order sought is necessary and proportionate.
- [54] The court finds very helpful the pronouncements in **Bankers Trust Co v Shapira** at page 1282 Lord Denning said:

“This new jurisdiction must of course be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer’s account and the documents and correspondence relating to it. It should be done when there is a good ground for thinking

the money in the bank is the plaintiff's money as for instance, when the customer has got the money by fraud or other wrongdoing and paid it into his account at the bank."

[55] At page 1283, Waller LJ said "*Clearly, it is undesirable that an order such as this should be lightly made. But the answer in my judgment is that there is very strong evidence indeed of fraud on the part of the other defendants.*"

[56] In the present case, learned counsel Ms. Bernard for the bank, sought to identify matters of confidential nature and interests which militate against disclosure in the present circumstances. This is a matter which the court must bear in mind when considering whether the requirement of necessity and proportionality has been satisfied. The court must also have in mind the public interest in not involving innocent third parties, if this can be avoided. It must be shown that it is required to justify exercise of this intrusive jurisdiction. The necessity arising from the absence of any other practicable means of obtaining the essential information. But when determining what is practicable for these purposes the court, in my judgment, is entitled to have regard to all the circumstances prevailing in the particular case, including for example the size and resources of the applicant as an organization and the urgency of its need to obtain the information it requires and any public interest in it having its need satisfied.

[57] The court has perused the Confidentiality Act of the Laws of Anguilla and is not of the view that the bank can properly rely on the confidential relationship that it has with its customers in order to prevent the disclosure from being ordered. See **Bankers Trust v Shapira** [1980] WLR 1274; **Initial Services Ltd v Patteril** [1968] QB 396. In an appropriate case the court is clothed with the jurisdiction to make an order for the disclosure, the effect of which would lead to the identifying the wrongdoer. Also, in cases where the identity of the wrongdoer is already known, the court will lend its assistance by granting the order for discovery.

[58] The court finds very helpful the principle stated in **P v T** *ibid* in which Scott VC made an order for discovery to enable P to determine whether any action lay against the informant. At page 209e the Vice Chancellor concluded thus:

“For my part, I see no reason whatever why the Norwich Pharmacal principle should be regarded as inapplicable to assist a prospective plaintiff to obtain information and documents necessary for the bringing of an action of malicious falsehood in circumstances such as those in the present case. I am of the opinion that this is a case in which the justice does require the granting of the relief sought.”

[59] The court wishes to reiterate that while it has jurisdiction to make the orders sought it is a jurisdiction which falls to be exercised sparingly, it involves the court in balancing the rights of the applicants with the obligations of the respondent towards its customers and the rights of those subscribers. These obligations are obligations of confidentiality or privacy. These duties of confidentiality are owed by the respondent to its customers and the customer’s entitlement may arise under statute, by contract or at common law.

[60] The court digresses to state that in any event for the bank E to comply with any order sought by the applicants A,B,C and D in relation to defendant F and the eighteen named entities would entail considerable costs and intrusion. It is wholly disproportionate to the private interest that would be affected.

The court’s conclusion on the merits of the application

An Arguable Case

[61] The following represents the court’s conclusion on the merits of the application. The court is satisfied that the evidence establishes the requirement of an arguable case of wrongdoing on the part of the person whose identity the applicants have already stated. See ***J in Mitsui & Co Ltd v Nixen Petroleum UK Ltd*** [2005] EWHC 6.

The threshold requirement of involvement on the part of the Respondent

[62] The court is equally satisfied that the evidence establishes the required alleged innocent involvement of the respondent E in the wrong, according to the principles discussed above. On the

evidence presented, the court is prepared to accept that the respondent is an innocent third party and I am quite satisfied that the respondent has nonetheless become mixed up in the wrongdoing so as to facilitate the wrong. On the pleaded evidence the court is not of the view that the respondent is a mere witness, so as to prevent the Norwich Pharmacal jurisdiction being triggered.

Discretion: the issue of necessity and proportionally

- [63] The court must now move on to consider whether in all the circumstances it would be necessary and proportionate for the court to exercise its discretion in favour of the grant of the order.
- [64] Despite the forceful arguments of Mr. Wallbank, on behalf of the applicants, the court is not satisfied, that the disclosure which is sought in this case, has been established to be “*a necessary and proportionate response in all the circumstances.*” See Lord Woolf in **Ashworth** at 2049F.
- [65] While the court has jurisdiction to make the orders sought it is a jurisdiction which the court has to ensure that the justice of the case requires its grant.
- [66] In the present application it bears restating that due to the nature and extent of the orders that the applicants seek, the court finds it very disproportionate in the countervailing circumstances. The effect of the grant of such an order to the applicants would be disproportionate and a great inconvenience to the persons whose accounts would be intruded. Indeed, invasion would be caused to a wide category of persons whose accounts are likely to be open to scrutiny as a consequence. The court does not accept that it is a good argument to merely assert that it is unreasonable for the applicants to know what has happened to its money or to be able to identify for certain those individuals or entities who might hold accounts or have received accounts at some stage; as such the scope of the Order must be sufficiently wide in order to enable the applicants to avail themselves of their equity.
- [67] In the application at bar, the identity of the wrongdoers is known and there is a very obvious practicable route which could and should have been utilized in preference to the application for Norwich Pharmacal relief. See **Mitsei & Co Ltd v Nixen Petroleum Ltd** [2006] EWHC 626.

- [68] Of course, it is always open to the applicants if they are certain that the persons who are named in their Defence and Counterclaim committed breaches either to join those persons as defendants or summons them to appear as witnesses.

Foreign Claims or Potentially Foreign Claims

- [69] It is the law that the court has the jurisdiction to make a Norwich Pharmacal order in aid of foreign proceedings. See the judicial pronouncements in ***AL-Rushaid Petroleum Investment Company v TSJ Engineering Consulting Company Ltd.*** Claim No. BVIHCV (COM) 37 of 2010 are noteworthy.
- [70] Equally, noteworthy are the pronouncements in ***Ashworth Hospital*** *ibid* [2002] 1 WLR 2003 at para 30 in which Lord Woolf stated that:

“What is required is involvement or participation in the wrongdoing and that, if there is the necessary involvement it does not matter that the person has become innocently mixed up.

- [71] The applicants have placed many matters before the court, in relation to their allegations with respect to matters that may be potentially brought. Most of the evidence that they have placed before the court is speculative and vague. At its highest the evidence is not strong enough to enable the court to grant the sort of relief that is sought.

An Arguable Case

- [72] The first question the court has to answer is whether there is an arguable case in relation to the foreign proceedings or the proceedings contemplated. With the greatest of respect, in relation to the foreign proceedings in existence or likely to be brought, the court has carefully examined the evidence that is before the court and is not of the view that the quality of evidence meets the required threshold of the first condition of the Norwich Pharmacal Order.

- [73] To put the matter clearly, the pleaded allegations are speculative or tenuous. The applicants do not seem to have clearly in their own minds that there is the need to pursue any other litigation abroad. Further, in relation to the matter that is extant in the foreign court, the entire nature of that evidence in support of the application in relation thereto leaves much to be desired.
- [74] In relation to the alleged proposed action, the applicants have not presented the court with any cogent evidence to point to the involvement or participation of the bank E against whom the discovery order is sought.
- [75] It is the law that in order for the court to justify this intrusion, by way of a Norwich Pharmacal/Bankers Trust Order, there must be evidence of the third party's involvement. See ***The President of the State of Equatorial Guinea v Royal Bank of Scotland International***. [2006] UKPC 7.
- [76] Lord Slynn in ***Ashworth Security Hospital v MGN Ltd*** *ibid* at paragraph 30 has put it very succinctly when he said:

“what is required is involvement or participation in the wrongdoing and that if there is the necessary involvement, it does not matter that the person from whom the discovery is sought was innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish.”

- [77] In the absence of any cogent evidence upon which the court can conclude that the applicants have an arguable case, in relation to potential overseas proceedings or the overseas proceeding that is pending, the applicants are not entitled to the exercise of the court's discretion in their favour. To put the matter beyond doubt it bears stating that the statements in the affidavits in relation to any potential litigation do not demonstrate an arguable case that respondent E has been mixed up or become involved (innocently or otherwise) in any wrongdoing of F. The evidence in the court's view falls far short of this. It is clear that the applicants are merely seeking to see what, if any case,

they may have or could bring against F. They hope to use the court's exceptional jurisdiction in this regard.

[78] The quality of evidence in the application at bar is quite unlike that in the **Citco's** case. In the latter case, the judge clearly found evidence on which to conclude that there was an arguable case of wrongdoing.

[79] It has been said that using the jurisdiction to find information, for example, to plead a claim would be a "*fishing*" expedition, but if there are respectable grounds for thinking that there may be a claim or which will enable an applicant to ascertain whether an action could lie, this can no more be described as a fishing expedition then could many applications for pre-action disclosure. If it is possible to plead a case without the information then the Norwich Order is not available. See **Axa Equity and Law Life Assurance Society v National Westminster Bank**.

[80] The court accepts the principles enunciated in **Koo Golden East Mongolea v Bank of Nova Scotia**.

[81] In relation to potential foreign proceedings or pending foreign proceedings, the court has no doubt that the evidence that the applicants have placed before the court is not of the quality that is sufficient to enable the court to grant the disclosure. The evidence is very speculative and tenuous. This is not the quality of evidence on which the court can properly conclude that there is an apparent wrong carried out, or arguably carried out. The applicants seek to use the court's procedure in a "*fishing expedition*" in an effort to determine whether there is an apparent wrong carried out, at large.

[82] It cannot be disputed that most of the allegations that are made in the affidavits in support of the application do not speak definitively in relation to any possible legal action overseas that is contemplated. In the court's considered opinion, if there was ever a fishing expedition, this is one. The applicants have failed to provide the court with any cogent evidence on which it can be concluded that they have an arguable case that a wrong has been committed. The court is nevertheless cognizant of the fact that it is not necessary to prove that the applicant intends to

bring legal proceedings against the wrongdoer provided that there is some other legitimate purpose in seeking disclosure is identified.

[83] While the applicants have told the court that there is an existing matter abroad (the court purposely does not state where nor its nature) in the court's view the evidence presented to ground the application does not meet the required threshold for the disclosure of the information that is sought.

[84] In relation to the foreign claim or potential foreign claim and in an effort to persuade the court to grant the application, the applicants have placed before the court material some of which have no probative value or relevance to the matter that is engaging the court's attention.

[85] By way of emphasis, it bears repeating that in relation to the potential foreign litigation, there is no sufficiency of evidence on which the court can properly conclude that there is an arguable case of wrongdoing or that the bank E is in anyway involved or participated in any alleged wrongdoing. In relation to the extant matter in the foreign jurisdiction, to which the court's attention has been drawn, the court similarly is not of the view that the applicants have provided any cogent and sufficient evidence on which to ground the application.

[86] Is this fatal to the applicant's application? The answer is clearly yes, in the present case

Is the court's intervention necessary?

[87] Even if the court is wrong in concluding that in the present case failure to establish an arguable claim it is fatal, the court has reviewed the totality of circumstances and is of the considered opinion that the application for the Orders sought is unnecessary and exceedingly disproportionate.

[88] There is no doubt that the court has jurisdiction to grant the order sought pursuant to Part 11 and Part 17 CPR 2000, read together with the Eastern Caribbean Supreme Court Act. The Confidentiality Relationships Act, Revised Statutes of Anguilla, C85 does not in anyway preclude the court from making the order sought, in an appropriate case. Further, the court is not of the view

that the Confidentiality Relationships Act or the Banking Act of the Laws of Anguilla operates to prevent the court from making a Norwich Pharmacal/Shapiro Order, in an appropriate case.

- [89] The court is not of the view that the justice of this case requires that it grants the Order sought or any order whatsoever. This application must be contrasted with the circumstances in **P v T** *ibid*. If as argued by the applicants that the defendant and its affiliates have maintained accounts with the Respondent E, once the claim is properly pleaded the applicants would be able to obtain the relevant information which they seek, even in the foreign case, if any.
- [90] In summary therefore, the applicants have failed to persuade the court that there is an arguable wrong committed in relation to the potential or pending overseas proceedings.
- [91] Equally, the applicants have failed to satisfy the court that the bank E has innocently or otherwise become involved in any wrongdoing.
- [92] The threshold test, referred to earlier, that is required to be satisfied in order to trigger the court's jurisdiction has not been met in relation to this limb of the applications at bar. For the sake of completeness the court reiterates that there is an insufficiency of cogent evidence in order to trigger the court's jurisdiction. Even if the court is wrong in so concluding, this is an equitable remedy and the court having reviewed the totality of circumstances is not of the view that it should exercise its discretion in favour of the applicants.
- [93] It is therefore unnecessary for the court to go on to consider whether the other conditions necessary for the grant of the Norwich Pharmacal Order are satisfied, in relation to the foreign proceedings or potential foreign proceedings.
- [94] In passing, the court states that the application is indeed unduly wide, the applicants wish to have an extremely wide amount of information in relation to a similarly wide list of person.
- [95] In view of the totality of circumstances, the court has no doubt that the discovery order sought in the application in relation to the foreign proceedings or any potential proceedings is neither

necessary nor proportionate. Indeed, to require the court to intrude into the confidential information of so many of the bank's customers, on the basis of the evidence adduced is neither necessary or proportionate. The court states that in the case of disclosure orders, they could have detrimental impact not only on the sources in question whose identity may be revealed but also on innocent third parties who may not be implicated at all. There must be the maintenance of a balance of the public interest and the necessity to obtain the information. In relation to the possible foreign action which the applicants allude to as likely to be brought, the court has no doubt that the quality of evidence presented to the court is not such that would suffice to persuade a court to make the order sought. Most of the matters that have been placed before the court in support of this aspect of the application are highly speculative. It is tenuous at best.

[96] Importantly, the probative value of the evidence deposed to in relation to matters that are likely to be brought in the foreign court leaves much to be desired. It is very clear that the applicants are seeking to cast their net very wide in the hope that they may come up some information which they may be able to use to launch yet another proceedings. At the very highest, they are seeking to obtain information to possibly launch another claim, the parameters of which they are unsure. There is no evidence on which the court can say that even a wrong has been arguably committed. See *Mitsui & Co Ltd v Nixen* *ibid*. The court reminds itself that the order cannot be one for wide ranging discovery or the gathering of evidence and is strictly confined to necessary information. The court must determine what is proportionate in all of the circumstances.

[97] The court finds that the interest of the applicants in obtaining the information sought is outweighed by the public interest and the private interest of the named persons having the protection of their confidential information maintained.

Conclusion

[98] In view of the totality of circumstances, the court is of the view that the applicants A,B,C and D have not satisfied the court that the present application is an appropriate one in which the court should exercise its discretion and grant the discovery orders sought.

[99] Accordingly, A,B,C and D's application against respondent E, for disclosure is refused.

[100] Costs are awarded in the sum of US \$10,000.00.

[101] The court is of the view that while the application, pleadings, the written submissions and other relevant matter should remain under seal, as requested by the applicants, justice must be open. A judgment is a public document and the parties are entitled to receive the full reasons which led to the court's conclusions. It is against this background that the court has crafted its judgment so as not to reveal the identity of any of the parties while hoping the principles and reasoning that emerge do not suffer from the need to protect the privacy of the individuals/entities, even in writing its reasons for decision.

[102] Open Justice must be done between the parties.

[103] The court gratefully acknowledges the assistance of learned counsel.

Louise Esther Blenman

Resident High Court Judge

Anguilla