IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 76 OF 2018 (IKJ)

BETWEEN

DISCOVER INVESTMENT COMPANY

Applicant

-and-

(1) VIETNAM HOLDING ASSET MANAGEMENT LIMITED

First Respondent

(2) SAIGON ASSET MANAGEMENT CORPORATION

Second Respondent

IN CHAMBERS

Appearances:	Mr Ardil Salem of Carey Olsen on behalf of the Applicant
	Ms Jennifer Colegate and Ms Farrah Sbaiti on behalf of the 1st Respondent ("VNHAM")
	Mr David Lee and Ms Heather Froude on behalf of the 2nd Respondent ("SAMC")
Before:	The Hon. Justice Kawaley
Heard:	On the papers
Final submissions:	4 January 2019
Draft Judgment Circulated:	26 February 2019
Judgment Delivered:	7 March 2019

HEADNOTE

Application for costs by Norwich Pharmacal Order applicant-usual rule that applicant pays respondent's reasonable costs of obtaining Order-respondents appeared and unsuccessfully opposed grant of Norwich Pharmacal Order-whether grounds made out for displacing usual rule that applicant should pay respondents' costs-relevance of respondents' statutory confidentiality obligations under the Confidential Information Disclosure Law 2016 and contractual obligations under Swiss law

RULING ON COSTS

Background

1. On November 5, 2018 I delivered a reserved judgment declaring that the Applicant was entitled to a Norwich Pharmacal Order ("NP Order") following a hearing in which both of the Respondents, VNHAM and SAMC, participated. Paragraph 3 of the NP Order provided that in the absence of agreement on costs, the parties should be entitled to file written submissions. It was implicitly agreed that the Court should determine the issue of costs on the papers.

2. The essence of the substantive hearing to which the present costs application relates was described in the opening paragraphs of this Court's Judgment dated November 5, 2018 herein:

> "*4. The application was made on the explicit basis that although Discover had a good arguable case that wrongdoing had occurred it was not at this point known whether or not the information sought would in fact justify the commencement of proceedings against MW. Although there was no basis for believing that the Respondents were themselves guilty of any wrongdoing, Discover expressly reserved the right to deploy the information in proceedings against the Respondents if required.*
>
> *5. The Respondents' position was not to positively oppose the application but rather to raise such principled objections as they could identify with a view to ensuring that they did not in substance consent to the making of an Order which ought not properly to be made. VNHAM, it appeared to me, had received some encouragement to adopt this stance as MW had apparently threatened legal action for breach of the confidentiality obligations in one or more of the contracts which Discover was seeking to obtain copies of. The contract sought from SAMC is also believed to be subject to similar*

confidentiality obligations governed by Swiss law. The principles governing the grant of Norwich Pharmacal relief being essentially common ground, issue was joined as to whether or not:

> *(a)Discover had demonstrated that the Order sought was necessary in the requisite legal and factual sense;*
>
> *(b)assuming this Court possessed general jurisdictional competence to make the Order, the scope of the Order sought was sufficiently proportionate to justify exercising the jurisdiction on the facts of the present case; and*
>
> *(c)if an Order was granted, it should be on Discover's undertaking not to use the information obtained in proceedings against the Respondents without further leave of the Court."*
>
> *6. Issue was also joined on a fourth, important ancillary matter. VNHAM contended that it could not properly be required to produce the information sought without directions being given under the Confidential Information Disclosure Law 2016 ("CIDL"). Discover and SAMC contended that CIDL did not apply. This was a difficult point not directly addressed by previous authority which was dealt with by counsel in an economical way. Counsel understandably focussed their effort on a detailed analysis of the Norwich Pharmacal jurisdiction, and their submissions greatly assisted the Court."*

3. The result of the hearing may be summarised as follows:

(a) it was common ground that the Applicant needed to establish three conditions to obtain the NP Order: (1) good grounds for suspecting that it was the victim of wrongdoing, (2) necessity for the information sought in terms of both (a) a legitimate purpose and (b) a proportionate request, and (3) that the respondent was "mixed up" in the wrongdoing so as to be more than a mere witness;

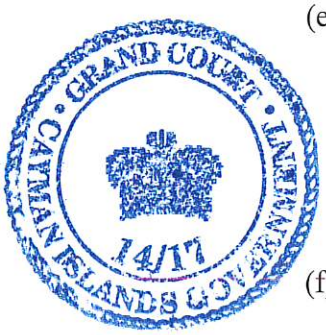
(b) the Respondents only seriously challenged and/or tested whether limb 2(a) and 2(b) were satisfied;

(c) the Applicant succeeded in establishing that limb 2(a) was made out and the Respondents succeeded in establishing that limb 2(b) had not been made out and

the scope of relief sought was substantially narrowed in the form of Order granted;

(d) the contested hearing assisted the Court to clarify the necessity limb of the *Norwich Pharmacal* jurisdiction after a careful review of authorities which could reasonably have been viewed as being somewhat inconsistent or unclear, as applied to the facts of the present case;

(e) the contested hearing also assisted the Court to clarify the uncertain state of the law and practice as to applications under the Confidential Information Disclosure Law (2016 Revision) ("CIDL"), and (through establishing the existence of jurisdiction to grant the NP Order, avoided the need for an additional freestanding application by the Respondents under CIDL;



(f) I expressed no provisional view on costs in the Judgment, merely stating: "*I shall hear counsel, if required, on the terms of the Order*".

4. The factual and legal matrix of the present case (with the traditional Norwich Pharmacal jurisdiction interacting with CIDL in its post-2016 form) was not apparently illumined by any local authorities on the ancillary costs jurisdiction. The first of the English authorities to which the parties referred on the question of costs provides very persuasive guidance indeed.

An overview of the authorities

Totalise-v-The Motley Fool [2002] 1 WLR 1233

5. The facts of this case are closest to the facts of the present case. The applicant applied on notice to the respondent for *Norwich Pharmacal* relief. The respondents (M and I) hosted websites on which defamatory material was posted and the applicant sought information about the identity of Z to support a potential claim against Z. It was accepted that the respondents were innocent of wrongdoing.

6. The respondents participated to some extent in the hearing, with M not appearing through counsel and adopting an entirely neutral position and I submitting that no order should be made. In responding to a letter before action, I had contended that it could not supply the requested information because of its private confidentiality obligations and its statutory obligations under the Data Protection Act 1998 (UK). The judge held that the respondents should pay the

applicant's costs because this was not a standard *Norwich Pharmacal* situation and the respondents ought to have simply complied with the request for information. This decision was reversed on appeal.

7. The English Court of Appeal (Aldous LJ) firstly held that the proceedings were not adversarial, would not ordinarily be opposed and that it was appropriate for the respondents to insist on a Court order being made rather simply complying with the information request based on their own view of its merits:

> *"22 We accept that the court has a discretion as to the order for costs when deciding a Norwich Pharmacal application, but such applications are not truly ordinary adversarial proceedings as the defendant, whether it be a web provider, Customs and Excise, a telephone company or a bank, does not normally resist the order being made. Such defendants have become mixed up in tortious acts and are only concerned that duties and rights, such as duties of confidence and legitimate interests of privacy, are considered by the court. It is for the applicant to satisfy the court that the order should be made, not for the defendant to take a view which could be wrong. We believe that that is emphasised by an analysis of the parties' submissions on the effect of the Data Protection Act 1998."*

8. Next, the Court identified the difficulty of fairly assessing whether disclosure was appropriate when the party's whose confidence and privacy rights were in issue was not before the Court on the *Norwich Pharmacal* application:

> *"25 In a case such as the present, and particularly since the coming into force on 2 October 2000 of the Human Rights Act 1998, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life, especially when that individual is in the nature of things not before the court: see the Human Rights Act 1998, section 6, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, articles 10 and (arguably at least) 6(1). There is nothing in article 10 which supports Mr Moloney's contention that it protects the named but not the anonymous, and there are many situations in A which—again contrary to Mr Moloney's contention—the protection of a person's identity from disclosure may be legitimate.*

26 It is difficult to see how the court can carry out this task if what it is refereeing is a contest between two parties, neither of whom is the person most concerned, the data subject; one of whom is the data subject's prospective antagonist; and the other of whom knows the data subject's identity, has undertaken to keep it confidential so far as the law permits, and would like to get out of the cross-fire as rapidly and as cheaply as possible. However, the website operator can, where appropriate, tell the user what is going on and to offer to pass on in writing to the claimant and the court any worthwhile reason the user wants to put forward for not having his or her identity disclosed. Further, the court could require that to be done before making an order. Doing so will enable the court to do what is required of it with slightly more confidence that it is respecting the law laid down in more than one statute by Parliament and doing no injustice to a third party, in particular not violating his convention rights."

9. Aldous LJ further noted that it would not always be necessary for an innocent third party to actually appear in Court to ensure that a *Norwich Pharmacal* application was properly made, but that the general rule ought to be that the applicant pays the innocent respondent's costs:

> "*29...In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.*"

10. The crucial part of the English Court of Appeal's judgment is that which sheds light on the sort of circumstances in which it will be likely appropriate for the respondent to appear in court at the hearing. Aldous LJ opined as follows:

> "*30 The court when considering its order as to costs after a successful Norwich Pharmacal application should consider all the circumstances. In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. <u>There may be cases where the circumstances require a different order, but we do not believe they include cases where: (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal</u>*

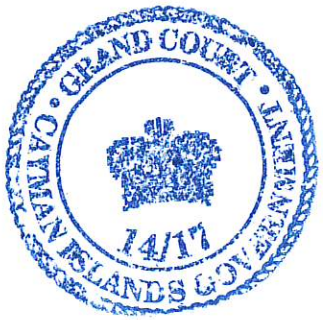
obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntarily giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another." [Emphasis added]

11. Categories (a) to (e) of Aldous LJ's examples would all appear to be potentially applicable to the Respondents in the present case.

JSC BTA Bank-v-Ablyazov [2015]1 WLR 1547

12. This case considered the circumstances in which the conduct of a third party ordered to supply information in aid of the applicant's substantive claim against an alleged wrongdoer justified a departure from the usual rule that the applicant should pay the costs of complying with the order. The focus was on a party's conduct relating to compliance with a *Norwich Phamacal* order already made, not the conduct of a party opposing the making of the order. At first blush, this case deals with a somewhat different costs issue to the precise issue which arises in the present case. Flaux J crucially held as follows:

> "*117 Taking account of both the failure to engage in good faith with the disclosure process under the Norwich Pharmacal order and the extent to which Mr Tyschenko actively assisted Mr Ablyazov to move his assets around and exercising the discretion in relation to costs anew as the material changes of circumstances entitle me to do, it seems to me the appropriate and just order is as follows. Given that some of the material in his affidavits will be of limited assistance to the bank, I consider Mr Tyschenko should be entitled to recover 25% of the costs of preparing those affidavits. So far as the two days of cross-examination are concerned, it seems to me that he should not be entitled to recover any of his costs or expenses, but on the contrary, that he should pay the bank's costs of the cross-examination exercise. To that extent the bank's application succeeds.*"



Cartier International AG-v-British Telecommunications Plc [2018] 1 WLR 3259

13. This case concerned the costs of compliance with an injunction obtained by the applicant against innocent third parties to a trade mark enforcement claim, which took the form of website blocking orders. Although made under European law, the UK Supreme Court held that the

orders were analogous to equitable relief against innocent third parties such as *Norwich Pharmacal* orders. The *Motley Fool* was cited with approval. Lord Sumption (with whom the rest of the Court agreed) reached the following conclusions on compliance and litigation costs respectively:

> "*36 It follows that in principle the rightholders should indemnify the ISPs against their compliance costs. That is subject to the bounds which EU law sets on the power to grant relief. But there is no reason to believe that these bounds would be exceeded by such an indemnity. The indemnity must be limited to reasonable compliance costs. The evidence is that the compliance...*
>
> *37 It is critical to these conclusions that the intermediary in question is legally innocent...*
>
> *38 Intermediaries very rarely resist website-blocking orders, although they do insist that the claimant should obtain an order in order to protect themselves against regulatory restrictions on interfering in network communications, and complaints by third parties on various grounds. The practice in such cases should normally be to award them their costs of the action. In this case, Arnold J awarded costs against the ISPs because they had made the litigation a test case for the jurisdiction to make the order at all and had strenuously resisted the application. In the circumstances, he was plainly entitled to exercise his discretion concerning the costs of the litigation in the way that he did.*"

14. The finding that the judge was entitled to deprive the innocent third parties of their costs because "*they had made the litigation a test case for the jurisdiction to make the order at all and had strenuously resisted the application*" illustrates the sort of judicially recognised circumstances in which the usual *Norwich Pharmacal* costs rule may be displaced.

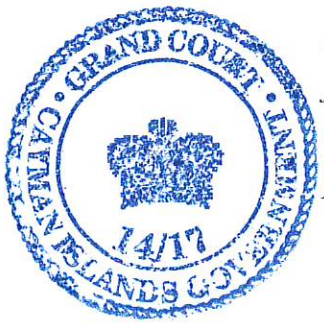
Popov-v-Deloitte LLP [2018] EWHC (QB) 2326

15. This case concerned costs incurred in commencing proceedings for *Norwich Pharmacal* relief which were discontinued because a party connected to the respondent disclosed the relevant information in an arbitration so that no order was actually ultimately sought. Each party sought its costs. Leigh-Ann Mulcahy QC (sitting as a Deputy High Court Judge) summarised the governing costs principles as follows:

"15. So, the general rule is that this is not treated as usual adversarial litigation where costs follow the event. Normally, the costs of the person against whom a Norwich Pharmacal order is made will be paid by the person seeking the order who can then claim them back from the alleged wrongdoer in any proceedings brought arising out of the disclosure. There are, however, exceptions to that general rule, one is where the person against whom the disclosure is sought is implicated in the wrongdoing, whether that be criminal wrongdoing, tortious or other wrongdoing, as one can see from the Totalise case at para. 31 and, indeed, as it is illustrated by the JSC case where the respondent to the Norwich Pharmacal application, Mr Tyschenko, was ordered to pay costs to the claimant because he was shown to be implicated in the wrongdoing at issue in that case. Another exception involves considering whether it was reasonable to oppose the application (see Totalise para. 14). These examples are not, of course, exhaustive. It is a matter for the discretion of the court in the particular circumstances of the case and, as is made clear in the JSC case at para.82, there may be a gradation in relation to the order made as to costs. Again that case confirms that the exceptions to the general costs order are not confined to a situation where the respondent is implicated in the alleged wrongdoing."

16. The approach adopted by the judge in deciding whether the general costs rule should be displaced was to consider whether the respondent had during any relevant period during the action acted unreasonably:

"21. I turn now to Deloitte LLP's response to, and conduct in relation to, the application of whether it was reasonable since this is a factor which may displace the general rule as to costs. This is, of course, a matter for the discretion of the court. It seems to me there are effectively three periods. Period one, which is pre-action and up to the end of November 2017. Period two, between 4 December 2017 when the High Court Stay Application was issued and 14 March 2017 when it was determined; and Period three, which is the period thereafter up to and including today. In my view, given that the High Court Stay Application and the evidence in relation to it and the correspondence relating to it, are already the subject of the costs order made by Master McCloud in favour of the claimant and against the first defendant, this is likely to comprise the vast majority of if not all of the costs of Period two. The issues that I am determining relate principally, if not exclusively, to the costs in Period one and Period three."



17. The judge found that the respondent should bear its own costs, but not pay the claimant's costs, for the third period for the following reasons:

> "*25. In light of those factors I have come to the conclusion that, in the particular circumstances of this case, the general rule should apply in that the claimant should pay the first defendant's costs of the claim, excluding the costs of the High Court stay, which were the subject of Master McCloud's order, up until 23 May 2018, that is seven days after the letter from the claimant's solicitors dated 16 May 2018. I consider by that point Deloitte LLP could and should have responded stating that all disclosable documents would be disclosed in the arbitration which would then have made the further preparation for the hearing unnecessary. I consider that from that date onwards Deloitte LLP should not recover its costs...*
>
> *28. Period three is the period of time during which I regard Deloitte LLP as having acted unreasonably. As I have said, it should have responded to the letter of 16 May 2018 within a reasonable time. It would appear that the decision had already been made to disclose everything that was the subject of this claim in the arbitral proceedings (indeed, there was a suggestion from Mr Burns QC, on behalf of the first defendant, that that decision may have been made as long ago as December 2017). But, in any event, it had clearly been made by that point in time and Deloitte LLP could, and should simply have said that this was the position. Again, I do not consider that it acted in bad faith, and I do not consider that this is a situation akin to any kind of implication in wrongdoing such that it would justify an order that the defendant pay the claimant's costs.*" [Emphasis added]

18. Finally, the judge considered that this approach was fair because the applicant ought in principle to be able to ultimately recover its costs incurred in obtaining information of wrongdoing which were not paid by the respondent from the wrongdoer in any subsequent substantive proceedings:

> "*32. The costs of the claim are to be paid by the claimant to the first defendant, Deloitte LLP, up to 23 May 2018, but excluding the costs of the High Court Stay Application, with no order as to costs for the period thereafter on the basis that Deloitte LLP will not recover its costs for that period, but it will remain open to the claimant to seek its costs (including any it has to be pay to Deloitte LLP) against any alleged wrongdoer in any future proceedings.*"

19. This case adopts the following principles which are potentially relevant to the present costs application:

(a) the general rule is that the applicant should pay the respondent's costs in relation to obtaining a *Norwich Pharmacal* order; and

(b) the respondent's usual entitlement to its costs should only be displaced to the extent that it has acted unreasonably.

The parties' respective positions

The Applicant

20. The Applicant firstly made it clear that the present costs application did not relate to compliance costs at all. Instead the costs sought related to:

> "*7…(a) the costs which the Applicant incurred in preparing the Second Affidavit of Mr Zankel, in response to those filed on behalf of the Respondents;*
>
> *(b) the costs which the Applicant incurred in preparing for the Hearing, which was heavily contested by the Respondents, who both raised objections in their respective skeleton arguments that were ultimately rejected by the Court; and*
>
> *(c) the costs of attending the Hearing, which in light of the resistance put forth by the Respondents required lengthy oral submissions that took up a full day of Court time, a significant portion of which was spent dealing with the ill fated objections raised by the Respondents to the disclosure which the Honourable Judge ultimately required the Respondents to provide in the Order.*"

21. Reference was made to the following Grand Court rule. Order 62 rule 4(5) provides:

> "*If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*"

22. After referring to the authorities cited above, the task for the Court was defined in the following way:

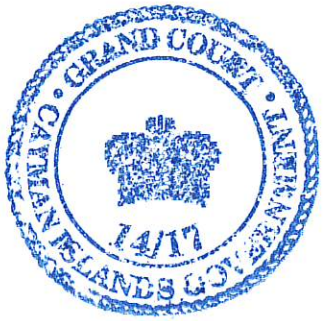
"22. The key issue for the Court to consider in determining the appropriate order to make in respect of the Application Costs is accordingly the conduct of the Respondents in their opposition to it."

23. The core complaints made against the 1st Respondent, VNHAM, were set out in the Applicant's Written Submissions as follows:

"24. In its affidavit evidence and skeleton argument the First Respondent:

(a) raised factual issues as to the content of conversations to which the deponent was not in fact a party, which ultimately were irrelevant to the issues which the Court had to determine, but which sought to call into question the veracity of Mr Zankel's and Mr Funaki's sworn affidavit evidence;

(b) sought to limit the documents which would be encompassed by the Order to that which were necessary to plead a case against Mr Winkler. This purported limit was flatly rejected by the Court in the Judgment, and ought never to have been raised. It required time to be spent dealing with it in circumstances where it was a spurious objection; and



(c) sought to suggest that the Order should not be granted because the Applicant had other potential sources of documents which had not been explored. This was also flatly rejected in the Judgment, yet required time and argument to be devoted to it.

25. It was of course open to the First Respondent to adopt a neutral position in respect of the Application. It could have adopted the sensible course indicated in the Motley Fool case itself, by inviting Mr Winkler, the target or the prospective claims in respect of which the Norwich Pharmacal disclosure was being sought, to make such objections as he had to make to disclosure and placing them before the Court, yet gone no further.

26. As it happens, Mr Winkler, of his own volition wrote to the First Respondent and made his position clear – including submitting several affidavits from former directors of the Applicant apparently in support of his position. Other than putting these matters before the Court for the purposes of the Hearing (which may not have necessarily required the First Respondent to send counsel to attend), nothing more was required of the First Respondent."

24. As regards the conduct of the 2nd Respondent, SAMC, the following complaints were made:

"31. In its skeleton argument the Second Respondent:

(a) invited the Court to dismiss the application in its entirety. Of course, the Court declined this invitation and granted the Order;

(b) suggested that there was no relevant wrongdoing sufficient to trigger the Norwich Pharmacal jurisdiction vis-à-vis the Second Respondent. Put differently, the Second Respondent argued that there was no relevant wrongdoing in which it was involved. This was quite simply, misconceived, and ultimately abandoned by the Second Respondent's counsel at the Hearing;

(c) argued that the Application should be refused because the documents sought were not required to bring proceedings and that the Applicant already had sufficient material to plead its claim. This was rejected by the Court, which granted the Order;

(d)suggested that the Second Respondent was a mere witness, such that it had no obligation to provide documents under the Norwich Pharmacal jurisdiction. Again, the fact that the Order was made is a flat rejection of this argument;

(e) suggested that the fact that the information sought was subject to an obligation of confidence meant that there was a freestanding, discretionary basis upon which the Court ought to refuse the Application. This was summarily rejected in strident terms by the Court; and

(f) argued that the Application was an abuse of process, and ought to be dismissed. It was further suggested that the Applicant had 'grievously misunderstood the conditions required for and the relief available in the jurisdiction that it seeks to invoke'. This was a misconceived, confrontational suggestion that was ultimately proven to be incorrect.

32. In common with the First Respondent, it was open to the Second Respondent to adopt a truly neutral stance suggested at paragraphs 24 to 26 above. Instead, the Second Respondent objected vigorously to the Application, and notwithstanding the misconceived nature of many of the arguments made on its behalf, they did still require the Applicant to incur costs in preparing itself to deal with them. These unnecessary costs ought to be visited upon the Second Respondent."

25. These submissions may be distilled into the following propositions: (a) it was not necessary for the Respondents to participate in the hearing at all, and (b) the usual costs follow the event rule should accordingly apply. Indeed, it was expressly submitted that:

> "*37...The stance taken by the Respondents in this Application made the proceedings adversarial in nature. It accordingly calls for an application of the ordinary rule for costs of adversarial proceedings. This could have been avoided by the Respondents if they had adopted a truly neutral stance, but they chose not to do so.*"

26. It was argued that the Respondents could have sought to agree a narrower scope of Order but instead "*chose the path of most resistance*" (paragraph 38). In addition, as regards SAMC, the following further submissions were made:

> "*35. In circumstances where it appears that the Second Respondent enjoys the benefit of an indemnity from Mr Winkler, the alleged wrongdoer, in respect of the Application Costs, it is appropriate for the Court to order that it should pay the Applicant's costs and call on the indemnity for recompense (if it has not in fact already done so, which it should confirm to the Court).*
>
> *36. The presence of the indemnity also does raise significant questions which it is incumbent upon the Second Respondent to answer, as to whether it has called on the indemnity in respect of the Compliance Costs. If it has done so, and made recoveries under it, then it should not look to the Applicant for recovery of them on any view, notwithstanding the agreement of the Applicant to meet them.*"

27. In its Reply Submissions, the Applicant notes that no response has been forthcoming to its request for information as to whether or not SAMC has called upon its indemnity. It is also argued that indemnity costs may only be awarded in the limited circumstances prescribed by Order 62 rule 4(11).

VNHAM's Submissions

28. VNHAM invoked the costs principles adopted in the cases considered above. On the critical question of whether it had acted unreasonably, the following central submissions were made:

> "*14.The Applicant seeks to suggest that the general principle should not apply in this case for the reason that the conduct of the First Respondent effectively took the Application outside the "non-adversarial dynamic". This is a mischaracterisation of*

the position adopted by the First Respondent which, as set out in the First Affidavit of Mr Ezra Vontobel (Vontobel 1), was placed in the invidious position of being caught between the interests of the Applicant, and the legal rights of DAC due to the obligation of strict confidentiality owed by VNHAM under Swiss law.

15. VNHAM was faced with the very real prospect of having proceedings commenced against it by Mr Winkler / DAC. VNHAM acted reasonably in seeking to ensure that it was able to disclose documents that Discover appeared entitled to, without itself potentially committing a breach of Swiss law and exposing itself to proceedings in Switzerland...

17...VNHAM did not oppose relief being granted, but disputed the wide-ranging disclosure in the form of the draft Order. VNHAM adopted the position that the Court should make an order that was confined to what was necessary to enable it to determine whether or not it has a viable claim in respect of Mr Winkler's suspected wrongdoing...

34. The suggestion that the concerns of VNHAM relating to the application of CIDL could have adequately have been addressed to the Court in writing is simply wrong. Quite clearly the Application required the Hearing and it would not have been sufficient for the Application to be determined on the papers. Reverting the issue of CIDL to the Court separately would not have served to ventilate the legal issues relevant to the Court's determination as to the effect of Norwich Pharmacal applications and their relationship with CIDL. Taking such an approach would not have resulted in the saving of time nor [sic] *costs.*"

SAMC's submissions

29. SAMC also invoked the costs principles adopted in the cases considered above. On the critical question of whether it had acted unreasonably, the following central submissions were made:

"*26. It is submitted that the Second Respondent has acted reasonably throughout. In particular:*

(a) In an attempt to assist the Applicant without the need for the matter to be brought before the Court, the Second Respondent sought the consent of the Mr Winkler to waive the confidentiality provisions shortly after the Summons was received. That consent was refused and the confidentiality provisions insisted upon

(b) The Second Respondent provided detailed information by way of affidavit evidence prior to the Hearing setting out the full extent of its relationship with Mr Winkler as far as it was able to without breaching the confidentiality provisions.

(c) As set out above, the Second Respondent considered that the information sought by the Applicant was not necessary for its stated purpose of pleading its claim against Mr Winkler and that the Draft Order was so broad that there it had a real doubt as to whether it, therefore, went beyond the Norwich Pharmacal jurisdiction. Accordingly, as noted by the Honourable Court, the Respondents' position was not to positively oppose the application but rather to raise principled objections with a view to ensuring that they did not in substance consent to the making of an order which ought not properly to be made.

(d) The Second Respondent notes and accepts that the Honourable Court was able to discern a wider purpose on the Applicant's behalf of investigating its claim against Mr Winkler. Nevertheless, the arguments put forward by the Respondents on necessity were clearly of significant value to the court in determining its approach to the appropriate scope of the Order. In that regard it should be noted that the Honourable Court has held, unequivocally, that the Draft Order sought by the Applicant was too broad and that it was, therefore, appropriate to remove the majority of categories of documents sought by the Applicant. In addition to this, the Court narrowed the scope of the affidavit sought by the Applicant and limited the temporal scope sought by the Draft Order.

(e) The Second Respondent has fully complied with the Order in disclosing all documents and information within its scope. Indeed, the Second Respondent has gone beyond the terms of the Order to provide explanatory material connecting the contracts disclosed to the payment information disclosed as it considered that the disclosed material would be open to misinterpretation without that explanatory material."

30. As regards the question of whether or not SAMC had recourse to its contractual right of indemnity, it was submitted that:

> "*33…the Second Respondent accepts and agrees that it should not be able to make any double recovery. Nevertheless, the potential existence of a theoretical means for the Second Respondent to recover any of its costs does not remove the Applicant's primary liability for these costs. Should the Applicant bring a claim against Mr Winkler, it would of course be open to it to seek recovery of these costs from Mr Winkler.*"

31. Finally, it was submitted that "reasonable costs" in the *Norwich Pharmacal* context entitled the Respondents to indemnity costs so that they would not be left "*out of pocket*". Reliance was placed on the following passage in Lord Sumption's judgment in *Cartier International AG-v-British Telecommunications Plc* [2018] 1 WLR 3259 where the following passage in Lord Neuberger's judgment in *Miller Brewing Co v Mersey Docks and Harbour Co* [2004] FSR 5 (at paragraph 30) was cited with approval :

> "*The logic behind that general rule is that, where an innocent third party has reasonably incurred legal costs to enable a claimant to obtain relief, then, as between the innocent third party and the innocent claimant, it is more unjust if the innocent third party has to bear his own legal cost than it is for the innocent claimant to pay them. After all, it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket.*" [Emphasis added]

32. VNHAM in its Submissions on Costs cited the same passage by way of supporting the general principle as to the incidence of costs without seeking to suggest that it supported an indemnity basis of taxation.

Findings: legal principles applicable to the costs of opposed Norwich Pharmacal applications

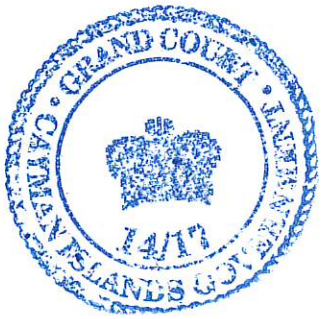
33. It was essentially common ground that the general rule in relation to the costs of *Norwich Pharmacal* applications is that they are not ordinarily regarded as adversarial proceedings so that the usual 'costs follow the event' rule does not apply. This is the position only in so far as the respondent to the application is not the alleged wrongdoer, or not alleged to be a wrongdoer when the relevant application is made. This conclusion is supported by all of the authorities to which counsel referred. To the extent that the Applicant's counsel placed reliance on Order 62 rule 4(5), I find that the non-adversarial character of the present application constitute grounds for displacing the usual rule which applies to adversarial proceedings.

34. It was also essentially common ground that, if costs did not 'follow the event', the central issue for determination was whether or not the Respondents should be deprived of the costs award to which they would otherwise be entitled because they acted unreasonably in relation to the application which resulted in the granting of the NP Order. The local rule which supports this principle is Order 62 rule 11, which provides:

> *"(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party."*[1]

35. The most helpful general guidance as to the types of consideration which may make it reasonable to mount opposition to a *Norwich Pharmacal* application which ultimately succeeds is found in *Totalise-v-The Motley Fool* [2002] 1 WLR 1233 where Aldous LJ opined as follows:

> *"30 The court when considering its order as to costs after a successful Norwich Pharmacal application should consider all the circumstances. In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. There may be cases where the circumstances require a different order, but we do not believe they include cases where: (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntarily giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another."* [Emphasis added]



36. This guidance is particularly useful because it was provided in a case which, like the present one, involved a collision between two competing legal policy principles. On the one hand, there is the desirability of parties innocently mixed up in wrongdoing producing evidence which may help the victim of wrongdoing pursue a legal claim for appropriate relief. On the other hand, when parties hold potential information about wrongdoing subject to statutory and/or contractual duties of confidence owed to the alleged wrongdoer, those conflicting privacy rights may only properly give way if the grounds for making a valid *Norwich Pharmacal* order are actually made out. These principles will perhaps have greater general practical significance

[1] This appears to be recognised as a rule of general application despite the heading "*Personal liability of attorney for costs*". The rule confers the discretion to require the culpable party to either bear his own costs or to pay his opponent's costs.

under Cayman Islands law than under English law, because the preponderance of *Norwich Pharmacal* applications are likely to involve information held by professional service providers under both statutory (CIDL) and contractual duties of confidence.

37. It is important to appreciate that the availability of these broad circumstances in which a respondent may potentially be regarded as having acted reasonably in opposing a *Norwich Pharmacal* order is always subject to more detailed scrutiny in each case. An application for such relief ought not to be allowed without more to deliver a 'free lunch' to respondents who choose without good cause to oppose a *Norwich Pharmacal* application. Accordingly in my Judgment in the present case, having considered whether an application for directions under CIDL was required in every case to which the Law applied (as was arguably the case), I held that no separate application was required for permission to disclose information required to be produced pursuant to a *Norwich Pharmacal* order (paragraphs 84-87). In future cases this potential justification for attending court will not generally be available.

38. In an unrelated subsequent case heard shortly before the filing of the present costs submissions had been completed, *Re XYZ Ltd-v- Genesis Trust & Corporate Services Ltd*, FSD 226 of 2018 (IKJ), Judgment dated February 12, 2019 (unreported), a *Norwich Pharmacal* order was granted ex parte without notice and without any participation by the respondent in the relevant hearing. I was invited by counsel for the applicant to provide further guidance as to the circumstances in which an application under CIDL was required. I held:

> "*27. In summary, the statutory defences under section 3 will in most cases be available where a respondent is able to demonstrate that he complied with what appeared to be a lawful demand to produce confidential information, in cases where client consent cannot be obtained. The need to seek directions under section 4(2) should arise only in exceptional circumstances, even where consent for disclosure cannot be obtained. The most obvious examples are:*
>
> *(a) cases where on the face of the order or other demand for the production of protected material, it appears that the order ought <u>not</u> to be made;*
>
> *(b) cases where, having regard to the unusually sensitive nature of the relevant information, the respondent considers that special protective measures are required in relation to the way in which the information is deployed which the applicant is unwilling to agree; and/or*

(c) cases where the respondent has properly sought consent to produce the confidential information from the person to whom the duty of confidence is owed, and that person has either:

(i) threatened an action for breach of confidence,

(ii) raised doubts as to whether the respondent is legally obliged to comply with the production request, or

(iii) failed to respond at all, resulting in doubt as to whether or not the respondent can rely on the statutory defence of implied consent (CIDL, section 3(1)(b))."

39. In future cases, therefore, 'innocent' *Norwich Pharmacal* respondents will have to carefully consider whether any opposition to an application of which they have had prior notice or to an order made without prior notice is justified. This will particularly be the case where the form of opposition takes the form of appearing in Court to oppose the making of an order or to set aside an order already made. It is clear from the judgment of Aldous LJ in the *Motley Fool*, that the reasonableness of appearing to challenge a *Norwich Pharmacal* order must be assessed on a case by case basis:

"*29...In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.*" [Emphasis added]

40. I am unable to accept the submission of SAMC that this costs jurisdiction ordinarily attracts an award of costs on the indemnity basis. Such a view does not appear to be directly supported by any of the authorities. It is also inconsistent with this Court's Rules, which expressly contemplate indemnity costs as a penalty for misconduct. GCR Order 62 rule 4 provides:

"*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that*

part of the proceedings to which the order relates, improperly, unreasonably or negligently."

41. It appeared to me to be common ground that, despite the fact that the Applicant reserved the right to bring substantive proceedings against the Respondents as wrongdoers when seeking the NP Order, the Respondents are entitled to be treated as innocent third parties at this stage. This position appears to me to conform to common sense and legal principle.

Findings: did the Respondents act unreasonably to such an extent as to displace the usual Norwich Pharmacal costs rule?

Overview

42. Before considering the specific complaints made by the Applicant about the Respondents' conduct, two preliminary observations should be made. Firstly, I expressed no provisional view as to how the "application costs" should be dealt with in the Judgment. Secondly, however, there are various general observations in the Judgment which reflect positively on the Respondents' general conduct and none which are explicitly negative. Some of these positive statements rebut complaints made about the Respondents' conduct. Paragraph 5 (reproduced in paragraph 2 of the present Ruling, above) is particularly instructive in this regard.

43. I have, therefore, already expressed the view in adjudicating the substantive application that:

(a) the Respondents did not positively oppose the application but merely raised principled objections;

(b) VNHAM had been threatened with legal action for breach of confidentiality; and

(c) each of the Respondents were subject to contractual confidentiality obligations governed by Swiss law.

44. I have already also expressed the view that it was necessary and appropriate in any event for the Respondents to seek guidance as to their CIDL obligations and that their testing of the appropriateness of the NP Order was of assistance to the Court:

"*6...This was a difficult point not directly addressed by previous authority which was dealt with by counsel in an economical way. Counsel understandably focused their*

effort on a detailed analysis of the Norwich Pharmacal jurisdiction, and their submissions greatly assisted the Court."

Failing to adopt a truly neutral stance

45. The Applicant complained that the VNHAM raised points which were summarily rejected and that a neutral position could have been adopted. I find that VNHAM did on balance adopt an approach which was not inconsistent with neutrality in the circumstances. As regards, SAMC similar complaints were made, most validly about an abuse of process argument, which was fairly characterised as "*confrontational*". Looking at SAMC's stance overall, I also find that its approach was not sufficiently inconsistent with neutrality so as to make the dominant character of the application an adversarial one. It is also clear that the Respondents did not adopt a scattergun approach, but instead focussed primarily on two aspects of the necessity requirement (see paragraph 41 above), the most substantial topic addressed in the Judgment. Unlike in *Cartier International AG-v-British Telecommunications Plc* [2018] 1 WLR 3259, in my judgment this was not a case where it could fairly be said that the Respondents "*had made the litigation a test case for the jurisdiction to make the order at all and had strenuously resisted the application*".

Attending Court unnecessarily

46. The Respondents were (a) given prior notice of the application, (b) had reasonable grounds for believing they required directions from the Court under CIDL in any event and (c) were subject to contractual confidentiality obligations governed by Swiss law. Further, not only was the scope of the relief initially sought substantially reduced. As the Respondents pointed out, I have already explicitly rejected the Applicant's contention that a pre-hearing concession to provide the wide-ranging discovery initially sought on a staggered basis ought to have been accepted by the Respondents. The offer did not in any way signify a willingness to negotiate about the scope of the discovery sought; instead, it signified a willingness to reduce the burden of complying with the requests. I ruled (Judgment, at paragraph 46): "*This concession was not enough.*"

47. In my judgment it is impossible to fairly conclude that their election to attend Court was unreasonable in the particular circumstances of this case. The facts of the present case are distinguishable from those in *Popov-v-Deloitte LLP* [2018] EWHC (QB) 2326 where the

respondent was held to have failed to communicate its position in relation to the application within a reasonable time.

Conclusion

48. In summary, the usual rule is that the applicant must bear the reasonable application costs of an innocent *Norwich Pharmacal* respondent (as well of course as such respondent's costs of complying with the relevant order. The usual rule can only be displaced to the extent that the respondent's participation in the proceedings is unreasonable. In the present case the Respondents are entitled to be treated as innocent of any wrongdoing based on the information presently available to the Applicant. They have not opposed the application unreasonably. It follows that the Applicant must pay their application costs (including the costs of the present costs application), to be taxed if not agreed on the standard basis.

HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT