

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2011/0001

BETWEEN:

A, B, C & D

Appellants

and

E

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Don Mitchell
The Hon. Mr. Paul Webster, QC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Gerhard Walbank for the Appellants
Ms. Ayodeji Bernard for the Respondent

2012: November 26
2013: April 22.

Civil appeal – Discovery order – Norwich Pharmacal and Bankers Trust jurisdictions – Whether separate – Criteria for granting Bankers Trust relief – Criteria for granting Norwich Pharmacal relief – Whether relief sought under Bankers Trust jurisdiction should be granted by Court of Appeal – Whether learned judge correctly applied principles under Norwich Pharmacal jurisdiction – Challenge to findings of fact made by learned judge

The appellants had applied to the High Court for discovery orders against the respondent, a bank operating in Anguilla. The appellants sought information relating to accounts controlled by certain entities from which unauthorised secret commissions had been paid. These entities were part of a group of companies with which the appellants had invested money and the appellants believed that some of their funds had been used to pay the secret commissions. The learned judge dismissed the appellants' application for the discovery orders. The appellants appealed this ruling, claiming that the learned judge had erred in failing to grant them relief under the Bankers Trust jurisdiction, which they contended was separate from the Norwich Pharmacal jurisdiction. The appellants also

argued that the learned judge had failed to properly apply the principles under the Norwich Pharmacal jurisdiction and had erred in making certain findings of fact.

Held: allowing the appeal and making no order as to costs, that:

1. Although there may, on occasion, be a risk of some conflation of the Norwich Pharmacal and Bankers Trust jurisdictions, this does not change the fact that they are two separate jurisdictions. The learned judge fell into error when she conflated the two jurisdictions and applied the criteria for relief under the Norwich Pharmacal jurisdiction to the instant case, rather than carry out a separate assessment of the criteria for granting relief under the Bankers Trust jurisdiction.

Murphy v Murphy [1999] 1 WLR 282 applied; **Bankers Trust Co. v Shapira and Others** [1980] 1 WLR 1274 applied.

2. The Bank's confidentiality obligations are outweighed by the findings of wrongdoing by the learned judge and the judge in Texas, as well as the possibility that the disclosed information may assist the appellants in finding out what has happened to their investments. The appellants having met the criteria for the grant of Bankers Trust relief, the Court can exercise its discretion in favour of granting the order.
3. In exercising her discretion under the Norwich Pharmacal jurisdiction, the learned judge did not give sufficient weight to the appellants' evidence and did not apply the relevant principles correctly.

REASONS FOR DECISION

- [1] **WEBSTER JA [AG.]:** On 24th September 2010, the appellants applied to the High Court for discovery orders against the respondent, a bank operating in Anguilla ("the Bank"). The application was supported by a comprehensive affidavit by Ms. Jacqueline Lynch ("Ms. Lynch"), a financial investigator retained by Martin Kenney & Co., a firm of solicitors in the British Virgin Islands specialising in fraud investigations. The application was made without notice to the Bank and the file in the High Court proceedings was sealed because of the confidential information contained in it. The sealing order was continued in the Court of Appeal and I will continue to refer to the parties as "the appellants" and "the Bank" without mentioning their names. The trial judge ordered that the application be served on the Bank and gave the Bank leave to file evidence in reply and written

submissions. The application then proceeded on an *inter partes* basis with written submissions from both sides.

[2] On 30th December 2010, the trial judge dismissed the application and provided written reasons for her decision on 26th January 2011 (“the Judgment”). The appellants appealed against the order dismissing the application. There are several grounds of appeal and the ones that are still relevant are summarised as follows:

- (i) the judge’s failure to consider the application under the separate jurisdiction known as Bankers Trust jurisdiction;
- (ii) the judge’s failure to grant relief under the Bankers Trust jurisdiction;
- (iii) the judge’s application of the principles under the Norwich Pharmacal jurisdiction;
- (iv) the judge’s finding that the application was not necessary and proportionate because there was an alternative method of getting the required information and documents;
- (v) the judge’s finding that the identity of the alleged wrongdoers was known to the appellants;
- (vi) the judge’s findings that there was no arguable case of wrongdoing in respect of the overseas proceedings, and that the application amounted to a “fishing expedition”;
- (vii) the judge’s finding that the costs of providing the information and the intrusion into the Bank’s business were disproportionate.

[3] The grounds of appeal will be considered in this judgment under the following general headings:

- (a) Whether the so-called “Norwich Pharmacal/Bankers Trust” jurisdiction is one or two jurisdictions;

(b) The application of the facts to the criteria for receiving relief under the Bankers Trust jurisdiction;

(c) The application of the facts to the criteria for receiving relief under the Norwich Pharmacal jurisdiction.

[4] The appeal was heard on 26th November 2012. We allowed the appeal with no order as to costs, made the discovery orders sought, and promised to put our reasons in writing. We now do so.

Background

[5] The four appellants are companies formed under the laws of Saint Christopher and Nevis and are owned by members of an American family. In 2005, as a part of the family's estate planning, they invested approximately \$34 million in cash and securities in various investments offered by a Mr. Duane Critchfield of Tampa, Florida ("Mr. Critchfield"), and his associates, through their related companies, Fidelity Insurance Company Limited and First Fidelity Trust Limited (together "Fidelity"), Alliance LLC and Alliance Inc. (together "Alliance"), and several other companies and trusts performing a variety of functions in the investment scheme (all together "the Fidelity Group").

[6] The \$34 million was invested in two types of investments. The first consisted of annuities and variable life insurance policies worth \$23.7 million insuring the life of one of the appellants in an unrelated insurance company called Lighthouse Capital Insurance Company ("Lighthouse"). In 2005, the appellants were advised to and did cause Lighthouse to transfer the annuities and policies to five irrevocable trusts set up under the laws of Saint Christopher and Nevis of which First Fidelity Trust Limited was the trustee. Secondly, \$10.6 million was invested by Alliance in oil and gas royalties in an entity called Noble Oil and Gas Co Royalties ("the Noble Royalties").

[7] The appellants were advised in all of these transactions by Mr. Critchfield of Fidelity, and the partners of the now defunct Chicago law firm, Handler, Thayer & Duggan ("HTD"). The appellants were unaware that at all material times HTD had a commercial relationship with Fidelity and were paid commissions for business that they introduced to Fidelity. The appellants' case is that entities in the Fidelity Group had accounts at the Bank. Ms. Lynch's affidavit lists 11 such entities at sub-paragraph 94 (a). Further, that starting in 2005 secret commissions were paid from the accounts controlled by these entities to various third parties which could include the 17 persons and entities listed in sub-paragraph 94 (d) of the affidavit, and other persons or entities unknown to them. The appellants did not authorise the payment of these commissions and were unaware of them until November 2007 when HTD refused to assist them in taking steps against Fidelity. They now seek disclosure of information at the Bank relating to the accounts of the 11 entities listed in sub-paragraph 94 (a) of the affidavit to determine if payments were made from these accounts to the 17 persons listed in sub-paragraph 94 (d), or to other unknown persons, so that they can include the payers and payees in proceedings to recover the secret commissions.

[8] The total investment of \$34 million remains unaccounted for and has resulted in lawsuits in several jurisdictions:

Texas

(a) The \$10.6 million that was invested in the Noble Royalties was managed by Compass Royalty Management LLC ("Compass") which is an independent management company not associated with the Fidelity Group. The investment produced a regular stream of income and through a series of complicated transactions Alliance received profits that were passed on to its investors (including the appellants). In April 2009 Compass filed interpleader proceedings in the County Court of Dallas, Texas seeking a determination of the ownership of the royalties that it managed which included the \$10.6 million invested by the appellants ("the Texas Interpleader"). The appellants were

served with the proceedings and have filed cross-claims against Alliance. Two other groups of investors have also appeared and filed cross-claims. In August 2009 the Texas judge made an interlocutory order freezing the disputed royalties held by Compass and the income therefrom.

The Main Anguillian Claim

- (b) On 4th December 2009, Fidelity Insurance Company Limited commenced Claim No. AXAHCV 2009/0133 in the High Court of Anguilla ("the Main Anguillian Claim") against the appellants claiming that they wrongfully asserted claims to the \$10.6 million which is the subject of the Texas Interpleader resulting in the filing of the Interpleader by Compass and the freezing order by the Texas judge. Fidelity Insurance Company Limited claims that the freezing order has caused it to suffer loss and damage. The appellants counterclaimed seeking, inter alia, the return of their investments or the traceable proceeds thereof including profits and secret commissions. The claim has not proceeded to trial and there is no indication as to when this will happen.

St. Thomas, USVI

- (c) There are two sets of proceedings in St. Thomas, USVI brought by the appellants:
- (i) a claim against HTD and its former partners, Thomas Handler, Steven Thayer and James Duggan, alleging mal-practice and breach of fiduciary duties and seeking relief in respect of the secret commissions and the investment in the Noble Royalties; and
 - (ii) a claim against the partners of HTD, Mr. Critchfield and others alleging racketeering offences (RICO), conspiracy, conversion, breach of fiduciary duties and fraudulent conveying of the appellants' assets.

Nevis

- (d) First Fidelity Trust Limited, the trustee of the trusts formed in Nevis by the appellants, brought a claim against the appellants which is similar to the Main Anguillian Claim. The appellants have applied to stay the claim on the ground that the issues in the claim are similar to the issues in the Main Anguillian Claim.

Utah, USA

- (e) The appellants intend to file an application in Utah to compel disclosure of banking records in the possession of Zions Bank, a bank operating in that state.

Middle District Court, Tampa, Florida

- (f) The appellants have started proceedings in Tampa, Florida to compel an individual named Kasey Klem to deliver up certain documents. There is no evidence to suggest that this claim is directly relevant to the case at bar.

The Current Application

- [9] In these proceedings the appellants applied for disclosure from the Bank to assist them in pursuing their defence and counterclaim in the Main Anguillian Claim, and to pursue pending and contemplated proceedings overseas. In the Main Anguillian Claim they are seeking:

- (i) the recovery of the secret commission payments of up to \$1,109,995.20 believed to have been paid to one or more partners of HTD or entities controlled by the partners; and
- (ii) the rescission of the transfers of the annuity contracts to First Fidelity Trust Limited and the return of all assets and monies invested in Fidelity or the traceable proceeds thereof for which no proper account has been given.

It is unnecessary for the purposes of this judgment to detail the reliefs sought in the overseas proceedings beyond the details set out in paragraph 8 above.

THE NORWICH PHARMACAL / BANKERS TRUST JURISDICTION

- [10] The notice of application filed on 24th September 2010 seeks disclosure of information and documents ‘*by way of relief known as a Norwich Pharmacal / Bankers Trust Order*’. This suggests that there is only one source of relief. However, the appellants separated the two forms of relief in their written and oral submissions in the High Court, and it is clear that they were seeking relief under the Court’s Norwich Pharmacal jurisdiction or under its Bankers Trust jurisdiction, or both. The Bank’s position on this issue is that the Bankers Trust jurisdiction falls under or is an extension of the Norwich Pharmacal jurisdiction, and that there is no separate Bankers Trust jurisdiction. The Bank’s position is not supported by the cases and I will briefly examine the development of the law relating to the two jurisdictions to illustrate this.

Norwich Pharmacal Relief

- [11] 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. The modern development of the jurisdiction started in the eponymous case of **Norwich Pharmacal Co. and Others v Customs and Excise Commissioners**¹. A brief summary of the facts is that the claimants owned patents that they believed were being infringed by certain importers whose identity was not known to the claimant. However, the identity of the offending importers was known to the Customs and Excise Commissioners by virtue of their dealings with the importers in the ordinary course of their duties. The claimant applied for an order to compel the commissioners to disclose the identity of the importers notwithstanding that this information was confidential. The House of Lords granted the order. Lord Reid summed up the relevant principle as follows:

“... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no

¹ [1974] AC 133.

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 that it matters whether he became so mixed 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 righting the wrong if he unwittingly facilitated its perpetration.”²

- [12] The House of Lords granted the disclosure in order to assist the claimants to determine the identity of the wrongdoers so that they could bring proceedings against them. Subsequent cases have widened the scope of disclosure that can be ordered under the Norwich Pharmacal jurisdiction. The developments were summed up by Mr. Justice Lightman in **Mitsui & Co, Limited v Nexen Petroleum UK Limited**³ as follows:

“In subsequent cases, the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing: *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309; *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616, [2003] FSR 876 (*Carlton Films*); and is not limited to cases where the identity of the wrongdoer is unknown. Relief can be ordered where the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: see *AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc* [1998] CLC, 1177 (*Axa Equity*); *Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2002] 1 Lloyd’s Rep 417; see also *Carlton Films*. Further the third party from whom information is sought need not be an innocent third party: he may be a wrongdoer himself: see *CHC Software Care Ltd v Hopkins and Wood* [1993] FSR 241 and Hollander, *Documentary Evidence* (8th edn, p 78, footnote 11.”⁴

The jurisdiction can also be used in tracing claims and a claimant with a tracing claim can usually opt to apply for relief under either or both jurisdictions, depending on the facts of his case. However, a claimant with a non-tracing claim cannot apply for discovery under the Bankers Trust jurisdiction.

² p. 175B.

³ [2005] EWHC 625 (Ch).

⁴ At para. 19.

Bankers Trust Relief

- [13] The Bankers Trust jurisdiction was developed to allow litigants who claim that their assets have been misappropriated to obtain information from third parties about the location of the assets so that they can pursue a tracing claim against the wrongdoers to recover the assets. The relief takes its name from the case of **Bankers Trust Co. v Shapira and Others**⁵. Two individuals presented forged cheques drawn on a Saudi Arabian bank, each for half a million dollars, to the claimant bank in New York. The New York bank honoured the cheques and paid over the \$1 million to the two men. On instructions from the fraudsters the New York bank transferred over \$700,000.00 of the money to Discount Bank (Overseas) Ltd., a bank in London. Upon notification of the forgeries, the New York bank reimbursed the Saudi Arabian bank and brought proceedings in London against the fraudsters and the Discount Bank to trace and recover the \$1 million. The New York bank's application for disclosure from the Discount Bank of all information, correspondence and documents relating to the fraudsters' accounts at the Discount Bank was refused by Mustill J, largely on the ground that the fraudsters had not been served with the proceedings. The Court of Appeal allowed the New York bank's appeal and made the disclosure orders. In coming to their decision the Court of Appeal noted that a court should not lightly order the disclosure of confidential information at an interlocutory stage, but should do so where the claimant seeks to trace funds which belong to him, there is strong evidence of fraud or other wrongdoing, and delay could result in the dissipation of the funds before the matter comes to trial.
- [14] The leading judgment was delivered by the Master of the Rolls, Lord Denning, who traced the history of the court's ability to grant disclosure orders to facilitate tracing claims to three unreported decisions, namely:

⁵ [1980] 1 WLR 1274.

- (a) **London and Countries Securities Ltd. (in Liquidation) v Caplan**,⁶ a tracing claim for £5,000,000 in which Templeman J ordered the bank to disclose information showing where the money had gone.
- (b) **Mediterranea Raffineria Siciliana Petroli S.p.a. v Mabanft G.m.b.H.**,⁷ a decision of the Court of Appeal involving a payment made to third parties by mistake. There was no allegation of fraud in the case. A discovery order was made to ascertain where the money had gone.
- (c) Finally, in **A v C**⁸ where Robert Goff J made a discovery order to enable the plaintiffs to trace what had happened to money that had been fraudulently taken from them.

[15] Having analysed these cases Lord Denning noted that in the **A v C** case Robert Goff J had observed that:

“There is no doubt that this jurisdiction is in a process of development; and that it is still in the course of throwing up problems which have yet to be solved.”⁹

Lord Denning described the new jurisdiction further as follows:

“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 only 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. The plaintiff who has been defrauded has a right in equity to follow the money. He is entitled, in Lord Atkin’s words, to lift the latch of the banker’s door: see *Banque Belge pur l’Etranger v Hambrouck* [1921] 1 K.B. 321, 355. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd. v Putterill* [1968] 1 Q.B. 396, 405. If the plaintiff’s equity is to be of any avail, he must be given access to the bank’s books and documents – for that is the only way of tracing the money or of

⁶ 26th May 1978, unreported.

⁷ 1st December 1978, unreported – Court of Appeal (Civil Division) Transcript No. 816 of 1978 C.A.

⁸ 18th March 1980, unreported – at the time of writing of *Bankers Trust Co. v Shapira and Others* [1980] 1 WLR 1274, but later reported: [1981] QB 956.

⁹ *Bankers Trust Co. v Shapira and Others* [1980] 1 WLR 1274 at 1281C

knowing what has happened to it: see *Mediterranea Raffineria Siciliana Petroli S.p.a. v Mabanft G.m.b.H. (unreported)*. So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery: and the documents, once seen, must be used solely for the purpose of following and tracing the money: and not for any other purpose. With these safeguards, I think the new jurisdiction – already exercised in the three unreported cases – should be affirmed by this court.

“Applying this principle, I think the court should go to the aid of the Bankers Trust Co. It should help them follow the money which is clearly theirs: to follow it to the hands in which it is: and to find out what has become of it since it was put into the Discount Bank (Overseas) Ltd.”¹⁰

The new jurisdiction that Lord Denning MR was referring to is the power to order a discovery defendant in an equitable tracing claim with information about missing assets claimed by the applicant to disclose that information to enable the applicant to trace and recover the assets. This is the essence of the Bankers Trust jurisdiction.

Distinction between the two jurisdictions

[16] The distinction between the two jurisdictions is illustrated by Mr. Justice Neuberger in **Murphy v Murphy**¹¹

“In agreement with both counsel who appeared on this appeal, it seems to me that these cases demonstrate two different types of circumstance in which the court can order a defendant, who is not otherwise an appropriate party to proceedings, to identify the name and address of a third party. The first type of case is where the defendant has, albeit quite possibly wholly innocently, become “mixed up in” the wrong-doing of the proposed defendant and the plaintiff has a claim in respect of that wrong-doing. In such a case, the House of Lords, in the *Norwich Pharmacal* decision [1974] A.C. 133, has held that the court can grant the plaintiff the discovery he seeks, if it is appropriate to do so. I shall call this “the discovery jurisdiction.” Secondly, there is what I shall call “the equitable jurisdiction,” considered and applied in the first and last passages I have quoted from the judgment of Robert Goff J. in *A. v C. (Note)* [1981] Q.B. 956, by Templeman L.J. in the *Mediterranea* decision, 1 December 1978

¹⁰ Bankers Trust Co. v Shapira and Others [1980] 1 WLR 1274 at 1282B.

¹¹ [1999] 1 WLR 282 at 289-290.

and also referred to in *Bankers Trust Co. v Shapira* [1980] 1 WLR 1274, 1280F. Where, as in those three cases, the defendant against whom an order is sought is, albeit wholly innocently, “mixed up in” the wrong-doing of other defendants, there is a risk of some conflation of the two types of jurisdiction (as could be said to appear from the first passage I have quoted from the judgment of Lord Denning M.R. in the *Shapira* decision). However, this does not seem to me to alter the fact that there are, in reality, two separate jurisdictions, albeit that in many cases they will overlap.”

I agree with Neuberger J’s separation of the two jurisdictions and his observation that where an innocent party becomes mixed up in the wrongdoing of other persons there is a risk of conflating the two jurisdictions, but this does not alter the fact that they are two separate jurisdictions.

- [17] The tendency to conflate the two jurisdictions is understandable, and sometimes convenient given the degree of overlap between them. This was done by Lord Denning MR in **Bankers Trust** as noted by Neuberger J in the passage cited above from **Murphy v Murphy**. Having traced the development of the disclosure jurisdiction in tracing claims, Lord Denning MR noted that:

“The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] A.C. 133”¹²

Norwich Pharmacal is a case involving a non-tracing claim. Nonetheless, the Master of the Rolls referred to it in a case dealing with a tracing claim to illustrate the development of the court’s powers in disclosure applications. But, as Neuberger J said in **Murphy v Murphy**, this does not alter the fact that they are two separate jurisdictions.

- [18] I agree with Mr. Wallbank, counsel for the appellants, that the judge in this case conflated the two jurisdictions and applied the criteria for relief under the Norwich Pharmacal jurisdiction and did not deal with the Bankers Trust jurisdiction separately. This puts this court in as good a position as the trial judge to carry out

¹² *Bankers Trust Co. v Shapira and Others* [1980] 1 WLR 1274 at 1281F.

its own assessment of the application under the Bankers Trust jurisdiction which I will now do, applying the relevant principles to the facts.

BANKERS TRUST CRITERIA

[19] An applicant for Bankers Trust relief must satisfy the court that:

- (a) there is compelling evidence that the applicant was defrauded or otherwise wrongfully deprived of his money;
- (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)**¹³); 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.

Evidence of Fraud or Wrongdoing

[20] The evidence in this case establishes that the appellants invested approximately \$34 million in value into the Fidelity Group. Their investment has not been returned to them and there has been no proper accounting for the investments. Further, unauthorised commissions of up to of \$1,109,995.20 were paid out of what the appellants believe is their money without their knowledge or consent, and

¹³ [1992] 2 All ER 911 at 918.

there has been no accounting for these payments. This evidence, and in particular the payment of the unauthorised commissions, is sufficient to raise an arguable case that fraud or other wrongdoing has been committed. The trial judge made two findings of wrongdoing at paragraphs 32 and 61 of the Judgment. The findings of wrongdoing by the trial judge are buttressed by the findings of the court in Texas in the Interpleader Claim. The judge, Mr. Justice Greenberg, made a number of findings of fact, albeit at an interlocutory stage, including the following:

“2.1 Critchfield [the president of Fidelity] was one of the primary tortfeasors in this action and committed multiple frauds upon the Boothes in Texas and upon other investors, including [the appellants¹⁴].”

- [21] I have no difficulty adopting the trial judge’s findings of wrongdoing by the members of the Fidelity Group.

Good reason to believe money held by the Bank belonged to the appellants

- [22] The affidavit of Jacqueline Lynch contains evidence, supported by documents, that Fidelity and related entities made numerous transfers from accounts at the Bank to various persons and entities. The appellants believe some of these payments were from their funds and were used to pay the secret commissions. This, combined with the findings of wrongdoing by the trial judge, is sufficient to satisfy the second element of the Bankers Trust test.

Delay and dissipation

- [23] Delay in this context can be of two kinds: delay in making the application for disclosure or delay which results in the assets being gone from the discovery defendant and therefore becoming untraceable.
- [24] In relation to the first type of delay this case involves complicated allegations of fraud and other wrongdoing committed by multiple parties, and litigation in five overseas jurisdictions. There could have been several reasons for the time that it

¹⁴ Appellants’ names intentionally omitted.

took to make the application including the time when the alleged fraud or wrongdoing was discovered by the appellants, and the time taken to investigate the matter, gather the evidence and instruct lawyers. There has been no serious criticism levelled against the appellants regarding the time that they took to file the application and I find that there was no unreasonable delay in making the application.

- [25] The second kind of delay arises where the wrongdoers have had sufficient time to dissipate the assets and any discovery order made will be futile in the tracing process. It is this aspect of the delay that the Bank is relying on. Where the facts clearly establish this type of delay the applicant will run foul of the principle stated by Hoffmann J in **Arab Monetary Fund v Hashim (No. 5)**¹⁵ that the information sought should lead to the location and preservation of the assets. However, in cases where the wrongdoers have parted with the assets but the information that the discovery defendant possesses about the assets may assist the claimant in tracing and recovering them, wherever they may be and in whatever form, the court should make the order. This is illustrated by the **Bankers Trust** case where there was a delay of eight months between the fraud and the issuing of the claim. In dealing with the delay Waller LJ opined:

“... in my opinion, where you have a fraud of this nature, although it may be late and although much or perhaps all of the money may be now gone, the sooner that steps are taken to try and trace where it is the better. If steps are going to be taken, it is important that they should be taken at the earliest possible moment.”¹⁶

At this stage it cannot be said with any certainty that the information that the Bank possesses will not assist the appellants in tracing the missing funds, wherever they are and whatever form they have been converted to. In the absence of clear evidence that the tracing exercise would be futile, the appellants should be allowed to proceed notwithstanding the passage of time.

¹⁵ See para. 19 above.

¹⁶ p. 1283C.

Real prospects of locating assets

- [26] For the reasons stated in the previous paragraph I am satisfied that the information sought may lead to the location and preservation of the missing monies and investments.

Use of documents and undertakings

- [27] The appellants have given the necessary undertakings in damages and have agreed to pay the expenses of the Bank for providing the information. In a case of this magnitude where vast sums of money are at stake the expense of providing the information and documents should not deter the court from ordering the disclosure, provided the other criteria are met.
- [28] The Order that we made on 26th November 2012 contains the required restrictions on the use of the documents and information by the appellants. Nothing further needs to be said about this issue.
- [29] I agree with counsel for the appellants that the judge did not carry out a separate assessment of the criteria for granting Bankers Trust relief. Having now done so I am satisfied that the appellants have met all the criteria and it now remains to be decided whether this Court should exercise its equitable jurisdiction to grant the relief sought under the Bankers Trust jurisdiction. At this stage the court is required to weigh the advantage to the appellants in granting the order against the detriment to the Bank of the costs of complying with the order and the invasion of its privacy obligations to its customers, and exercise its discretion accordingly.¹⁷ In this case the findings of wrongdoing by the trial judge and the judge in Texas, and the possibility that the disclosed information may assist the appellants in finding out what has happened to their investments,¹⁸ outweigh the Bank's confidentiality obligations and are sufficient for the court to exercise its discretion

¹⁷ per Hoffmann J in *Arab Monetary Fund v Hashim* (No. 5) [1992] 2 All ER 911 at 919(h-i).

¹⁸ See paras. 25 and 26 above.

in favour of granting the order. The expenses of the Bank are covered by the appellants' undertakings.

- [30] That is sufficient to dispose of appeal. But in the event that the trial judge was correct in dealing with the application under the conflated Norwich Pharmacal / Bankers Trust jurisdiction I will also consider the application under the Norwich Pharmacal jurisdiction.

NORWICH PHARMACAL CRITERIA

- [31] In order to succeed on an application for discovery under the Norwich Pharmacal jurisdiction the applicant must establish an arguable case that:

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

- [32] In dealing with the application of the Norwich Pharmacal principles to the facts of the case the judge divided her decision into two parts. The first deals with the request for disclosure in relation to the Main Anguillian Claim and the second relates to the extant and proposed foreign proceedings. In reviewing the trial judge's discretion in refusing the application I am mindful of the guidance given by Chief Justice Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Ltd and Others**¹⁹ regarding the principles that the Court of Appeal should follow in reviewing the exercise of a discretion by a trial judge. The Chief Justice said:

"An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied (1) that in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or degree

¹⁹ (1996) 52 WIR 188.

of error, in principle the judge's decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly or blatantly wrong"²⁰

Main Anguillian Claim

[33] The judge found that the appellants had established an arguable case that a wrong had been committed by the Fidelity Group. This suggests that the judge was satisfied that there was an arguable case that unauthorised commissions had been paid out of the appellants funds. It could also mean that she was satisfied that there was other wrongdoing in relation to the transfers and other dealings with the annuities and the \$10.6 million invested in the Noble Royalties.

[34] The judge further found that the Bank had become mixed up in the wrongdoing so as to facilitate the commission of the wrongs, but went on to refuse the disclosure order on the ground that it was not necessary or proportionate because:

(a) the appellants knew the identity of the wrongdoers and of the persons to whom the secret commissions were paid;

(b) additional information was not needed to frame their pleadings or ascertain whether their defence and counterclaim had a reasonable prospect of success; and

(c) there is an alternative method of getting the required information.

[35] If it is correct that the appellants knew the identity of the payers and the recipients of the commissions and nothing further was needed to frame a claim against them, the Norwich Pharmacal jurisdiction would not be available – it cannot be used to obtain additional information to bolster an apparently complete claim. In the words of Madam Justice Hariprashad-Charles in **Al-Rushaid Petroleum Investment Company and another v TSJ Engineering Consulting Company Limited**.²¹

²⁰ p. 188.

²¹ Territory of the Virgin Islands Claim No. BVIHCV(COM) 37 of 2010 at para. 17.

“Because the jurisdiction is available to ensure that there is justice to the wronged person/entity, it can, in appropriate circumstances, be extended to see that justice is done, it being an equitable remedy. But 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 not available: **Axa Equity and Law Life Assurance Society v National Westminster Bank**.¹⁶ [[1998] P.N.L.R. 433].”

[36] The evidence of Ms. Lynch shows that members of the Fidelity Group had accounts at the Bank and that commissions could have been paid out of these accounts.²² The appellants do not have a complete picture of the identities of the persons who paid and received the commissions. They believe that the information that the Bank holds may help them to identify those persons and entities, and otherwise assist them in their efforts to recover their investments. The judge appears to have disregarded this part of the evidence or did not attach sufficient weight to it and found that the appellants knew the identity of the wrongdoers. The appellants' case is that they do not know the identities of all the persons who paid and received commissions, and they may be in a better position to marshal their pleadings and evidence in the Main Anguillian Claim when they receive the information and documents from the Bank. In a case where the judge has found that there is an arguable case of wrongdoing and the identity of some of the alleged wrongdoers is unknown justice requires that the appellants have access to the information that could help them to identify additional persons who have paid and received secret commissions, or indeed to eliminate any of the persons listed as recipients of the secret commissions.

[37] The judge also found that the suspected wrongdoers listed in the pleadings in the Main Anguillian Claim could be joined as parties, or summoned as witnesses to get the information. It is apparent from the evidence in support of the application that all of the persons listed and most of the companies are not resident in Anguilla and it would therefore be necessary for the appellants to apply for and get

²² See para. 7 above.

permission to serve these persons and entities outside the jurisdiction. In their application to the court the appellants would have to show that these persons are necessary and proper parties to the Main Action. To do this the appellants will need the information held by the Bank. Even if they get permission to serve these persons there is still the difficulty of actually serving them, probably in several different states or countries, and once served they will become aware of the request for disclosure. This would not be practical in a case where the information is urgently needed and alerting the proposed additional parties will provide further opportunities for them to dissipate the missing funds.

[38] In **The President of the State of Equatorial Guinea and Another v The Royal Bank of Scotland Limited (a company incorporated in Jersey) and Others**²³

Lord Bingham of Cornhill observed that if there is a straightforward and available means of getting the information the confidential relationship should not be overridden by ordering Norwich Pharmacal relief, but:

“If, on the other hand, they have no straightforward or available, or any, means of finding out, *Norwich Pharmacal* relief is in principle available if the other conditions of obtaining relief are met”²⁴

The appellants' case is that the information that the Bank holds is essential to finding out who paid and received the secret commissions, and the court should order the Bank to assist the appellants by turning over the information and documents. This court was faced with a similar situation in **JSC BTA Bank v Fidelity Corporate Services Limited et al**²⁵ where the applicant sought information relating to bank accounts opened and operated by several BVI companies at a bank in Latvia. The respondents to the application were the registered agents in the BVI of the companies. The registered agents objected to the application and the judge of the Commercial Court upheld their objection. The applicant appealed and this Court allowed the appeal and ordered the disclosure. Mitchell JA [Ag.] (with whom the other two justices of appeal agreed), found that in

²³ [2006] UKPC 7.

²⁴ para. 16 of the judgment.

²⁵ Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2010/0035 (delivered 21st February 2011, unreported).

all probability the information sought by the applicant would be in the possession of the BVI companies and saw no good reason for first sending the applicant to the bank in Latvia to get the information.

- [39] In the case at bar the evidence indicates that the information and documents that the appellants' need are in the possession of the Bank in Anguilla, and the procedures for getting the same from the persons listed in paragraph 94 of Ms. Lynch's affidavit are cumbersome and fraught with difficulty and uncertainty for the reasons set out in paragraphs 37 and 38 above. In the circumstances this court will not allow the availability of an alternative but inconvenient method of getting the information to deprive the appellants of the relief that may assist them in pursuing the Main Anguillian Claim.

Foreign Proceedings

- [40] The judge's primary reason for not allowing Norwich Pharmacal relief in respect of the foreign proceedings is that she found that the evidence did not establish an arguable case of wrongdoing. It is difficult to reconcile this finding with the evidence and her previous findings that there was arguable wrongdoing in relation to the Main Anguillian Claim.
- [41] There is no gainsaying the fact that all the disputes between the appellants and the Fidelity Group arise out of the same set of transactions – the investment of \$34 million in money and value in Fidelity by the appellants. There has been no proper accounting for the investments and the appellants are seeking, both locally and abroad, the rescission of the annuity contracts, a proper accounting for their investments, repayment of the secret commissions and consequential relief. The finding of arguable wrongdoing by the trial judge in relation to the Main Anguillian Claim, which involves the annuity contracts as well as the repayment of the secret commissions, must inevitably carry over to the wrongdoers' activities in relation to the allegations in the foreign proceedings. A brief examination of three of these claims illustrates this point:

- (a) The USVI proceedings include claims for breach of fiduciary duties and fraudulent conveying of the appellants' assets. These claims are similar to the claims in the Main Anguillian Claim and are probably based on the same or similar evidence.
- (b) The claim in Nevis is also based on similar evidence and if the appellants' application to stay Fidelity's claim is refused, and the action proceeds, the discovery obtained from the Bank could be relevant to the claim in Nevis.
- (c) The proposed application to the court in Utah is for discovery in relation to the monies paid out of accounts at the respondent Bank. The information from the Bank could assist the appellants in framing their claim for discovery from the Zions Bank in Utah.

[42] The judge also found that the appellants were using the court's procedures in a fishing expedition 'in an effort to determine whether there is an apparent wrong carried out, at large.'²⁶ A fishing expedition is usually characterised by a situation where there is 'a dearth of material.'²⁷ to show a prima facie case of wrongdoing, and the applicant is using the court's procedure to gather evidence 'to decide whether or not to sue'²⁸

[43] In this case the appellants have an arguable case of wrongdoing (as found by the trial judge and the judge in Texas) which I have found applies to the foreign proceedings, and they need the information and documents from the Bank in order to identify additional wrongdoers and generally to pursue their claims against all the wrongdoers, in Anguilla or elsewhere. This is a far cry from the situation where the applicant does not have evidence of a prima facie case and needs the new information to decide if it has a case. This is not a case of the appellants fishing for evidence.

²⁶ para. 81 of the Judgment.

²⁷ per Saunders JA in *Lester Bryant Bird v Observer radio Limited et al*, Antigua and Barbuda High Court Civil Appeal ANGHCVP2003/0005 (delivered 12th January 2004, unreported) at para. 10.

²⁸ per Hariprashad-Charles J in *Al-Rushaid Petroleum Investment Company et al v TSJ Engineering Consulting Company Limited*, supra para. 35.

[44] For reasons already given in relation to the Main Anguillian Action this court should order the Bank to assist the appellants in pursuing the foreign claims by providing the information and documents sought.

Conclusion

[45] In all the circumstances I find that the judge did not consider the application under the Bankers Trust jurisdiction (which I have now done), and in exercising her discretion under the Norwich Pharmacal jurisdiction did not give sufficient weight to the appellants' evidence and did not apply the relevant principles correctly. I would allow the appeal and confirm the order that was made on 26th November 2012.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]