[2020] JMCA Civ 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**HAROLD MORRISON and ROBERT WOODSTOCK ASSOCIATES LIMITED**	**APPELLANT**
AND	**MARJORIE MORRISON (Legal Guardian of JAMES MORRISON)**	**1ST RESPONDENT**
AND	**SJUAN MORRISON (Mother and Next Friend of ZOE MORRISON)**	**2ND RESPONDENT**
AND	**SJUAN MORRISON (Mother and Next Friend of ZARA MORRISON)**	**3RD RESPONDENT**
AND	**LOURICE MORRISON (Administrator Ad Litem of the Estate of HAROLD EUSTACE MELVILLE MORRISON, deceased)**	**4TH RESPONDENT**

Written submissions filed by Ransford Braham QC instructed by Brahamlegal for the appellant

Written submissions filed by Ms Sherry Ann McGregor instructed by Nunes, Scholefield, DeLeon & Co for the 1st, 2nd and 3rd respondents

20 July, 13 and 19 November 2020

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and there is nothing that I could usefully add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusion.

FOSTER-PUSEY JA

Introduction

[3] This is a procedural appeal brought by the appellant, Harold Morrison and Robert Woodstock Associates Limited, challenging the orders of Palmer Hamilton J(Ag) (as she was then), ("the judge"), made on 2 February 2018. On that date, in exercise of the jurisdiction of the court established in **Norwich Pharmacal Co & others v Customs & Excise Commissioners** [1973] 2 WLR 164, which empowers the court to make orders for disclosure against a person who is not a party to the proceeding ("**Norwich Pharmacal** orders"), having heard submissions by counsel, the judge ruled in favour of the first, second and third respondents (hereinafter called "the respondents") and made the following orders:

> "1. [The 4th respondent] shall specifically disclose receipts, invoices and/or estimated figures in respect of the

liabilities identified in paragraph 8 of the Affidavit of Lourice Morrison that was sworn to on May 24, 2017.

2. [The appellant] shall disclose copies of its audited or draft financial statements for the years 2015 and 2016.

3. [The appellant] shall disclose all documents pertaining to the income generated or derived by the firm as at 2015 and 2016.

4. [The appellant] shall disclose all documents pertaining to the debts owed to the firm as at 2015 and 2016.

5. …

6. Costs to [the appellant] in the Application to be taxed if not agreed. Costs to be costs in the claim with respect to [the 4th respondent].

7. Leave to appeal to [the 4th respondent] and [the appellant]."

The appeal

[4] Discontented with the judge's orders, the appellant, on 12 February 2018, challenged them on the following grounds:

"(a) The Learned Judge in Chambers erred in granting the orders made against the Appellant.

(b) The Learned Judge in Chambers failed to appreciate that the Appellant was not a party to the claim and could not properly be made a party to the claim.

(c) The Appellant not being a party to the claim ought not to be required to provide discovery.

(d) The Learned Judge in Chambers erred in the interpretation and application of the principles enunciated in **Norwich Pharmacal Co & others v Customs & Excise Commissioners** [1973] 2 WLR 164.

(e) The Learned Judge in Chambers failed to appreciate that the conditions precedent required for the making of a Norwich Pharmacal order did not exist in the instant case.

(g)[1] [sic] The Learned Judge in Chambers failed to appreciate that the orders made against the Appellant are oppressive, excessive, onerous, unjust and unfair."

[5] The appellant therefore asks that this court set aside the orders made by the judge, dismiss the first to third respondents' application, and award it costs of the application and of the appeal.

[6] In considering this appeal, this court will be required to closely examine the basis on which a **Norwich Pharmacal** order may be granted, and whether the necessary pre-conditions were satisfied in this case.

[7] The orders granted by the judge were as a result of an application made by Marjorie Morrison on her own behalf, as well as on behalf of James Morrison and Sjaun Morrison. It should be noted, however, that the notice of appeal has not named Marjorie Morrison as a respondent to the appeal in her own right. It appears, though, that the appellant is challenging the grant of the orders to all of the applicants in the court below and the appeal has been approached on that basis.

[8] Lourice Morrison was included as the fourth respondent to the appeal. However, at the case management conference, the appellant indicated that it will be withdrawing

[1] There is no ground of appeal (f).

the appeal against her. She has, therefore, not appeared or filed submissions in the appeal.

Background

Proceedings in the court below

[9] The appellant is an architectural firm. Harold Morrison, now deceased, ("HM"), was a renowned architect who owned 51% of the shares in the firm. He died on 4 March 2016, leaving his entire estate to Lourice Morrison ("Lourice"), his then wife. Since all the parties bear the same surname, with no disrespect intended, I will refer to them by their Christian names from hereon for ease of reference.

[10] On 17 June 2016, Marjorie, the first respondent and ex-wife of HM, along with Sjaun, filed a fixed date claim form ("the claim"), pursuant to the Inheritance (Provision for Family and Dependants) Act ("the Act"), seeking declarations that Marjorie, James, Zoe and Zara are entitled to receive financial provision from HM's estate. Marjorie provided the factual basis of the claim in her affidavit, which was also filed on 17 June 2016. She stated, among other things, that she had been married to HM and they divorced on 2 November 2001. Immediately prior to his death, HM was paying her $150,000.00 per month for maintenance. James, son of HM, up to the time of HM's death, was receiving financial assistance from his father as, although an adult, he suffers from a number of mental and other challenges, and is incapable of managing his own affairs. James is married to Sjaun and they have two children, Zoe and Zara. Although Sjaun has commenced divorce proceedings against James, HM, up to the time of his death, paid the school fees for Zoe and Zara.

[11] Lourice has, therefore, inherited HM's 51% share in the appellant.

[12] At paragraph 29 of her 17 June 2016 affidavit, Marjorie asserted:

> "In all the circumstances, I verily believe that James, his daughters and I are entitled to receive reasonable financial provision from the … estate in light of the likely size and nature of the … estate."

[13] Lourice, in an affidavit filed on 24 May 2017, which is not a part of the record of appeal, but to which reference is made in the judge's reasons, provided details of the assets and liabilities of HM's estate. Insofar as liabilities are concerned, she referred to his funeral expenses, credit card bills, testamentary fees, taxes and the litigation costs emanating from the claim. She also referred to real estate which, following HM's and Marjorie's divorce proceedings, was declared to be jointly owned by HM and Marjorie as tenants-in-common. Importantly, for the purposes of this appeal, she also stated at paragraph 8 of her affidavit:

> "(iii) In relation to the request for the audited financial statements of the firm, the current articles adopt Articles 35 to 38 from Table A, schedule 1 of the Companies Act of Jamaica, 2004, which provide that on Harold's death I would not automatically become a member of the firm but would first have to be elected and registered as a member. Since election and registration have not taken place, I do not have a right of access to the firm's documents including statements or accounts."

[14] By way of a comment, it is clear that the obstacle to which Lourice has referred would not be difficult to surmount. However, the matter has to be approached on the basis of the facts before the court and Lourice has not participated in this appeal.

[15] Apparently also in that May 2017 affidavit, Lourice, in reliance on a valuation prepared by Mr Ashburn Simon, a chartered accountant, who was the independent accountant and external auditor of the appellant for many years, had indicated that HM's 51% shareholding in the appellant valued between $27,000,000.00 and $30,000,000.00. Marjorie, however, describes that valuation as an estimate.

[16] The respondents were dissatisfied with this ascribed value of the shareholding and consequently, on 2 June 2017, filed a notice of application for court orders seeking several orders for the disclosure of the appellant's financial information, including audited financial statements, debts owed to it and its liabilities for the years 2015 and 2016. Importantly, the appellant, although not a party to the claim, was made a respondent to the notice of application. The grounds on which the respondents relied in the notice of application were as follows:

> "1. The substantive claim is made pursuant to the provisions of the Inheritance (Provision for Family and Dependents) Act for reasonable financial provision to be made for the maintenance of [the respondents] from the net estate of the deceased.
>
> 2. In determining that claim, the Court must determine, inter alia, the size and nature of the net estate of the deceased as defined in section 2 of the Inheritance (Provision for Family and Dependents) Act.
>
> 3. The most substantial asset in the deceased's estate is a 51% shareholding in the [appellant].
>
> 4. The estimate prepared by Mr. Ashburn Simpson [sic], Chartered Accountant, to which [the fourth respondent] has referred to say that the value of 51% of the shares in the firm is worth between J$27,000,0000 and J$30,000,000 is unreliable when

there is at least one debt owed to the firm in the amount of J$172,800,000.

5. The information being sought is critical to the fair disposal of this claim.

6. This application is made pursuant to Parts 26 and 28 of the Civil Procedure Rules, 2002, and in furtherance of the overriding objective."

[17] In the affidavit in support of the notice of application for court orders filed on 7 June 2017, Marjorie deposed that, to her knowledge, the appellant was not only owed $172,800,000 but also US$2,000,000.00 in respect of two contracts and there were additional debts owed to it. Therefore, HM's net estate was being deliberately undervalued.

[18] In response, Lourice filed an affidavit on 15 June 2017. She averred at paragraphs 6 and 7 that, since the appellant was not a party to the proceedings, the order for disclosure which was sought could not be made against it. She also stated that the information being sought was the appellant's private documents, and it would be highly prejudicial if such documents were to be released in the public, as this could have a negative impact on possible investors. Additionally, at paragraph 11, Lourice stated that there was no basis to find that the financial information provided by Mr Ashburn Simon, who was an independent and external auditor, was not accurate. The valuation noted "the loss of the most dominant partner, the late Harold Morison [sic] and the poor performance of the company to the date since his death." Lourice also denied, at paragraph 12, making any deliberate attempt to suppress or conceal documents from the respondents. No evidence was advanced from the appellant itself.

[19] It was on the basis of the above evidence that the judge made the orders outlined at paragraph [3] above.

Submissions

Appellant's submissions

[20] On 26 September 2018, Queen's Counsel, Mr Ransford Braham, filed brief written submissions on behalf of the appellant. Mr Braham submitted that, in light of the fact that the appellant was not a party to the claim, the judge failed to appreciate that the appellant had no responsibility or duty to disclose documents to the respondents. He referred to, and relied on, rules 2.4, 28.1(3), 28.2 and 28.6(1) of the Civil Procedure Rules, 2002 ("CPR"). Mr Braham further submitted that the respondents were not in a position to apply to the court to make the appellant a party to the claim, since there was no cause of action against it. In support of this point, he relied on the case of **Lowell Cameron & Errol Dennis v Robert Pike & Hopeton Pike** [2015] JMSC Civ 66.

[21] Of significant note, Queen's Counsel contended that the judge could not have properly relied on the **Norwich Pharmacal Co & others v Customs & Excise Commissioners** line of authorities because the conditions precedent to the grant of such an order did not exist. That is to say:

> (a) there was no wrong committed or arguably carried out by an ultimate wrongdoer;

(b) there was no need for an order against the appellant to enable action to be brought against an ultimate wrongdoer;

(c) there is no indication that the appellant, as the person against whom the order for discovery was sought is either mixed up in or facilitated any wrongdoing; and

(d) the information sought is not required to enable the ultimate wrongdoer to be sued (see **Mitsui & Co Limited v Nexen Petroleum UK Limited** [2005] EWHC 625 paragraphs 18-21)

[22] In concluding his submissions, Queen's Counsel also argued that the orders made by the judge were too wide in scope and nature, were unjust and oppressive, and should be set aside.

Respondents' submissions

[23] Counsel for the respondents, Ms Sherry Ann McGregor, made far more comprehensive submissions. In her written submissions, filed on 20 December 2018 and 29 April 2020, she submitted that the application for disclosure of the appellant's financial information stemmed from the sparsity of information provided by Lourice in her affidavit evidence concerning the value of HM's shareholding in the appellant. As this was the only asset of the estate, the accuracy of the value of the shares was the most important factor

to assist the court in determining whether, and in what manner, it should exercise its power pursuant to section 6 of the Act.

[24] Counsel submitted that, although Mr Ashburn Simon gave his opinion as to the value of the shares in a letter dated 17 May 2017, there was no actual information relative to the earnings of any single year. In addition, there was no evidence to show that Lourice had sought to acquire from the appellant, itself, the actual value of the shares.

[25] Counsel went on to address the various grounds of appeal. In brief submissions on ground (a), she submitted that it was a bare assertion, as it did not reflect any legal or factual underpinning for consideration by the court and so, it ought to be dismissed.

[26] Grounds (b) and (c) were addressed together. Counsel submitted that the fact that the appellant was not a party to the claim was never in issue. The respondents had never intended to add the appellant as a party to the claim, and the judge, at paragraphs [2], [4] and [19] of her reasons, clearly recognised this. Counsel argued that, in relying on these grounds of appeal, the appellant was asking this court to ignore the jurisdiction the courts have, pursuant to **Norwich Pharmacal Co & others v Customs & Excise Commissioners**, to make an order for discovery against a person who is not a party to a claim. Counsel referred to and relied on **William Clarke v The Bank of Nova Scotia Jamaica Limited and Others** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 05137, judgment delivered on 23 February 2010 and **Mark Anderson Jones v Mid Island Poultry Limited and Others** [2016] JMSC Civ 69.

[27] The judge at paragraph [21], counsel submitted, correctly relied on **William Clarke v Gwenetta Clarke** [2014] JMCA Civ 14, a decision of this court, to indicate that discovery is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.

[28] Counsel agreed that a **Norwich Pharmacal** order should not be lightly granted, and that the three pre-conditions outlined in **Mitsui & Co Limited v Nexen Petroleum UK Limited** should be satisfied. She submitted that, in the instant case, each of the three pre-conditions have been satisfied as: (i) the wrong arguably committed was HM's failure to make any financial provision for the respondents, who are entitled to receive reasonable financial provision from his estate, (ii) although the wrongdoer (HM) was already identified, a **Norwich Pharmacal** order was needed to properly execute the claim by ascertaining the size and nature of HM's net estate, and (iii) the appellant is inextricably "mixed up" in the wrongdoing because the estate owns the majority of its shares which, in reality, is the only asset in HM's estate.

[29] Counsel, relying on Lord Sumption's judgment in **Cartier International AG and others v British Telecommunications plc and another (Open Rights Group and others intervening)** [2018] 1 WLR 3259, submitted that, while there is no legal duty on a third party to assist the court, the court has power, pursuant to its inherent jurisdiction, to request a third party to provide information.

[30] Grounds (d) and (e) were also considered together. Counsel in her submissions referred to, and relied on, paragraphs [18] - [20] of **Mitsui & Co Limited v Nexen**

Petroleum UK Limited to address, in more detail, the question as to whether the various preconditions for the exercise of the **Norwich Pharmacal** jurisdiction had been satisfied.

a. Was there an arguable wrong?

[31] Counsel submitted that, although there was no tortious wrongdoing or breach of contract, arguably, HM had a statutory, equitable and moral obligation to provide for the respondents pursuant to sections 4 and 6 of the Act. Counsel highlighted that Marjorie, HM's former wife, was receiving maintenance from him immediately before his death, James, HM's son, although an adult, is a patient, pursuant to the Mental Health Act, and James' two children, Zoe and Zara, were financially assisted by HM immediately before he died. Consequently, the respondents have met the threshold requirements for the making of an application, pursuant to the Act. Counsel relied on **Ashworth Hospital Authority v MGN Limited** [2002] 1 WLR 2033, in which Lord Woolf CJ stated that it is not necessary to conclusively establish that a wrong has been carried out, as an arguable case is sufficient.

[32] Additionally, counsel submitted that it is arguable that Lourice and/or Mr Ashburn Simon have committed a wrong in undervaluing HM's shareholding in the firm with a view to defeating the respondents' claim for financial provision under the Act. Counsel posited that the letter dated 17 May 2017, a year after the claim was filed, was prepared with a view to supporting the defence of the claim. Counsel also referred to **British Steel Corp v Granada Television Ltd** [1981] AC 1096 and argued that the grant of a **Norwich**

Pharmacal order is not limited to circumstances in which an injured person wanted to sue or obtain redress from a wrongdoer. Instead, it is also applicable when the injured person seeks protection from further wrongdoing.

b. An order to enable action to be brought against the ultimate wrongdoer (necessity)

[33] Relying again on **Mitsui & Co Limited v Nexen Petroleum UK Limited**, counsel submitted that a **Norwich Pharmacal** order may be granted in circumstances where legal proceedings had already commenced and information is needed to assist the applicant to fully and properly plead and establish the wrong.

[34] Counsel acknowledged that it may be argued that the **Norwich Pharmacal** jurisdiction should only be exercised where the innocent third party is the only practicable source of information. However, citing **Ashworth Hospital Authority v MGN Limited**, counsel noted that the necessity test does not require the remedy to be one of last resort. Therefore, even if this court were to find that there are alternative methods to determine the value of the shares, and it is contended there is none, that would not be a basis to refuse the grant of a **Norwich Pharmacal** order.

c. *Mixed up/facilitation and ability*

[35] Counsel stated that there was no way that, in the circumstances, the appellant could avoid being mixed up in the wrongdoing. Since the shares are the only property of the estate, the value of the shares being incorrectly stated, whether innocently or deliberately, may be viewed as the appellant facilitating an attempt to defeat a genuine claim, therefore, interfering with the administration of justice.

[36] Counsel also submitted that the concept of being mixed up should be broadly construed to include the concealment of the value of an asset pending proceedings. This is similar to the equitable remedy of tracing. Counsel relied on **Koo Golden East Mongolia v Bank of Nova Scotia and others** [2008] QB 717, paragraph 37 and **Jeremy Outen and others v Mukhtar Ablyazov** [2011] ECSCJ No 282, paragraph 14 in support of this point.

[37] Further, counsel noted that there is no question that the appellant has the ability to comply with the **Norwich Pharmacal** order as it is still in existence and the financial records ought to have been preserved according to sound accounting and corporate principles.

[38] In relation to ground (g), counsel contended that paragraphs [25], [35] and [36] of the judge's reasons answered and dispelled this ground of appeal. Although the appellant did not provide any evidence in support of its assertion that the orders made were oppressive, onerous, unjust and unfair, the judge gave due consideration to its interests and any associated risks with the disclosure of its financial information. Also, the fact that costs was awarded to the appellant ought not to be overlooked.

[39] Counsel acknowledged that in making a **Norwich Pharmacal** order, it must be justified that it is a necessary and proportionate response in all the circumstances (see **Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)** [2012] 1 WLR 3333, per Lord Kerr at paragraphs [17]

and [46]). Counsel submitted that, relying on the available evidence to assess proportionality, this court should make the following findings:

1. there is a strong claim against the deceased's estate to recover financial provision under the Act;

2. there is a strong public interest that the respondents are not denied justice in preventing the court from being seized of the best evidence to assess the value of the estate;

3. this case could be a precedent to discourage personal representatives and companies in which deceased have shareholdings from failing to take active steps to enable the court to properly assess the value of the estate;

4. there is no other source in which the appellant's financial information can be obtained;

5. the appellant is aware of the consequences in failing to disclose the information and in doing so is facilitating wrongdoing;

6. the order will result in the disclosure of another shareholder, Mr Woodstock, but there is no evidence that harm will be done if disclosed. The judge examined this at paragraphs [35] - [43];

7. although the appellant is not a public listed company, its financial information is private but not confidential; and

8. there are no privacy or fundamental rights that are likely to be breached against a party who is entitled to 51% shareholding in the appellant.

[40] Counsel noted that inherent in this ground, the appellant is challenging the exercise of discretion of the judge. She referred to the oft-cited case of **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191, which speaks to when it would be appropriate for an appellate court to interfere with the exercise of a judge's discretion. Counsel contended that the appellant had not demonstrated that the judge was wrong in her approach.

Issues

[41] It is my view that, in resolving this appeal, the court must determine whether the judge considered and correctly addressed the following issues:

i. whether the appellant had to be a party to the proceedings for the **Norwich Pharmacal** order to be directed to it; (Grounds (b) and (c))

ii. whether a wrong was arguably committed by HM in failing to make reasonable financial provision in his last will and testament for the respondents, or whether the alleged undervaluing of HM's shareholding constitutes wrongdoing in these circumstances; (Grounds (d) and (e))

iii. whether there was a need for a **Norwich Pharmacal** order to be made to enable action to be brought against HM's estate; (Grounds (d) and (e))

iv. whether the appellant was mixed up in or facilitated the wrongdoing of HM; (Grounds (d) and (e))

v. whether the appellant was able or likely to be able to provide the information necessary to enable HM to be sued; (Grounds (d) and (e)), and

vi. whether in the interests of justice, this is an appropriate case in which to apply the Norwich

Pharmacal principles and grant the order sought.

(Grounds (a) and (g))

Analysis

Scope of review

[42] It is a well-established principle that an appellate court operates within defined boundaries when reviewing the exercise of discretion of a judge at first instance. In **Attorney General of Jamaica v John McKay** [2012] JMCA App 1, it was underscored at paragraph [20] that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference that particular facts existed or did not exist-which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[43] Additionally, in **Hadmor Productions Ltd and Others v Hamilton and Another**, we are reminded that this court ought not to interfere with the exercise of a judge's discretion merely on the ground that we would have decided differently.

Norwich Pharmacal Order – a discretionary remedy

[44] I will now do a short review of the facts and legal principles outlined in **Norwich Pharmacal Co & others v Customs & Excise Commissioners**, the case from which the jurisdiction emanated to make the order in question in these proceedings. In that case, the appellant, Norwich Pharmacal Co, an American corporation, was the owner and

licensee of the chemical compound patent, furazolidone. It was alleged by its subsidiary and licensee in the United Kingdom that a counterfeit of the compound was being imported by individuals whom it was unable to identify. To sue these individuals for infringement of their patent, the appellant made a formal request to the United Kingdom Customs and Excise Department to release the names and addresses of these importers. However, the department refused to do so on the basis that by law, they were only permitted to publish statistics conveying the total quantities of the imported product, as any other information was considered confidential. The appellant sued the department for aiding and abetting the breach of its patent, on the ground that they had failed to exercise their power to seize the counterfeited product. In addition, the appellant claimed that it had a right to the discovery of the names and addresses of the importers. The court, at first instance, agreed that the appellant was entitled to the provision of the names and addresses of the importers, but rejected the claim made against the department on the basis of aiding and abetting.

[45] This decision was subsequently reversed by the Court of Appeal. The justices of appeal found that the public interest required that the department keep the information being sought in respect of the importers confidential, and an action solely for the purpose of discovery could not be made in circumstances where no other relief was being sought. The appellant then appealed to the House of Lords.

[46] It should be noted that, at that level, the appellants did not pursue their argument that they had a cause of action against the department. The House of Lords unanimously reversed the decision of the Court of Appeal and held:

> "(1) although as a general rule no independent action for discovery would lie against a person against whom no reasonable cause of action could be alleged, or who was in the position of a mere witness in the strict sense, the rule did not apply where:
>
> (a) without discovery of the information in the possession of the persons against whom discovery was sought no action could be begun against the wrongdoer, and
>
> (b) the person against whom discovery was sought had himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. In such circumstances, although he might have incurred no personal liability, he was under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoer. In the performance of their statutory duties the respondents had been sufficiently involved in the importation of furazolidone in breach of appellants' patent as to impose on them, subject to considerations of public policy, a duty to disclose the identity of the importers so that appellants could commence proceedings against them;
>
> (2) even if the respondents had been right in treating the information relating to the identity of the importers as confidential, there was no statutory provision which prohibited the court from ordering discovery for the purpose of legal proceedings if the public interest in the proper administration of justice required it. In the

> circumstances the public interest in such confidentiality as might attach to the names and addresses of the importers was outweighed by the interests of justice in disclosure for the purpose of appellants' intended proceedings.
>
> Per Lord Reid, Viscount Dilhorne and Lord Cross of Chelsea: in any case in which there is the least doubt whether a person asked to disclose the name of a third party should do so, that person would be fully justified in saying that he would only make disclosure under an order of the court, the costs of the application to the court being borne by the person making the request."

[47] Lord Reid, in a passage now frequently referred to as distilling the **Norwich Pharmacal** principle, stated at page 175 of the judgment:

> "... 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 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 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 righting the wrong if he unwittingly facilitated its perpetration."

[48] Lord Kilbrandon, at page 196 of the judgment, explained that a duty lay on the court itself to make an order which is necessary to the administration of justice. This power is exercised "…where justice would be defeated without such a disclosure".

[49] At pages 205 – 206 of the judgment, Lord Kilbrandon acknowledged that the court was establishing a ground breaking principle. He stated:

> "In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their

> statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants bona fide believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which the respondents may qualify in respect of their position as a department of state. **It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. That exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been 'mixed up with the transaction,' to use Lord Romilly's words, or 'stands in some relation' to the goods, within the meaning of the decision in Post, 11 N.E.Rep. 540, is that that is the way in which judicial discretion ought to be exercised**." (Emphasis added)

[50] The power to order discovery against a person, even if it is not intended to pursue an action against them, is therefore not dependent on statutory provisions or rules, but emanates from the court itself.

Development of the Norwich Pharmacal principles

[51] The principles established in **Norwich Pharmacal Co & others v Customs & Excise Commissioners** have been developed in later cases. One such case, on which both parties have heavily relied, is **Mitsui and Co Ltd v Nexen Petroleum UK Limited**, a first instance decision by Lightman J in the England and Wales High Courts of Justice, Chancery Division. In that matter, Mitsui sought a **Norwich Pharmacal** order against the defendant, Nexen Petroleum UK Limited (formerly Encana UK Limited), for

disclosure of documents, and for provision of an affidavit by Mr Alan Booth. Mr Booth was the former managing director of the defendant and of its former holding company, Encana UK Holdings Limited "Holdings". Mitsui claimed that Encana Corp, Holdings' parent company, had agreed to not solicit offers from third parties in relation to its primary asset. However, Holdings entered into an agreement with Nexen Energy Holdings International Limited (Nexen Energy) in which it sold its entire issued share capital to Nexen Energy. Mitsui strongly suspected that Encana Corp solicited from Nexen Energy's holding company Nexen Inc ("Nexen') an offer to purchase Holdings. The purpose of Mitsui's application was to obtain from Nexen Petroleum UK Limited, the information required to enable it to determine whether to sue Encana Corp for such breach of contract.

[52] Lightman J conducted a detailed analysis of the **Norwich Pharmacal** principles. At paragraph [18] of the judgment, he referred to the basic principles outlined by Lord Reid. There followed a very useful synopsis of how the **Norwich Pharmacal** jurisdiction has developed since its classical formulation.

[53] At paragraphs [18] and [19], Lightman J wrote:

> "**THE NORWICH PHARMACAL PRINCIPLE**
>
> [18] The principles established in Norwich Pharmacal (as subsequently developed) are the basis of the Claimant's application for relief. In its original form, the Norwich Pharmacal jurisdiction allowed a claimant to seek disclosure from an 'involved' third party who had information enabling the claimant to identify a wrongdoer so as to be in a position to bring an action against the wrongdoer where otherwise he would not be able to do so. Lord Reid described the principle at page 175 as follows:

…

The required disclosure may take any appropriate form. Usually it takes the form of production of documents, but it may also include providing affidavits, answering interrogatories or attending court to give oral evidence.

[19] 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* Limited [1997] 1 WLR 1309; *Carlton Film Distributors Ltd v VCI Plc* [2003] FSR 47 ('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] [sic] 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* (CA) [1998] CLC, 1177 ('Axa Equity'); *Aoot Kalmneft v Denton Wilde Sapte* [2002] 1 Lloyds Rep 417 ('Aoot'); 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 v. Hopkins and Wood* [1993] FSR 241 and Hollander, Documentary Evidence 8th ed p.78 footnote 11."

[54] Thereafter, at paragraph [21], he listed the three conditions to be satisfied for the court to exercise its power to make a **Norwich Pharmacal** order. He stated that:

"i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."

In **Natalia Dixon (Mother and Next Friend of Lincoln Sterling Jr) v University Hospital of the West Indies and Others** [2013] JMCA Civ 18, Phillips JA, at paragraphs [38] – [39], relied on Lightman J's useful analysis of the manner in which the **Norwich Pharmacal** jurisdiction has developed. Phillips JA proceeded on the basis, with which I agree, that the jurisdiction can be and is exercised in our courts.

[55] In **Orb ARL and others v Fiddler and another** [2016] EWHC 361 (Comm), another first instance decision in the Queen's Bench Division of the High Courts of Justice, England and Wales, Popplewell J stated, at paragraph [89] of the decision, that, even where the three threshold conditions are met, there is still a discretion to be exercised, which involves weighing a number of relevant factors and determining whether disclosure should be ordered 'in order to do justice'. He referred to paragraph 17 of Lord Kerr's judgment in **Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation**), which states:

> "**The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors**. Various factors have been identified in the authorities as relevant. These include:
>
> (i) the strength of the possible cause of action contemplated by the Applicant for the order…;
>
> (ii) the strong public interest in allowing an Applicant to vindicate his legal rights;
>
> (iii) whether the making of the order will deter similar wrongdoing in the future: *Ashworth* at para 66 per Lord Woolf CJ;

(iv) whether the information could be obtained from another source: …;

(v) whether the Respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing: *British Steel* per Lord Fraser at 1197A-B, or was himself a joint tortfeasor, *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 54, [1990] 2 All ER 1, [1990] 2 WLR 1000 per Lord Lowry;

(vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result: *Norwich Pharmacal* at 176B-C per Lord Reid; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 434, [1973] 2 All ER 1169, [1973] 3 WLR 268 per Lord Cross;

(vii) the degree of confidentiality of the information sought: *Norwich Pharmacal* at 190E-F per Viscount Dilhorne;

(viii)-(x) …" (Emphasis added)

[56] Having outlined the main principles, I now review the various issues, which emanate from the grounds of appeal.

Issue (i): whether the appellant had to be a party to the proceedings for the Norwich Pharmacal order to apply (Grounds b and c)

[57] This aspect of the appeal can be addressed quite briefly. As would have been seen from the *locus classicus* itself, the **Norwich Pharmacal** jurisdiction was developed to address circumstances in which information was required from a third party who, in many cases, was never intended to become a party to a claim brought by the individual who needed the information.

[58] How did the judge treat with this issue? At paragraph [22] of her reasons she stated:

> "The law is dynamic and the **Norwich Pharmacal** principle was quite novel at the time in 1974 and had far-reaching implications on 'innocent' third parties…"

[59] It is clear that the judge did not err in her understanding of the relevant legal principles on this issue. She understood that it is not necessary that an individual be a party to a claim, or be an intended party to a claim, for a court to make such an order directing them to provide the necessary information. Grounds (b) and (c), therefore, fail.

[60] Grounds (d) and (e) raise the question as to whether the judge correctly concluded that the conditions precedent were satisfied so as to justify the making of a **Norwich Pharmacal** order. This will be addressed under issues (ii), (iii), (iv) and (v).

Issue (ii): whether a wrong was arguably committed by HM in failing to make reasonable financial provision in his last will and testament for the respondents or whether the alleged undervaluing of HM's shareholding constitutes wrongdoing in these circumstances (grounds (d) and (e))

[61] In order to address this issue, it is necessary to consider the provisions of the Act pursuant to which the claim was brought.

The Inheritance (Family Provision and Dependants) Act

[62] Section 4 of the Act provides that certain individuals may apply for financial provision on the ground that the disposition of a deceased's estate is not such as to make reasonable provision for their maintenance. These individuals include the deceased's wife, former wife, husband or former husband or child.

[63] Section 6 of the Act outlines the types of orders which the court may make in the event that it determines that no reasonable financial provision had been made for an applicant. These orders include periodical or lump sum payments as well as the setting up of trust funds.

[64] Section 7 is of particular significance to the issues arising in this matter. It provides:

> "7.–(1) **Where an application is made for an order under section 6, the court shall, in determining whether the disposition of the deceased's estate effected by his will** or the law relating to intestacy, or the combination of his will and the law**, is such as to make reasonable financial provision for the maintenance of the applicant and, if the court considers that such reasonable financial provision has not been made, in determining whether** and in what manner **it shall exercise its powers under that section, have regard to the following matters-**
>
> (a) **the size and nature of the net estate of the deceased;**
>
> (b) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future;
>
> (d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased;
>
> (e) any physical or mental disability of any applicant for an order under section 6 or any beneficiary of the estate of the deceased;

(f) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(g) the deceased's reasons, so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will:

(h) the conduct of the applicant towards the deceased;

(i) the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime;

(j) any other matter which, in the circumstances of the case, the court may consider relevant." (Emphasis supplied).

[65] As is reflected by the claim, the respondents seek to have the court make orders in their favour for reasonable financial provision, pursuant to sections 4 and 6 of the Act. They argue that HM, in disposing of his estate, did not make reasonable financial provision for them and has, therefore, arguably committed a wrong. The question is, therefore, whether the nature of the claim which they pursue would fulfil the criterion of arguable wrongdoing.

[66] Additionally, the respondents argue that there has been wrongdoing by Lourice or the chartered accountant, as they have undervalued HM's shareholding in the appellant.

Discussion

[67] The latter submission was not addressed in the judge's reasons and so it is not clear whether this line or argument was pursued before her. At the outset, I must immediately indicate that I am unable to accept this submission because, in my view, it is an incorrect approach to this issue. The alleged wrongdoing to which reference is made in the authorities, should have been carried out by the person against whom it is intended to pursue proceedings. In the instant case, the alleged wrongdoing would have been carried out by HM. This alleged undervaluing of HM's shares in the appellant clearly cannot be attributed to HM.

[68] The judge, commencing at paragraph [22] of her reasons, addressed the question as to whether it was arguable that HM had committed a wrong. She stated:

> "[22] … [The] principle does not seem to be limiting its application to a tort or the involvement of a tortfeasor but is relevant to **any** act of wrongdoing.
>
> [23] The specific meaning of wrongdoing is abstract or even nebulous. Given the particular context, the case of **John Corbett Barnsley et al v Philip Noble** [2015] EWCA Civ. 875 is instructive. In that case, an interpretation of 'wrongdoing' was being explored in the context of an exclusion clause contained in a Will. A possible interpretation is in contrast to fraud, 'wrongdoing' does not need any conscious intent to do wrong, and there is no need for the importation of any intent to do wrong in the context of the word 'wrongdoing.' …The cause for action is to remedy the exclusion from the Will since no provision was made for the applicants in the deceased's Will. In excluding the applicants, pursuant to the provisions of the **Inheritance (Provision for Family and Dependants) Act**, the testator is said to have committed a wrong. It is this act of wrongdoing that is

> being sought to be corrected. In other words, this interlocutory application is to facilitate a statutory cause of action." (Emphasis in original)

[69] Did the judge err in this approach to the issue? In **Ashworth Hospital Authority v MGN Limited**, at the level of the Court of Appeal, Lord Phillips of Worth Matravers MR addressed the question as to whether wrongdoing, in the context of an application for a **Norwich Pharmacal** order, was limited to tortious acts (see paragraphs 58 – 62). Lord Phillips MR noted that the authorities to which Lord Reid referred in **Norwich Pharmacal Co & others v Customs & Excise Commissioners** involved a wide variety of causes of action, including passing off, liability of stockholders for debts, and interference with proprietary rights that could have involved breach of contract. He saw no basis on which to confine the application of the **Norwich Pharmacal** jurisdiction to cases involving tort, and reiterated that it should be 'one of general application'.

[70] MGN Limited appealed to the House of Lords – see **Ashworth Hospital Authority v MGN Limited** [2002] UKHL 29. At the hearing before their Lordships, MGN no longer argued that the **Norwich Pharmacal** jurisdiction was limited to tortious acts (see paragraph [22] of the judgment). Lord Slynn, in agreeing with the reasons of Lord Woolf CJ, who wrote the main judgment, stated at paragraphs [1] and [2]:

> "[1] My Lords, I fully agree with my noble and learned friend Lord Woolf that this appeal should be dismissed for the reasons he gives. His analysis of the case law and the principles involved to my mind makes two things in particular abundantly clear. **The first is that the jurisdiction recognised in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 to order disclosure of, inter alia, the identity of a source of information or documents does not depend on**

> **whether the person against whom the order is sought has committed a tort, a breach of contract or other civil or criminal wrong.** It is sufficient but, it is important to stress, also necessary that that person should be shown to have 'participated' or been 'involved' in the wrongdoing which is at the basis of the application for discovery.
>
> [2] This latter requirement together with the residual discretion of the court as to whether it is right that an order should be made in all the circumstances provide a safeguard against an unjustified order for discovery..." (Emphasis added)

[71] In **Orb ARL and others v Fiddler and another**, Popplewell J at paragraph 84 noted:

> "The first condition is that there must have been a wrong carried out, or arguably carried out, by an ultimate wrongdoer. **The 'wrong' may be a crime, tort, breach of contract, equitable wrong or contempt of court.** It is not necessary to establish conclusively that a wrong has been carried out; it will be sufficient if it is arguable that a wrong has been carried out. The strength of the argument will be a factor in the exercise of the discretion, but an arguable case is sufficient to meet the threshold condition. **The wrongdoing must be identified by the applicant at least in general terms**: see ***Ashworth Hospital Authority v MGN Limited*** [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [60]." (Emphasis added)

[72] The evidence before the court is that HM has not made any provision for the respondents in his last will and testament. Lourice, based on the terms of HM's last will and testament, stands to inherit his entire estate. The respondents have placed evidence before the court to show that, immediately before his death, HM was financially assisting them. In these circumstances, it is arguable that they fall within the class of persons who are entitled to make a claim, pursuant to the Act, on the basis that HM failed to make

reasonable provision for them in his will. The facts outlined support an arguable case that HM ought to have made reasonable financial provision for the respondents.

[73] In light of the principles outlined in the various authorities, the judge did not err in concluding that a wrong had been arguably committed by HM.

Issue (iii): whether there was a need for a Norwich Pharmacal order to be made to enable action to be brought against HM's estate (grounds (d) and (e))

[74] The judge, having considered the circumstances of the case, at paragraph [30] of her reasons, expressed the view that the respondents' action in seeking specific disclosure from the appellant was an act of desperation, as there was no other practical means of obtaining the information. The judge went on to examine the standard of necessity and proportionality at paragraphs [31] – [34]. She referred to, and relied on, **Ashworth Hospital Authority v MGN Ltd**, per Lord Woolf CJ, in respect of the principle that the need to order disclosure will be found to exist only if it is a necessary and proportionate response in all the circumstances. The judge concluded that, in the instant case, the purpose of the relief is to do justice, and the grant of the order was, in all the circumstances, a necessary and proportionate response.

[75] In this matter, while the pre-condition that a wrong should have arguably been committed was not difficult to satisfy, the question as to whether the judge was correct to conclude that the second condition had been satisfied has required greater reflection. It is quite obvious that in this matter, it cannot be argued that the information is needed to enable action to be brought against HM's estate. The action has been brought and

information of the value of the 51% shareholding in the appellant has, in fact, been provided.

[76] At paragraph [27] of her reasons, the judge, however, referred to and relied on an excerpt from **Mitsui & Co Ltd v Nexen Petroleum UK Ltd,** in which Lightman J stated that the **Norwich Pharmacal** jurisdiction was not limited to cases where the identity of the wrongdoer is unknown. Lightman J stated that relief could also be ordered where the identity of the wrongdoer is known, but the applicant requires "disclosure of crucial information in order to be able to bring its claim" or where the applicant "requires a missing piece of the jigsaw". Having referred to the flexibility of the **Norwich Pharmacal** jurisdiction, and its capacity to adapt to new circumstances, the judge stated at paragraph [29] of her reasons:

> "I have also considered whether there would be any prejudice to the respondent if this application were granted. In my judgment, the potential advantages to the applicant of seeing this part of the jigsaw and the potential disadvantages of it being denied a sight of that part outweigh any detriment or prejudice to the respondents. (per McGonigal, J in **Aoot Kalmneft v Denton Wilde Sapte** [2002] 1 Lloyds Rep. 417)."

[77] In **Mitsui & Co Ltd v Nexen Petroleum UK Ltd** Lightman J examined the nature and scope of this second pre-condition. At paragraphs [23] and [24] of the judgment, he stated:

> **"'NECESSITY'**
>
> [23] I consider first whether the second condition is satisfied. I proceed in this judgment on the basis that the Claimant needs further information which the Defendant is

likely to be able to provide before it can fully and properly plead a breach of the First Limb and sign on the pleading the Statement of Truth required by CPR r.22(i)(a) confirming that the facts pleaded are believed to be true. In a word the information sought is necessary to enable the action to be brought. The critical question raised is whether this is sufficient to satisfy the second condition or whether satisfaction of the second condition also requires the Claimant to establish that it cannot obtain this information elsewhere and in particular from EnCana Corp, the likely defendant in any proceedings for breach of the First Limb. EnCana Corp can be no less in possession of the information sought than the Defendant.

[24] In my judgment despite the argument of Mr Carr that there is no authority directly in point, it is clear that the exercise of the jurisdiction of the court under Norwich Pharmacal against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy of last resort. (It is the Claimant's case that the Defendant is such an innocent third party.) **The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information. The whole basis of the jurisdiction against them is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence**: see e.g. Lord Kilbrandon in Norwich Pharmacal and 203B and 205G. **Whilst there is a public interest in achieving justice between disputing parties, there is also a public interest in not involving third parties if this can be avoided**: see Sir John Donaldson MR in Harrington v. Polytechnic of North London [1984] 1 WLR 1293 at 1299 F-G. The jurisdiction is both exceptional and only to be exercised when it is necessary: Lord Woolf CJ in Ashworth Hospital Authority v. MGN Ltd [2002] 1 WLR 2033 at 2049. **The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information**." (Emphasis added)

[78] Lightman J, thereafter, considered whether there were other practicable means of obtaining the essential information. At paragraph [37] of the judgment, he concluded

that the application should be dismissed because the claimant could obtain the information sought by other means.

[79] Of significant note, in **Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)** [2009] 1 WLR 2579 (Queen's Bench Division comprising of Thomas LJ and Lloyd Jones LJ), Thomas LJ, who delivered the judgment of the court, expressed the view that it was too stringent a requirement for the courts to insist that the information sought must be a missing piece of a jigsaw, or that the remedy must be one of last resort. At paragraphs [93] and [94] he stated:

> "**(a) The legal principles**
>
> **93** In *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, as we set out at para 132 below, Lord Woolf CJ made it clear that the remedy under *Norwich Pharmacal* should only be granted when the court was satisfied that the information was necessary. In *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511 Lightman J put the test in more stringent terms; at para 19 he referred to its being available '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'… **The requirement of necessity was also considered by King J in *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB), paras 15–20; it was argued on behalf of the defendant in that case that this test was not met where the claimant had failed to exhaust other available avenues through which the information might be obtained. King J observed that that was to put the matter 'too high' and to put the discretion of the court into too much of a straitjacket. He considered that the court was entitled to have regard to all the circumstances prevailing in the particular case including the size and resources of the applicant, the urgency of its need to obtain the information it requires and any public interest in its having its needs satisfied**.

> **94** It seems to us that the observations of Lightman J in the *Mitsui & Co Ltd* case and Langley J in *Nikitin's* case put an undue constraint upon what is intended to be an exceptional though flexible remedy. The intrusion into the business of others which the exercise of the *Norwich Pharmacal* jurisdiction obviously entails means that a court should not, as Lord Woolf CJ in the *Ashworth Hospital Authority* case made clear, require such information to be provided unless it is necessary. **But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort.** We agree in this respect with the views expressed in *Hollander, Documentary Evidence* , 9th ed (2006), para 5-26. Moreover it would be inconsistent with the flexible nature of this remedy to erect artificial barriers of this kind. **In our view the approach of King J in the *Campaign Against Arms Trade* case is to be preferred**." (Emphasis added)

[80] Later, at paragraph [133], he suggested a more flexible approach, which would depend on the factual circumstances of each case. He stated:

> "**133** It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information, and the court must always consider what is proportionate and the expense involved, **the scope of what can be ordered must depend on the factual circumstances of each case. In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511, para 19 as 'a missing piece of the jigsaw'. It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in *Norwich Pharmacal* and the cases to which we have referred.**" (Emphasis added).

[81] In a matter determined on 22 April 2013 by the Eastern Caribbean Court of Appeal, **A, B, C & D v E** Appeal No AXAHCVAP2011/0001, a more limited approach to this issue is seen. That court opined that if no further information was needed to frame a claim against known payers and recipients of alleged secret commissions, then a **Norwich Pharmacal** order would not be available. In that matter, the appellants had applied to the High Court for discovery orders against the respondent, a bank operating in Anguilla. They had invested money with a group of companies, the Fidelity Group, and this group controlled certain bank accounts held with the respondent. Unauthorised secret commissions had been paid from the accounts and the appellants believed that some of their invested funds had been used to do so. The appellants were not able to identify all of the persons who had paid and received the secret commissions. The first instance judge dismissed their application for discovery orders.

[82] The judge at first instance had found that the appellants had established an arguable case that unauthorised commissions had been paid out of their funds, so arguably, a wrong had been committed by the Fidelity Group. Furthermore, the Bank had become mixed up in the wrongdoing so as to facilitate the commission of the wrongs. The judge, however, had refused to grant the disclosure order on the ground that it was not necessary or proportionate, because the appellants knew the identity of the wrongdoers and the persons to whom the secret commissions were paid. Furthermore, they did not need additional information to frame their pleadings or ascertain whether their defence and counterclaim had a reasonable prospect of success, and the required information could be acquired through other means (see paragraphs [33] – [34] of the

judgment). Webster JA (Ag) wrote the judgment of the court, with which the other judges of appeal concurred. At paragraphs [35] and [36] of the judgment, he stated:

> "[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:
>
> > '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. 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 [sic] 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**." (Emphasis added)

The order sought was, however, granted since the appellants did not know the identity of some of the alleged wrongdoers.

[83] Baker J, in **Burford Capital Ltd v London Stock Exchange Group plc** [2020] EWHC 1183 (Comm), a very recent first instance decision in the Chancery Division, also considered this issue. It will be seen that he outlined a more flexible approach than that taken by the Eastern Caribbean Court of Appeal. He wrote, at paragraph [40] of the judgment:

> "It will be appreciated from what I have said, above, that in Lightman J's first proposition, '*arguably*' should be '*well arguably*', **and that his second proposition and the final part of his third proposition ('*necessary to enable …*') also require some qualification or explanation: firstly, they both use the language of bringing a civil suit against a wrongdoer, but it is now established that an intention to commence proceedings is not required; secondly, the supposed pre-condition of necessity '*does not require the remedy to be one of last resort, but the need to order disclosure will be found to exist only if it is a 'necessary and proportionate response in all the circumstances*'**", *per* Zacaroli J in *Blue Power Group SARL et al. v ENI Norge AS et al.* [2018] EWHC 3588 (Ch), at [17(ii)], derived from the *Rugby Football Union* case, *supra*, *per* Lord Kerr of Tonaghmore JSC at [16]. **Thus, it is not correct to say that the jurisdiction is limited to cases of strict necessity. Rather, the question is whether, in the circumstances of a**

> **particular case, justice requires from the facilitator the particular cooperation demanded of him by the claimant, with a view to righting facilitated wrongdoing.**" (Emphasis added)

[84] In the case at bar, the respondents have contended that the information provided by Lourice, the executrix, is sparse and the letter dated 17 May 2017, from the appellant's auditor, does not provide a true and accurate value of the shares. In fact, they contend that the shares have been undervalued.

[85] The information is crucial to the respondents' case because the value of the estate will have an impact on the possible outcome of their claim. By virtue of section 7(1)(a) of the Act, the size and nature of the net estate of the deceased is an important consideration for the court in determining whether to grant orders for reasonable financial provisions. In other words, the larger the estate, the stronger the respondents' claim for reasonable financial provision.

[86] In **Halsbury's Laws of England, Wills and Intestacy**, Volume (103) (2016), at paragraph 574, it was noted in a commentary on similar legislation:

> "**The size and nature of the estate.**
>
> In making its determination the court is required to have regard to the size and nature of the deceased's net estate. Where the estate is large, reasonable financial provision will be judged accordingly and it will not be so important to balance the rights of the applicant against the beneficiaries but a large estate does not of itself justify an award as provision must be reasonable. Applications and appeals in small estates are discouraged by the courts but there is no absolute rule that applications made in small estates must fail."

[87] In my respectful view, contrary to the views expressed by the judge, the information which has been sought by the respondents is not being required so as to provide a missing piece of a jigsaw. Information as to the value of the shareholding has been provided and the claim can proceed on the basis of what has been placed before the court. There does, however, appear to be a reasonable basis on which the respondents doubt the accuracy or completeness of the valuation that has been provided. In addition, since the appellant is not a public company, its financial records can only be acquired from its own records, thus satisfying the element that the information cannot be acquired elsewhere.

[88] If one were to rely on the traditional approach to this element of the pre-condition, that is, that the information must be necessary to facilitate the bringing of a claim, the application made in this matter could not satisfy that pre-condition. This is because the claim has been brought and can proceed, though perhaps not with the best available facts, on the basis of the information which is now before the court. I note, however, that the courts in some recent cases, including **Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)** and **Burford Capital Ltd v London Stock Exchange Group plc**, have emphasised that the **Norwich Pharmacal** jurisdiction is flexible and is capable of adapting to new circumstances.

[89] It seems to me that, in light of the authorities on this point, which do not all go one way, but which, increasingly, emphasise the flexibility of the jurisdiction, it was open to the judge to have concluded that the order requiring the provision of the information

was a necessary and proportionate response to enable the just consideration of the claim. The judge's order was therefore appropriate although the claim had already been brought.

Issue (iv): whether the appellant was mixed up in or facilitated the wrongdoing of the HM (grounds (d) and (e))

[90] The resolution of this issue has been another challenging aspect of the review of the judge's decision. At paragraph [20] of her judgment, the judge referred to the respondents' arguments on the question as to whether the appellant was mixed up in or facilitated the wrongdoing of HM. Unfortunately, the judge did not specifically indicate whether she accepted these arguments. At paragraph [26] of her reasons, however, the judge referred to the argument made by Mr Braham, that the three pre-conditions for the grant of a **Norwich Pharmacal** order, as outlined in **Mitsui & Co Ltd v Nexen Petroleum UK Ltd,** had not been satisfied. She then stated at paragraph [27] of her reasons:

> "… I respectfully disagree with learned Queen's Counsel's view that this instant application does not fall under the rubric of the Norwich Pharmacal relief..."

[91] It seems to me that the judge was expressing the view that all three pre-conditions had been satisfied, including that which requires that the third party would need to have been mixed up in the relevant actions so as to have facilitated the alleged wrongdoing.

[92] The respondents have submitted that the appellant was mixed up in wrongdoing because HM's estate owns the majority of its shares and those are said to be the only asset in his estate.

[93] They have also submitted that Lourice, the auditor and the appellant have facilitated wrongdoing as they have been involved in causing the shares to be undervalued. At the outset, I will state that this submission is not convincing. The mere fact that the respondents are dissatisfied with the value that has been provided for the shareholding would not mean that Lourice, the auditor or the appellant are mixed up in or have facilitated the alleged wrongdoing by HM. The respondents seem to be arguing that there has been independent wrongdoing by those persons. However, what is required is that the appellant, against whom the order was sought, should be shown to have been mixed up in or to have facilitated the alleged wrongdoing by HM.

[94] I will, therefore, examine the question as to whether the appellant was mixed up in or facilitated the alleged wrongdoing by HM, because HM's estate owns the majority of its shares and those are said to be the only asset in his estate. In order to assess these arguments and review the decision of the judge, it is necessary to closely examine how the authorities have interpreted this pre-condition.

[95] In **Norwich Pharmacal**, the Customs and Excise Department was clearly mixed up in and facilitated the importation of the counterfeit compound.

[96] In **British Steel Corporation v Granada Television Limited**, Granada Television had broadcast a programme in which it quoted from a number of secret and confidential documents that belonged to British Steel. These documents had been delivered to the station by a person whose work with British Steel enabled him to have access to highly classified documents. British Steel successfully obtained an order

directing the station to disclose the name of the person who had provided them with the information. Again, the station was clearly mixed up in and facilitated wrongdoing.

[97] In **Ashworth Security Hospital v MGN Limited**, MGN had published information that it knew had been transferred to it in breach of confidence. Proceedings had been commenced against MGN claiming relief, additional to the disclosure of the identity of others involved in the breach of confidence.

[98] Lord Woolf CJ, at paragraph [26] of his judgment, explained that where a **Norwich Pharmacal** order is sought, the wrongdoing which is required is that of the person whose identity the claimant seeks to establish, and not that of the person against whom proceedings have been brought to acquire the relevant information. Insofar as the person from whom the information is sought is concerned, however, that person should have participated or been involved in the wrongdoing, even if this occurred innocently and in ignorance of the wrongdoing by the person whose identity it is hoped to establish (see paragraph [30] of the judgment).

[99] Paragraphs [33] - [37] of Lord Woolf CJ's judgment provide additional insight into the nature of the involvement required where an order is sought. He commenced by referring to the judgment of the Court of Appeal in the matter-

> "**[33]** The Master of the Rolls went on to conclude, in para 63:
>
> > 'The intermediary, knowing that the information had been obtained in breach of confidence, passed it to MGN, through Mr Jones. MGN,

> knowing that the information had been transferred in breach of confidence, published extracts from it. In these circumstances, claims for breach of confidence lie against MGN, the intermediary and the source.'"

[100] Lord Woolf CJ approved of the Master of Rolls' conclusion, and stated further:

> "**[34]** On the facts of the present case the Master of the Rolls is almost certainly correct in coming to this conclusion. However, for the purposes of the present appeal, as I have already explained, such a finding in favour of the authority is not necessary. It is sufficient that the source was a wrongdoer and MGN became involved in the wrongdoing which is incontestably the position. Whether the source's wrongdoing was tortious, or in breach of contract in my judgment matters not. **If there was wrongdoing then there is no further requirement that Mr Jones' and MGN conduct should also be wrongful. It is sufficient if, in the words of Lord Dilhorne in the *Norwich Pharmacal* case, at p 188C, that there was 'involvement or participation'.** As MGN published the information which was wrongfully obtained, the answer as to whether there was involvement or participation must be an emphatic yes.
>
> [35] **Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness**. The need for involvement, the reference to participation can be dispensed with because it adds nothing to the requirement of involvement, **is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.**
>
> [36] It is not the only protection available to the third party. There is the more general protection which derives from the fact that this is a discretionary jurisdiction which enables the court to be astute to avoid a third party who has become involved innocently in wrongdoing by another from being

> subjected to a requirement to give disclosure unless this is established to be a necessary and proportionate response in all the circumstances: see ***John v Express Newspapers*** [2000] 3 All ER 257, [2000] 1 WLR 1931. **The need for involvement can therefore be described as a threshold requirement. The fact that there is involvement enables a court to consider whether it is appropriate to make the order which is sought.** In exercising its discretion the court will take into account the fact that innocent third parties can be indemnified for their costs while at the same time recognising that this does not mean there is no inconvenience to third parties as a result of becoming embroiled in proceedings through no fault on their part." (Emphasis added)

[101] In **Mitsui & Co Limited v Nexen Petroleum UK Limited**, Lightman J considered whether the defendant was mixed up in or facilitated the alleged breach of what he had described in that matter as the "First Limb". At paragraph [39] he stated:

> "A further ground on which I would (if this were necessary) refuse the application would be the absence of evidence that the Defendant was mixed up in or facilitated the alleged breach of the First Limb. As it seems to me, the only available breach of the First Limb is solicitation (i.e. asking for or encouraging an offer or invitation to treat) and not the subsequent negotiation or provision of information after an unsolicited offer or invitation to treat has been received. There is no reason to believe that the Defendant was involved or mixed up in the suspected breach of contract and accordingly that the third condition for exercise of the Norwich Pharmacal jurisdiction is not satisfied."

[102] **Koo Golden East Mongolia v Bank of Nova Scotia and Others**, a decision of the Court of Appeal of England and Wales, also provides a useful perspective on this issue. As the facts are somewhat complicated, I have relied on the headnote of the report to relate them, even as I apologise for the unavoidable length of the quotation:

"The claimant deposited over three million grams of unrefined gold with the central bank of Mongolia pursuant to an agreement entered into under Mongolian law. Under the agreement the central bank was obliged to keep the gold in safe custody until the date of sale by the claimant to the central bank and the claimant was obliged to sell at least one million grams of the gold to the central bank by 25 December 2007, by delivery of a metal sale letter. Because of gold price fluctuations in the international market, and before receiving a metal sale letter from the claimant and allegedly without the claimant's consent, the central bank exported a portion of the gold for refinement abroad for the stated purpose of increasing the country's currency reserves. The claimant requested the return of the gold and indicated its willingness to repay the advance payment of 85% of the value of the gold made by the central bank at the time of deposit. The central bank responded by requesting the claimant to deliver the metal sale letter. The claimant declined and, believing that the refined gold was in the possession of the London branch of a Canadian bullion bank, issued proceedings in England against the bullion bank, its subsidiary and the central bank, claiming damages for tortious interference with and conversion of its property. The claimant subsequently accepted that the gold was not in the bullion bank's possession, although the bullion bank had credited a quantity of refined gold to the central bank's unallocated precious metals account, which was an account maintained by the bullion bank in the central bank's name recording the amount of precious metal which the bullion bank had a contractual obligation to transfer to the central bank. In an attempt to discover the whereabouts of the gold and any proceeds of sale, and whether it had any claims against third parties such as the unknown refiners, the claimant applied for an order against the bullion bank for disclosure of the central bank's accounts with it, asserting that by allowing credits to be made against the unallocated account the bullion bank had facilitated the central bank's wrongdoing and was therefore mixed up in the central bank's alleged tortious act. The judge granted the application and ordered the bullion bank to disclose various account statements and clearing records relating to the central bank.

On appeal by the bullion bank and on the questions whether the threshold requirements for relief were met, whether the central bank was entitled to immunity from suit under

> the State Immunity Act 1978[1], whether the bullion bank was its agent, and whether in those circumstances disclosure could or should be ordered —
>
> *Held*, (1) **that where the alleged tort involved dealing with the claimant's property without its consent, relief was in principle available against a person other than the alleged tortfeasor requiring him to disclose information about an account, held by him on behalf of the alleged tortfeasor, which contained the proceeds of sale of, or represented, the affected property (post, paras 37-38, 53, 54)**.
>
> (2) Allowing the appeal, that the claimant would not be entitled to the relief sought as against the central bank, since the central bank would be entitled to state immunity under the State Immunity Act 1978, …" (Emphasis added)

[103] Sir Anthony Clarke MR wrote the judgment of the court. At paragraph 33 of the judgment, he referred to particular circumstances concerning the bank. He wrote:

> "In the event, the evidence is that MongolBank does not have an allocated but only an unallocated account with the bank. The bank does not hold any gold for MongolBank and its obligations are purely contractual. The claimant wishes to know who the refiners were and who holds the gold. Mr Black recognises that the bank may not know who the refiners were but submits that it is likely to have information which will lead the claimant to the name of a gold clearing bank, of which I think there are five, which will have information which may lead to the whereabouts of the gold. It is, I think, likely that the bank does have such information which would take the claimant a step nearer the gold or the name of the refiner, even if the claimant may have to make further *Norwich Pharmacal* applications in the future."

[104] He then referred to the classic statement of the **Norwich Pharmacal** principle - see paragraph 34. Later at paragraphs 35 – 37, he wrote:

> "**35** Mr Fulton submits that that is not this case because the bank was not, 'mixed up with the tortious acts of others so as

to facilitate their wrong-doing'. He submits that the bank was not mixed up with the refining process or with the subsequent movement of the refined gold, if there was any such movement. The judge rejected that submission on the basis that it is too narrow. So would I. I do not think that Lord Reid intended to put it so narrowly.

36 Some of the other members of the house put it more broadly. For example, Lord Morris of Borth-y-Gest said, at pp 178-179:

> '**It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information. In all ordinary circumstances there would then be some proceedings in the course of which the machinery of the court would enable all relevant and admissible evidence to be obtained**.'

See also per Lord Cross of Chelsea, at pp 196-197.

37 It seems to me that, whereas here the alleged tort involves dealing with the claimant's property without its consent, *Norwich Pharmacal* relief should in principle be available against a person who holds an account which contains the proceeds of sale of the product, here the refined gold. **Indeed that would, to my mind, be a classic case for such relief. In the present case the account does not hold the proceeds of sale but (it appears) the quantity of gold which, in one sense at least, represents the refined gold. I agree with the view expressed by Lightman J** in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511, para 20 **that *Norwich Pharmacal* relief is a flexible remedy**. See also *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, per Lord Woolf CJ.

> **38** In these circumstances this is a case in which, in my opinion, *Norwich Pharmacal* relief is, in principle, available. However Lord Cross [2008] QB 717 Page 732 made it clear that this is a discretionary remedy. He said in *Norwich Pharmacal* [1974] AC 133, 199:
>
> > 'Then the court would have to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant.'
>
> I will return to the appropriate exercise of the discretion in a moment but for the reasons I have given I would not uphold the first ground of appeal." (Emphasis added)

[105] Eventually, the remedy was not granted on the ground of the state immunity of MongolBank as well as, among other things, that the court should be very reluctant to grant an order which "involves a breach of confidence as between a bank and its customer". The House of Lords did not grant leave to appeal the decision.

[106] In **Various Claimants v News Group Newspapers Ltd and another (No 2)** [2014] 2 WLR 756, several claimants, in order to strengthen their claim or to plead it fully, sought an order against the police who had information, based on their investigation, that the proprietor of a national newspaper had intercepted and listened to

their mobile telephone messages. Mann J, in granting the application, noted at the following paragraphs:

> **"38** Mr Tomlinson's reliance on the case comes when one reaches para 57 of the speech of Lord Woolf CJ. In that paragraph Lord Woolf CJ seemed, at p 2049, to leave open the possibility of further developments in jurisdiction:
>
> > 'The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised when it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.'
>
> **39**. I agree that that paragraph allows for the possibility of some development, but it does not allow for the possibility of a development which allows the jurisdiction to be invoked against a mere witness. **That much appears from the following paragraph in Lord Woolf's speech in which he comes back to the point that the respondent must have been 'involved, whether innocently or otherwise, in the wrongdoing'. What it does, however, in my view, is to allow the court to consider what 'involvement' is sufficient, without being trammelled by rigid concepts of participation or facilitation.** I do not accept, as I understand Miss Rose to have submitted, that the flexibility referred to was in relation to other areas of the principle than the 'participation/facilitation' area." (Emphasis added)

[107] In the more recent case of **Burford Capital Ltd v London Stock Exchange Group plc**, Baker J relied on the classical formulation of this pre-condition. He opined at paragraph 42:

"I think there is room for the view that in truth there is:

(i) but one strict pre-requisite (unless the cause of action issue creates a second, as to the nature of the wrongdoing that the claimant must be alleging), namely that **the *Norwich Pharmacal* defendant must have been mixed up in so as to have facilitated that which the *Norwich Pharmacal* claimant alleges to have been wrongdoing against him**; and

(ii) thereafter, a single question for the court, assessing and balancing all of the factors that bear upon it in any particular case, **namely whether justice requires that the defendant provide the assistance that the relief sought would compel him to provide, to further the end of righting a facilitated wrong**." ("Emphasis added")

[108] The authorities establish that the pre-condition that the person from whom the information is sought had to be mixed up in or to have facilitated the wrongdoing, has evolved to a minimum requirement of involvement. Thus, the individual against whom the order is sought should, at the very least, have become involved in some transactions or arrangements as a result of which he has acquired the required information. Furthermore, in certain circumstances, an individual may become actively concerned if they can assist in locating the whereabouts of assets which are in issue in the proceedings. In such circumstances, the individual could not be seen as a 'mere witness'.

[109] The respondents relied on **Koo Golden East Mongolia v Bank of Nova Scotia and Others**, and argued that their application was analogous to a tracing claim, where an applicant seeks to locate assets, and a person who has the asset or proceeds of its sale could be said to have been mixed up, or involved in alleged wrongdoing. It is my

view that the analogy is entirely appropriate in the instant case. The appellant is in the analogous position of the bullion bank in **Koo Golden East Mongolia v Bank of Nova Scotia and Others,** where the bank held an account containing, not the gold itself, but possibly proceeds of the sale of the missing gold. In the instant claim, there is a level of 'tracing', in an informal sense, which the respondents have shown is required to verify the true value of the 51% shareholding which HM disposed of in his last will and testament. The appellant either has the information or has the ability to access and provide the information needed by the court for a just and fair determination of the claim. As a consequence, I believe that it was open to the judge to have found that all three pre-conditions had been satisfied for the grant of a **Norwich Pharmacal** order.

Issue (v): whether the appellant was able or likely to be able to provide the information necessary to enable HM to be sued (grounds (d) and (e))

[110] At paragraph [30] of her judgment, the judge, in dealing with whether the appellant is able or likely to provide the necessary information, accepted the respondents' submission that ordering the appellant to provide the information, was the only practicable means of obtaining the essential information. It is my observation that the judge had regard to the fact that the respondents had previously requested the information from Lourice, who refused to give the information on the basis that she was not privy to it.

[111] There is no doubt, in my view, that the appellant would be privy to the information. Given the legal and accounting obligations to maintain and preserve appropriate records

of the appellant's accounts, it is reasonable to expect that it is in possession of the requisite financial information or is in a position to acquire same. I find that the judge did not err in this regard.

Issue (vi): whether in the interests of justice, this is an appropriate case in which to apply the *Norwich Pharmacal* principles and grant the order sought (Grounds (a) and (g)).

[112] This issue would touch on the exercise of the judge's discretion. The judge considered potential disadvantages of the grant of the order, the absence of other practicable means of obtaining the essential information, the purpose of the relief, which is to do justice, any costs which would be faced by the appellant in providing the information and concerns as to whether the information could be leaked into the public domain. The judge ordered that the appellant's costs in the application, and any expense incurred in providing the information, should be borne by the applicant (see paragraph [43] of her reasons).

[113] In addition, the respondents were required, through their attorney -at - law, to give an undertaking that the information disclosed would be used solely for the purpose of assessing the true value of HM's net estate, unless the court gives permission for it to be used for another purpose (see the order made at paragraph [44] (3) of the reasons).

[114] These considerations were all appropriate. The judge sought to ensure that the grant of the order would not have been oppressive, excessive, onerous, unjust or unfair. In any event, the appellant had not filed any evidence on which it relied to substantiate

that allegation. The issue was only raised in their arguments. The order for the appellant to disclose the requisite information was properly made. As such grounds (a) and (g) fail.

Conclusion

[115] It was open to the judge to have found that all of the pre-conditions to the grant of the **Norwich Pharmacal** order were satisfied.

[116] In addition, it has not been shown that she erred in law in the exercise of her discretion.

[117] As a result, the grant of the **Norwich Pharmacal** order should be upheld.

As a result, the grant of the **Norwich Pharmacal** order should be upheld.

[118] I therefore propose that the following orders be made by the court:

1. The appeal is dismissed.

2. The order made by Palmer Hamilton J (Ag) on 2 February 2018 is affirmed.

3. The appellant shall, on or before 24 November 2020, disclose the following:

    a. Copies of its audited or draft financial statements for the years 2015 and 2016;

b. All documents pertaining to the income generated or derived by the firm as at 2015 and 2016; and

c. All documents pertaining to the debts owed to the firm as at 2015 and 2016.

4. The appellant and respondents shall, on or before 4 December 2020, file written submissions on the issue of costs of this appeal.

MCDONALD-BISHOP JA

ORDER

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