

**Judgment 17/2005**

**Systems Design Limited et al v. The President of the State of Equatorial Guinea et al – Court of Appeal (Civil Appeal 354) – 5 April, 2005**

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**Norwich Pharmacal disclosure order – appeal from orders of the Royal Court – practice of applying for ex parte orders to be re-assessed – appeal allowed and application for Norwich Pharmacal disclosure dismissed – leave to appeal to the Judicial Committee refused. (See also Judgment 53/2004.)**

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

The 5th day of April, 2005 before Richard Charles Southwell, Esq., Q.C., Presiding, Sir de Vic Graham Carey, Bailiff, and David Arthur John Vaughan, Esq., Q.C.

Between

1. SYSTEMS DESIGN LIMITED

and

2. LOGO LIMITED

(Appellants)

and

1. THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA

and

2. THE PROCUREUR OF THE STATE OF EQUATORIAL GUINEA

and

3. THE ROYAL BANK OF SCOTLAND INTERNATIONAL  
(A COMPANY INCORPORATED IN JERSEY)

(Respondents)

In the appeal of the above appellants from the Judgments and Orders made by the Royal Court on 3<sup>rd</sup> November, 2004, 9<sup>th</sup> and 10<sup>th</sup> December, 2004;

THE COURT, having on 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> February, 2005, heard Advocates N. J. Barnes for the First and Second Appellants, A. M. Merrien for the First and Second Respondents and M. G. Ferbrache for the Third Respondent thereon, this day GAVE JUDGMENT in the terms attached hereto, ALLOWED the appeal, DISCHARGED the Orders made by the Royal Court on 30<sup>th</sup> April 2004, 3<sup>rd</sup> November 2004 and 9<sup>th</sup> and 10<sup>th</sup> December 2004, DISMISSED the First and Second Respondents' applications against the Third Respondent for

Norwich Pharmacal relief, REFUSED AN APPLICATION by the First and Second Respondents for leave to appeal to the Judicial Committee of the Privy Council and ORDERED: -

1. That the originals, and any copies, whether made in paper or electronic form or otherwise, of the documents supplied by the Royal Bank of Scotland International on 7<sup>th</sup> May 2004, whether in the hands of Mr H C M Page or Penningtons, or their Counsel, or the Respondents, or of any other advisors of the Respondents, or any other person to whom copies of those documents may have been supplied by any of the above, wherever such documents may be situated, and including, if possible, any copies of those documents which have been lodged with the High Court in England, are to be delivered forthwith by Mr Page to the Royal Bank of Scotland International in Guernsey and to be held by such Bank in safe custody pending any application for special leave to appeal to the Judicial Committee of the Privy Council.
2. That the Respondents or their legal or other advisors or anyone else on their behalf are not to make any use of the documents or the information contained therein.
3. That notwithstanding the provisions of paragraphs 1 and 2 above, Guernsey Counsel shall be permitted to retain in their safekeeping any of such documents which they currently have in their files for the purposes of any such application for special leave to appeal and for the purpose of instructing Privy Council Agents and English Counsel for the purpose of any such application for special leave, and to supply copies thereof to such Agents and English Counsel for the said purpose.
4. Any such application for special Leave shall be made within four weeks from today.
5. If such application is not made, or having been made is not granted, all such documents in the possession of Guernsey Counsel and any such Agents and English Counsel shall forthwith be delivered to the Royal Bank of Scotland International in Guernsey.

AND THE COURT further ORDERED that the First and Second Respondents shall pay the costs incurred by the Appellants, and by the Third Respondent (pursuant to the existing undertaking renewed this day by the First and Second Respondents as

respects the Third Respondent), both in this Court and in the Royal Court, such costs to be calculated on the normal recoverable basis.

K. H. TOUGH

Registrar of the Court of Appeal

**Approved Text**

**IN THE COURT OF APPEAL OF GUERNSEY  
(Civil Division)**

**Before** Richard Charles Southwell Esq QC, Presiding  
Sir de Vic Carey, Bailiff  
David Arthur John Vaughan Esq CBE QC

**On** 5<sup>th</sup> April, 2005

**Between**

- (1) Systems Design Limited
- (2) Logo Limited

**Appellants**

- and -

- (1) The President of the State of Equatorial Guinea
- (2) The Procureur of the State of Equatorial Guinea
- (3) The Royal Bank of Scotland International  
(a Company incorporated in Jersey)

**Respondents**

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**Southwell JA**

1. This is the judgment of the Court on an appeal by Systems Design Limited and Logo Limited (respectively “SDL” and “Logo”) from orders and judgments of the Royal Court of 3 November 2004 and 9 and 10 December 2004. These orders arose from the application by SDL, and later also Logo, to set aside an earlier order of the Royal Court of 30 April 2004 made against The Royal Bank of Scotland International (“the Bank”) and requiring the Bank to disclose to the first and second named respondents (respectively “the President” and “the Attorney-General”, and together “the Plaintiffs”) information and documents relating to SDL and a company called Logo Logistics Limited.

2. On about 7 March 2004 Mr Simon Francis Mann and others were arrested in Zimbabwe. Soon after Mr Servaas Nicolaas du Toit and others were arrested in Equatorial Guinea. All these arrests are said by the Plaintiffs to have been made in connection with an attempted coup d’état in Equatorial Guinea. The attempt at a coup d’état is denied by some at least of those alleged to have been involved. Between 9 and 26 March 2004 certain statements and other documents were obtained from Mr Mann in prison in Zimbabwe and from Mr du Toit in prison in Equatorial Guinea. Allegations that the statements were obtained by torture or threats have been made by them. We will return to those allegations later.

3. On 15 March 2004 Mr Mann made a warned and cautioned statement to the Zimbabwe Police at the Chikurabi Maximum Security Prison in Zimbabwe. This appears to be the only statement by Mr

Mann during that period which he accepts as having been a voluntary statement not obtained by torture or threats. The text of this statement seems to be of some importance, and we quote a substantial part of it:

**“WARNED AND CAUTIONED STATEMENT**

I *SIMON FRANCIS MANN* passport number 500167929 (UK) do admit having been informed by *Detective Chief Inspector NDLOVU* that enquiries are being made in connection with a case of Contravening Section 4 (2)(b) of the Firearms Act Chapter 10:09 PURCHASE FIREARMS AND AMMUNITION WITHOUT A FIREARM CERTIFICATE. In that on the 8<sup>th</sup> February 2004 and at Manyame Airbase, Harare, I purchased the following weapons: 10 Browning pistols 500 X 9mm pistol ammunition, 61 AK rifles, 45 000 AK ammunition, 20 PKM Light machine guns, 30 000 PKM ammunition, 100 RPG7 anti tank launchers, 2 X 60mm motor tubes, 80 X 60mm motor bombs, 150 Offensive hand grenades and 20 Icarus flairs without a firearm certificate, will give this statement out of my own freewill.”

There followed the section dealing with the caution. The statement continued:

**“Accused’s reply reads: (English)**

I deny the allegations. I wanted to purchase the weapons to be used in DRC [Democratic Republic of Congo] in guarding a diamond mine where our company had been contracted to provide security services.

The negotiations to purchase the weapons were made openly with the managing director of the Zimbabwe Defence Industries together with his deputy Group Captain HOPE.

We had a written contract properly signed by both parties. It was the obligation of the Zimbabwe Defence Industries to advise us about the legal requirements. We never got delivery of the alleged weapons. If the deal was unlawfull then why have the Zimbabwe Defence Industries accepted and not returned the US \$ 180 000.00.

Signed *Simon Francis Mann*

I certify that the above statement was made freely and voluntarily by SIMON FRANCIS MANN. It was read by him and he signed it, in the presence of his lawyers JONATHAN SAMUKANGE.”

The statement ended with formal signatures and confirmation of the place, date and time.

4. On 6 April 2004, Mr Mann was interviewed in the Zimbabwe prison by a delegation from Equatorial Guinea. The delegation included the Attorney General and the Minister of Home Affairs of Equatorial Guinea, and also an English solicitor acting for the State of Equatorial Guinea, Mr H C M Page, a partner in the firm of solicitors called Penningtons with offices in London and in Paris, where Mr Page works. As to the circumstances in which this interview took place, we will return to consider those later. It suffices at this point to record that Mr Mann’s evidence is that it was involuntary on his part.

5. On 13 April 2004 the Attorney-General and the President sought ex parte by petition in the High Court of Justice of the Isle of Man, Chancery Division, in relation to Logo Logistics Ltd, SDL

and Triple Option Trading (“TOT”) a company associated with Mr du Toit, against the Bank, orders under the principles stated by the House of Lords in *Norwich Pharmacal Co et al v Customs and Excise Commissioners* [1974] AC 133; [1973] 3 WLR 164 HL(E) requiring the Bank to provide information and documents as to the beneficial owners of Logo Logistics Ltd and SDL, documents identifying transactions on any account held in the name or for the benefit of Logo Logistics Ltd, SDL, Mr Mann and Mr du Toit showing whether moneys had been transferred from such accounts since 1 January 2003, and copies of any documents contained in any safe deposit box held by that bank in the names of any of such persons. In the petition it was stated in paragraph 8 that

“Your Petitioners wish to initiate and commence appropriate criminal legal proceedings against the Conspirators in relation to their involvement with the Attempted Coup.” (our underlining)

The petition was supported by a witness statement dated 9 April 2004 of Mr H C M Page. There were exhibited to the witness statement (inter alia) statements alleged to have been obtained from Mr Mann and Mr du Toit in prison by Mr Page dealing with steps said to have been taken in preparation for the coup d’état. These statements contained detailed confessions by both men as to the preparations by them for the coup and the way in which the coup would have been carried out. In his witness statement (in contrast to the petition) Mr Page stated in paragraph 3 that

“The documents and information are required by the Claimants in connection with intended civil proceedings in Equatorial Guinea and perhaps elsewhere in connection with the matters described herein. I understand that criminal proceedings are also envisaged.”

The Order was granted on 14 April 2004, subject to undertakings by the President and the Attorney-General (inter alia) not, without leave of the Court, to use any information or documents obtained as a result of the enforcement of the Order except for the purposes of bringing civil legal proceedings in Equatorial Guinea, Spain or England and Wales, against the alleged wrongdoers including Mr Mann and Mr du Toit, and a Mr Ely Calil. It subsequently became apparent that the Bank had no information or documents in the Isle of Man, and its office on that island was involved only in processing payments on behalf of its Jersey and Guernsey branches. Accordingly on 22 April 2004 the Order was amended so as to enable proceedings to be brought in Jersey or Guernsey, and discharged except in relation to the petitioners and their undertakings.

6. These first proceedings brought in reliance on *Norwich Pharmacal* principles were initially directed to criminal, not civil, proceedings. One of the concerns expressed on this appeal by the appellants relates to the apprehended use of information and documents by the Equatorial Guinea authorities for the purposes of criminal, not civil, proceedings. We will return to the statements of Mr Mann and Mr du Toit relied on in the Isle of Man proceedings later. It suffices at this point to say that Mr Mann and Mr du Toit allege that the statements were obtained in circumstances in which they were

subject to torture and ill-treatment, and to undue pressure, in the absence of their lawyers, and without protection against self-incrimination.

7. It appears that on 7 April 2004 the President and the Attorney-General brought similar proceedings in Jersey, which in the first place appeared similarly to be directed to assisting the bringing of criminal proceedings, and the application was initially dismissed. But apparently after clarification on this aspect, the Jersey Royal Court made a partial order on about 26 April 2004. The result of those proceedings in Jersey has apparently not been fruitful for the Plaintiffs. This Court has not been shown any documents relating to these proceedings in Jersey.

8. On 30 April 2004 the President and the Attorney-General obtained an ex parte order in the Royal Court of Guernsey (Ordinary Division) against the Bank in terms substantially the same as those of the order made in the Isle of Man (see paragraph 5 above). The application dated 23 April 2004 was supported by a draft of Mr Page's first affidavit of 30 April 2004 alleging a conspiracy to pursue a coup d'état in Equatorial Guinea and exhibiting his witness statement in the Isle of Man High Court and the alleged confessions of Mr Mann and Mr du Toit attached to it. Leave was granted to the Plaintiffs to use the information supplied to them by the Bank "to pursue others both within this jurisdiction and within Equatorial Guinea, Spain, Jersey, England and Wales, in any civil legal action or actions that the Plaintiffs are advised may be appropriate (excluding criminal actions)". The undertakings by the Plaintiffs in Schedule II included at paragraph 6 an undertaking in terms similar to those of the order which we have quoted. We note that the order did not contain any undertakings by the Plaintiffs to start civil proceedings or to serve the order or affidavit on SDL or Logo Logistics Ltd. It did contain an undertaking to lodge with the Court on 30 April 2004 Mr Page's first affidavit. The order also contained an undertaking to deposit with HM Greffier £2,500 as security for the Bank's costs and expenses.

9. The affairs of Logo and SDL have been managed in Guernsey by Hansard Management Services Limited and Hansard Trust Company Limited (together "Hansard"). On 30 April 2004 Hansard accepted service of the order and Mr Page's first affidavit on behalf of SDL, but declined service on behalf of Logo Logistics Ltd. On the same day the order (but not the affidavit) was served on the Bank in Guernsey.

10. Following discussions between the Plaintiffs' then Guernsey advocate and the Bank's advocate, and an attempt by the Bank to extend the periods for compliance with the order, the Bank apparently disclosed on 7 May 2004 to the Plaintiffs some banking records relating to accounts of Logo with the Bank, a US dollar account, a £ sterling account, and a South African Rand account. It is somewhat surprising that the Bank disclosed records relating to Logo, because the order required disclosure in relation to Logo Logistics Ltd and SDL, and not to Logo. Prima facie, therefore, the disclosure by the

Bank was not in accordance with the order of the Royal Court, and may have involved a breach of its duty of confidence owed to its customer, Logo.

11. In relation to the making of this ex parte, without notice order, it is relevant that:

- (1) The order was sought and granted solely in respect of disclosure of information and documents: no freezing order or other ancillary order was then or has since been sought.
- (2) There appeared to be no ground of urgency requiring such an order to be made ex parte, and no reason why the Plaintiffs should not have been required to give due and reasonable notice of the application to SDL, Logo Logistics Ltd, Mr Mann and Mr du Toit, and the Bank, before the application was heard. The coup d'état against the present regime in Equatorial Guinea, if a coup was indeed threatened, had already been nipped in the bud by the arrests there and in Zimbabwe, as Mr Page's draft affidavit made clear.
- (3) We have already commented above on the terms of the undertakings given by the Plaintiffs.

We will consider later whether the order ought to have been made ex parte, and whether it should have been discharged, or should now be discharged.

12. On 12 May 2004 Penningtons Paris Office, acting on behalf of the government and president of Equatorial Guinea wrote to the British "Anti-Terrorist Branch" complaining that individuals resident in England had been involved in financing or organising the alleged coup d'état, which acts came within the definition of "terrorism" in two international conventions, and asking that body to "take all appropriate steps". The letter is headed "Re Complaint Relating to Terrorist and other Criminal Acts: Attempted Coup d'Etat 7 March 2004"; so there can be no doubt that this related to an attempt to secure the initiation of criminal proceedings by the UK Authorities. Penningtons annexed a complaint and summary of facts, as well as other documents including statements of Mr Mann and Mr du Toit which those gentlemen now disown as already mentioned above. It appears that no steps have as yet been taken by such "Anti-Terrorist Branch" in response to Penningtons' letter of 12 May 2004, notwithstanding at least one subsequent meeting (see paragraph 27 below).

13. On 13 May 2004 the ex parte order was varied by consent of the Plaintiffs and the Bank, to take account of a change of Advocates on behalf of the Plaintiffs (it appears that no fewer than four firms of Advocates had so far acted for them), to vary the periods within which disclosure was to be made, to provide for due service on the Bank, SDL and Logo Logistics Ltd, and to include an undertaking by the Plaintiffs to start a civil action no later than 30 June 2004.

14. On 14 May 2004 SDL applied to discharge the Order of 30 April 2004, and to prohibit the Bank from disclosing any information relating to the affairs of SDL pending the hearing of this application. The Royal Court ordered that no further disclosure to the Plaintiffs be made until further order, and adjourned the hearing of the application.

15. On 9 June 2004 Mr P C Blows, a chartered accountant and a director of Hansard, swore an affidavit in support of the application to discharge. He deposed that SDL, a Bahamian company, was a company administered by Hansard. Mr Blows raised a number of points in support of the application including (1) that the Order represented a request for evidence which ought to have been brought under the appropriate statute (in England and Wales, the Evidence (Proceedings in other Jurisdictions) Act 1975); (2) that use of any information by the State of Equatorial Guinea could not be controlled; (3) that the *Norwich Pharmacal* principles do not apply where information is sought for the purposes of substantive proceedings in other jurisdictions; (4) because of Equatorial Guinea's bad record in respect of human rights (as shown by exhibited reports from the UN Commission on Human Rights, the US Department of State and Amnesty International) the Royal Court ought not to rely on **either** the Plaintiffs' assertion that the information was needed for civil proceedings **or** their undertaking not to use the information for criminal proceedings. Those Reports also stated the judiciary in Equatorial Guinea was not independent and was under the control of the President's political party. We will return later to consider the relevance of those reports and the views expressed in them as to the nature of the President's regime in Equatorial Guinea.

16. On 24 June 2004 Penningtons Paris Office wrote direct to Hansard (despite the fact that the Plaintiffs, and Hansard in their capacity of acting for SDL, both had Guernsey Advocates on the record) stating (inter alia) that "Logo Logistics Limited" was a misnomer for Logo, and contending that service on Hansard on 30 April 2004 had been effective service on Logo as well as SDL.

17. On 29 June 2004 Mr Page swore a second affidavit in response to Mr Blows. The heading of this affidavit is different from the heading of the orders of 30 April 2004 and 13 May 2004. The Plaintiffs are the same, but the Bank is referred to as "Parties cited" and two defendants appear – Logo Ltd and SDL. There had at that stage been no order of the Royal Court authorising such an amendment of the proceedings. In paragraph 11 of his second affidavit Mr Page asked the Royal Court to order that the references to Logo Logistics Ltd in the application and the previous orders be amended to Logo Ltd, and in paragraph 40 that SDL be described as a Bahamas company.

18. At this stage it is not necessary to refer to more than a few of the factual matters mentioned in Mr Page's second affidavit. In paragraph 15 he referred to a conversation he had had with Mr Mann on 6 April 2004 in the Harare High Security Prison; and he also referred to (and exhibited) a document (clearly a private letter) purporting to be written by Mr Mann. He did not explain how this private letter came into his possession. In paragraph 20 he said that civil proceedings would be commenced

against SDL and Logo and others by 30 June 2004 to which others would be added when identified. In paragraphs 23 and 30 Mr Page stated that criminal proceedings were envisaged against Mr Mann in Zimbabwe, and Mr Mann might be extradited to Equatorial Guinea. Mr du Toit would face criminal proceedings in Equatorial Guinea.

19. In paragraph 31 he said that a complaint had been made to the English criminal authorities, but there had been as yet (and so far as we are aware, there still has been) no response. The authorities of Equatorial Guinea considered it more difficult “to instigate or control criminal proceedings in England, against the conspirators resident in England, Spain or elsewhere, than is the case in civil proceedings,” and the Plaintiffs had the right to choose to bring civil proceedings.

20. He also responded to the concerns expressed by Mr Blows and the references to the reports mentioned in paragraph 15 above. He disputed the allegations in the UN and US State Department Reports, saying that he had personally visited Mr du Toit and others in detention in Equatorial Guinea and that essentially they had no complaint about their treatment. He also exhibited a statement from the Attorney General of Equatorial Guinea that they would have the benefit of all judicial and other guarantees in conformity with international requirements, and concluded with the statement in his paragraph 38 that “The allegations relating to the treatment of prisoners are therefore unfounded as well as being irrelevant.” He justified the civil proceedings to be brought, on the basis that those who staged or financed the coup and who leave others to face the consequences “must be shown by due process of the Courts that such conspiracies will not be tolerated” (para 23), that is to say as a punitive measure to set an example to others in the future.

21. Finally in paragraph 41 he stated that an application would be made to extend the effect of the orders of 30 April and 10 (sic) May 2004 (presumably this was intended to be a reference to the order of 13 May 2004) to cover documents held by others in Guernsey including Hansard, and for a freezing order over any assets of SDL and Logo in Guernsey. No such application has been made.

22. The claim form appears to have been issued on 30 June 2004 in the English High Court, Queen’s Bench Division, by the President and the Republic of Equatorial Guinea (represented by the Attorney General) as claimants against (1) Logo (2) SDL (3) Mr Greg Wales (4) Mr Mann (5) Mr Eli Calil (6) Mr Severo Moto as defendants, claiming in the Particulars of Claim damages (including exemplary damages) for conspiracy to overthrow the lawful government of Equatorial Guinea so as to profit financially and to substitute as President Mr Moto (who was living in exile in Spain). Damages suffered by the Republic were said to be (i) the expense of increasing the level of security in “Equatorial New Guinea “ (sic); and (ii) detention and trial of the conspirators in Equatorial Guinea. An injunction against further attempted coups by the Defendants in Equatorial Guinea was also sought. We will consider the Particulars of Claim in this action in England (“the English Action”) in more detail by reference to their later draft amended form.

23. But we note here that information contained in the documents disclosed by the Bank to the Plaintiffs was used to a substantial extent in drafting these original Particulars of Claim.

24. On about 22 July 2004 Mr Mann was convicted in Zimbabwe on two counts: first, attempting to purchase firearms in contravention of the Zimbabwe Firearms Act; and second, attempting to possess dangerous firearms without an end-user certificate in contravention of the Public Order and Security act. He was apparently acquitted of purchasing firearms. He was subsequently sentenced to a total of seven years imprisonment, reduced later by the High Court of Zimbabwe to a total of four years imprisonment. The statement of facts agreed between prosecution and defence for the purposes of the first count includes no reference to a coup against the regime in Equatorial Guinea, and refers to the agreement with the Zimbabwe defence forces of 8 February 2004 mentioned in Mr Mann's warned and cautioned statement: see paragraph 3 above. The alleged admissions by Mr Mann to which Mr Page adverted (and which are strongly disputed by Mr Mann) formed no part of the prosecution case against Mr Mann in Zimbabwe.

25. On 27 July 2004 a default judgment was apparently entered in the English Action against Mr Calil. On 28 July 2004 Master Eyre made an order in the English Action. It was recited that no cause of action in the President was disclosed, that the action ought anyway to be stayed pending disposal of pending criminal proceedings against some of the defendants, and that the Particulars of Claim required clarification. It was ordered that the judgment in default be set aside, that by 31 August 2004 the claimants file and serve draft amended Particulars of Claim, and that the English Action be stayed forthwith pending disposal of the criminal charges or further order. On 4 August 2004 the claimants in the English Action applied to set aside the order of 28 July 2004, alternatively for the stay to be lifted as against all the defendants, or all the defendants except Mr Mann.

26. In the Guernsey proceedings on 19 August 2004 SDL applied for a stay of the order of 30 April 2004 (in the alternative to the discharge already applied for: see paragraph 14 above).

27. On 23 August 2004 Mr Page swore a third affidavit. He dealt with the approach to the British Home Office as regards criminal proceedings and a meeting with them on 5 July 2004. They would not cooperate without first receiving information and undertakings from the government of Equatorial Guinea, in particular in relation to the continuing use in that country of the death penalty, since they do not cooperate in any criminal investigation which could involve capital punishment. Mr Page indicated that accordingly this is one of the reasons why the Plaintiffs were pursuing their civil proceedings in England.

28. Mr Page went on to make various allegations about Hansard, suggesting that Hansard had been involved in trading in arms. Mr Page exhibited pages of Logo's accounts with the Bank which had

been disclosed on 7 May 2004. He stated that Penningtons had been instructed to apply to extend the existing orders to require Hansard to provide information and documents as to the control of Logo, SDL and Hansard. Such an application has not been made.

29. On 26 August 2004 the London Evening Standard published a long feature article in which there was disclosed information, which appeared to have emanated from either Penningtons or their clients, including the alleged statements by Mr Mann and copies of part of the Logo bank accounts disclosed on 7 May 2004 as a result of the Royal Court's order of 30 April 2004. Mr Page denied that his firm or their clients were the source for the article. The source has not been made known to us. Whether they were the source or not is not relevant to our decision. This Court wishes to make it clear that it deprecates the use (if it were such a use) of such information obtained in discovery by one side in civil proceedings in Guernsey to conduct litigious warfare in the media, as well as in the Courts.

30. On 6 September 2004 Ozannes for Hansard wrote to F Haskins & Co for the Plaintiffs making a large number of points in relation to the Guernsey proceedings, including the fact that Hansard act for a company called Logo Ltd registered in Nevis, and denying the allegations made by Mr Page against Hansard which they characterised as untrue and defamatory. This Court has seen no answer from the Plaintiffs to the points cogently made by Ozannes.

31. On 7 September 2004 an affidavit was sworn by Mr A D Kerman, an English solicitor acting for Mr Mann, in support of SDL's application to discharge the order of the Royal Court of 30 April 2004. The main factual contentions appearing from this affidavit are:

- (1) The conspiracy to carry out a violent coup d'état in Equatorial Guinea was strongly denied by Mr Mann. Mr Moto had publicly stated that he was not prepared to bring violence to his country to liberate it from the President.
- (2) Mr Mann had negotiated openly with the Zimbabwe Defence Industries who had failed to advise him that a licence to buy arms for defensive use in the Democratic Republic of Congo (and not in Equatorial Guinea) was required. He had pleaded guilty to trying to buy arms without a licence.
- (3) Documents exhibited contained allegations that the 30 year regime of the President had been brutal and repressive, and the President had milked Equatorial Guinea of much of its oil revenues.
- (4) Mr du Toit and others had been tortured in custody in Equatorial Guinea. One defendant was thought to have died of torture. Another defendant complained in the Equatorial

Guinea court of the presence in court of one of the men who had tortured him, but his complaint was ignored by the judge.

- (5) The statement exhibited to Mr Page's first affidavit was given by Mr Mann to Mr Page in a Zimbabwe maximum security prison, without the presence of Mr Mann's lawyer as he wished, Mr Page having assured him that the meeting was off the record and Mr Page would do his best to sort everything out with the President, at a time when Mr Mann was disoriented and desperate in prison. Mr Mann denied the truth of the statement.
- (6) Allegations concerning Equatorial Guinea and the President's finances were supported by a report dated October 2003 by the International Bar Association Human Rights Institute following their mission to that country, and a Minority Report of the Permanent Subcommittee of the US Senate on Riggs Bank, in particular the section on Equatorial Guinea (pages 37-66).

32. The hearing before the Royal Court of the Plaintiffs' inter partes application for the disclosure order against the Bank and the applications by SDL to discharge or stay the Royal Court's order of 30 April 2004 began on 7 September 2004 before Lieutenant Bailiff A C K Day CBE. Mr Kerman's affidavit was filed with the Court on that day. It appears that though the Lieutenant Bailiff received and read the affidavit, he decided not to take it into account in reaching his decision. The hearing continued on 13 and 21 September 2004. On 21 September 2004 HM Procureur appeared in order to assist in relation to the approach to the British criminal authorities. Judgment was handed down on 3 November 2004.

33. On 15 September 2004 Mr Calil (fifth defendant in the English Action) applied in the English High Court to strike out the proceedings against him or for summary judgment or for substantial security for costs to be provided.

34. On 16 September 2004 Master Eyre discharged the stay of the English Action and made consequential directions.

### **Royal Court Judgment of 3 November 2004**

35. The decision of the Lieutenant Bailiff was that the order of 30 April be stayed with liberty to apply (including liberty to apply as to costs).

36. The Lieutenant Bailiff in his long and careful judgment first set out the facts as presented to him, and the history. He referred to the conviction of Mr Mann, and the sentence of Mr Mann to imprisonment on the basis that the destination of the arms and personnel was a security company in

the Democratic Republic of Congo (and therefore not Equatorial Guinea). He held (and held correctly in our judgment) that the primary burden of proof was on the Plaintiffs to satisfy the Court that the Order of 30 April 2004 should have been made and should be maintained.

37. He stated the issues before him in paragraphs 23-25 of his judgment as being

- (1) whether under Guernsey law *Norwich Pharmacal* relief is available in respect of proceedings in another jurisdiction;
- (2) if such relief is available in those circumstances, whether on the facts of this case the Royal Court should exercise its discretion in favour of the Plaintiffs to grant the relief sought.

38. He considered the principles of *Norwich Pharmacal* relief generally in paragraphs 26 to 39, dealing primarily with the English authorities, and he summarised their effect in eight propositions in paragraph 39. He then turned to the issue whether such relief is available in respect of proceedings in another jurisdiction which he considered in paragraphs 40 to 65. He referred in this regard to English cases, and to the decision of this Court in *Seed International Ltd v Tracey et al* (18 December 2003, Civil Appeal 341, unreported). He concluded that in principle *Norwich Pharmacal* relief is available in respect of proceedings in other jurisdictions, but that the fact that such relief is being sought for that purpose is a relevant factor in the exercise of the discretion whether to grant the relief, and if so, on what conditions so as to provide adequate protection against misuse, given the difficulty the Guernsey Courts would have in providing sanctions against misuse of the information or documents obtained.

39. The Lieutenant Bailiff in the remainder of his judgment considered how the Court's discretion should be exercised in the present case. We will reserve consideration of that part of his judgment, and the submissions of counsel, until we have traced the subsequent history, which is of relevance to what this Court has now to decide. His conclusion was that it was appropriate, in principle, to grant the relief, but the Plaintiffs had not put forward any adequate mechanisms to enable the Guernsey courts to retain some effective control over the use of the information disclosed. Accordingly he stayed the Order of 30 April 2004 with liberty to apply.

40. In paragraph 91 of his judgment the Lieutenant Bailiff noted that the effect of his decision was to reverse his earlier decision of 30 April 2004, and said that this

“demonstrates, if nothing else, the wisdom, except in the rarest cases, of not adjudicating upon such applications on an *ex parte* basis”.

In fact there had already been disclosure on 7 May 2004 as a result of his *ex parte* order of 30 April 2004. One of the matters to which we will return later is to consider the correct procedure in relation to the making of such an order as was made on 30 April 2004.

41. It is relevant to note that at this stage (3 November 2004) Logo still had not been made a party to the Guernsey proceedings, even though the disclosure given by the Bank on 7 May 2004 was of Logo's bank accounts, not SDL's.

### **Subsequent Events**

42. On 16 November 2004 Mr Page swore a fourth affidavit which he stated in paragraph 2 to be

“in support of an application by the claimants (sic) for an urgent order effecting this Court's judgment on 3 November 2004”.

The documents before this Court show that the application to the Royal Court was in fact not made until 9 December 2004, the day on which the hearing of the application began. Much of this affidavit consisted of argument about English law. In paragraph 11 he offered on behalf of the Plaintiffs (referred to as “claimants”) the following undertaking:

“Not to make use without leave of the Court of any information obtained as a result of this order other than in connection with:

(A) The civil proceedings currently being pursued by the claimants in the High Court of England against Logo Limited and others under number HQ04X02003 (“the English proceedings”)

(B) Any other Norwich Pharmacal applications (or similar applications for disclosure of information) in any other jurisdictions in support of information as to wrongdoing and/or identity of wrongdoers relevant to the English proceedings”.

43. On 8 or 9 December 2004 Mr Kerman swore a second affidavit in response to Mr Page's affidavits:

(1) Mr Kerman exhibited an affidavit of Mr Mann (with two exhibits) which Mr Mann had approved in prison. Mr Mann's comments on the statement attached to Mr Page's first affidavit (which was Mr Mann's first exhibit) were as follows:

- “(a) The signature that appears at the beginning and end of the document is mine;
- (b) Whilst I acknowledge that the statement was signed by me, it was largely dictated to me by investigating police officers and I signed it under duress and following days of torture;
- (c) The circumstances under which the statement SFM/1 was made are as follows; I was arrested on the 7<sup>th</sup> of March 2004 and taken to the police station where I was brutally and severely tortured and assaulted for several days until the police came to my cell told me that they knew everything and handed me a piece of paper. They dictated to me what I should write and at every instance that I objected I was subjected to further torture and assaults. The police then typed the hand written statement which was brought to my cell and which I was

forced to sign. There was no commissioner of oaths and consequently I did not take oath;

- (d) I wish to make it quite clear that the version of events described in the statement is substantially untrue;
- (e) This document (SFM1) in itself never formed any part of the case against me in the Zimbabwean courts nor was it ever produced in Court; and
- (f) No document in different form from SFM1 but with similar or identical language was ever submitted in Zimbabwe as part of the prosecution case against me.”

- (2) Mr Mann stated that he freely signed the “warned and cautioned” statement on 15 March 2004 in the presence of his Zimbabwe lawyer, his South African lawyers and Zimbabwe policemen. The text of that statement has been set out already in paragraph 3 above.
- (3) Mr Mann’s Zimbabwe lawyer (Mr Jonathan Samukange) swore an affidavit (also exhibited to Mr Kerman’s Affidavit) in which he confirmed that this statement was the only statement made by Mr Mann to, and that this was made clear to him by, the Zimbabwe prosecuting authorities. He had not seen the document exhibited by Mr Page until he was shown it by Mr Kerman on 3 October 2004, and it had formed no part of the prosecution case against Mr Mann. He observed that the document appeared to have been witnessed by a Chief Superintendent of the Zimbabwe Police. He stated that only one Chief Superintendent was involved in the case and it would not have been lawful for him to witness an accused’s sworn statement in the absence of the accused’s lawyer. It would also be serious misconduct for a police officer to obtain a statement from an accused and to supply a copy to a third party for use in civil proceedings.
- (4) The final two paragraphs of Mr Mann’s affidavit read as follows:

“4. While I was in custody awaiting trial in Chikurubi Prison, I was taken to the airport and shown an aeroplane; I was told that it was ready to take me to Equatorial Guinea unless I did exactly what I was told. I was subsequently led to a room where Henry Page and others were present, although I did not know it at the time two of those others were the Attorney General of Equatorial Guinea and the Minister of Home Affairs of Equatorial Guinea. I had previously opposed Mr Page visiting me and he did so contrary to my own and my lawyer’s express wishes. By the time I saw Mr Page I was extremely distressed, disoriented and extremely vulnerable. My physical and mental condition would clearly have been apparent to Mr Page. I informed Mr Page that I did not want to see him unless my lawyer was present. Mr Page informed me and kept on informing me during our ‘interview’ that it was not necessary for my lawyer to be present as our conversation was completely off the record. He said that he felt very sorry for me and undertook “to sort out everything with the President of Equatorial Guinea” and that all I had to do was to speak openly with him. Mr Page then dictated to me a series of events to which I did not respond, he wrote on a piece of paper as he spoke. At no time during this ‘interview’ did Mr Page inform me that he was intending to use any information gained from me against me in any legal proceedings, whether of a criminal or civil nature. At one stage during the ‘interview’ I overheard the voice of Mr Venturas who is my lawyer’s, Mr Samukange’s, partner. He could easily have been called into the room and I

reiterated to Mr Page that I wanted my lawyer present. Mr Page told me that this was not necessary and made no attempt to accede to my request. Notwithstanding the above, Mr Page has completely invented the statement that he has attributed to me.

5. I wholly deny that any of my activities were at any time directed towards effecting, assisting, instigating, participating or in any way conspiring to procure a violent military overthrow of the Government of Equatorial Guinea. I am advised that my actions would not be considered as criminal under the laws of England, Guernsey, Jersey, the Isle of Man or South Africa. It is a matter of great regret to me that some of my friends and acquaintances such as Sir Mark Thatcher, Ely Calil and Tony Buckingham have been accused by the Government of Equatorial Guinea of conspiring with me to carry out such a crime. I maintain that there was no plot or understanding or conspiracy in which I was involved to carry out such a crime and accordingly there is no proper basis for the Government of Equatorial Guinea to make such accusations against my friends mentioned above.”

- (5) Mr Kerman also exhibited reports by the International Bar Association (“IBA”) and Amnesty International on the trial of Mr du Toit and others in Equatorial Guinea which had by then been concluded and in which Mr du Toit was sentenced to 34 years imprisonment. Clearly this Court has no means of verifying those reports, and it is unnecessary for the purpose of this appeal to do so. This point applies generally to the allegations in Mr Kerman’s affidavit and his other exhibits. The primary relevance of Mr Kerman’s affidavit and his exhibits is that they cast serious doubt on the factual allegations in Mr Page’s affidavits. The report by Amnesty International indicates that the witness evidence consisted solely of confessions which the defendants and their lawyers protested had been extracted under torture. The Equatorial Guinea court had ignored all references to torture. The confessions had been presented in Court in Spanish without adequate translation though none of the defendants spoke Spanish. One defendant, a German national, died before trial; according to the other defendants he died in front of them as a result of torture. It is unnecessary to state at further length the serious allegations in the Amnesty International report. We quote only one passage from the IBA report which concerns the allegations of torture and confessions extracted by torture presented in the Equatorial Guinea trial:

#### **“Irregularities**

During the interrogation stage of the trial the South African accused in particular alleged that they were tortured. Nick Du Toit the alleged ringleader on whose written declarations the prosecution is placing a great deal of weight retracted earlier admissions made during the trial in August and indicated that the confessions were made only after he had been tortured and threatened with death if he did not cooperate. Sergio Cardozo another South African was particularly vocal about his experiences of torture, describing the beating etc in vivid detail. He went so far as to indicate that his ‘torturer’ was in court at the very moment that he was speaking! They indicated that the torture was carried out initially by the Zimbabwean police who were assisting in their interrogation and this was

done with full acquiescence of the Guinean authorities. According to him the torture thereafter was carried out by the Guinean authorities.

The Court's response was terse. The accused were enjoined to stick to the relevant issues and defence counsel who sought to elicit evidence of torture was told to move on. The Court neither ordered an investigation into the allegations nor did it seek further clarity on the matter. In its view this was irrelevant to the issues at hand.

Each of the accused (with the exception of the Guineans) was shackled hands and feet at all times that they appeared before the Court and from their indication at all times since March when they were held. They made fervent requests for the shackles to be removed and for them to be allowed even a modicum of freedom of movement but the Court gave no indication that their request would be entertained.

This observer noted that the area around the ankles of most of the accused who were constantly shackled was bandaged. In relation to their general appearance there were no outward physical signs that they had been beaten and all the accused walked or more appropriately hobbled into court unassisted. The accused appeared to have lost quite a bit of weight between the first trial and its resumption and there was one indication made to the court that there had been an outbreak of flu and medication had been brought by the wives of the accused but they were being denied access to it.

### **Opinion**

The lack of investigation into allegations of torture is the most troubling feature of this trial. While the accused were brought to court mainly in short shorts and short-sleeves no doubt to allay the fears of the persons present as to the absence of any outward physical manifestations of injury the protestations of the accused should not have been so obviously ignored by the court. In considering the weight of the evidence against the accused particularly when reliance is being placed on confessions, there must be certainty that the circumstances of the taking of the statements were free from coercion, torture or ill-treatment. In addition the issue of whether the accused were tortured goes to the root of whether or not a trial against him is fair or not."

44. On the same day (9 December 2004) the formal application was made to the Royal Court by the Plaintiffs to lift the stay of the order of 30 April 2004, and to vary the order (inter alia) by including Logo. Also on the same day (9 December 2004) the Attorney General signed an undertaking on behalf of the Plaintiffs not to use without leave any information obtained as a result of the order other than in connection with the English Action and any applications ancillary to it, including applications for the joinder of other parties..

45. The Plaintiffs' application came before the Royal Court on the same day (9 December 2004). After hearing counsel, in his short judgment the Lieutenant Bailiff said (inter alia) this:

"Now, further information has come to my attention just today, and that is the information which was provided by the Bank back on 7<sup>th</sup> May of this year. Use has already been made of that information and without any impropriety as far as this Court is

concerned. No effort or application was made, and no application was granted, to restrain its use. And that information would appear to have informed, at least, the draft amended particulars of a claim in the English proceedings.

That information reveals much activity on one bank account at least, in the last few weeks of 2003 and the first couple of months of 2004, involving the transfer of monies and also revealing the names, or referring to the names, of which this Court has become aware during the course of this case, and which I have already identified in my earlier judgment.”

We observe in this regard that

- (1) The Lieutenant Bailiff had already been informed of the provision of information by the Bank, in particular by Mr Kerman’s first affidavit.
- (2) The disclosure already made was of bank accounts of Logo which until 9 December 2004 was not involved in the Guernsey proceedings.

46. The Lieutenant Bailiff on 9 December 2004 ordered that

- (1) leave be given to Logo to join the proceedings as second intervenor;
- (2) the stay of the order of 30 April 2004 made on 3 November 2004 be lifted on the undertakings given by the Plaintiffs as set out in the schedule attached to the order (the schedule was not included in the file placed before this Court);
- (3) the order of 30 April 2004 be varied by
  - (a) extending to 5 days the period for compliance;
  - (b) including Logo;
  - (c) changing the name of the lawyers acting for the Plaintiffs;
  - (d) giving leave to the Plaintiffs to use information obtained under the order in the English Action or applications ancillary to them.

47. The Lieutenant Bailiff, after a further short hearing, on 10 December 2004 changed the terms of the leave given to the Plaintiffs to use information obtained under the order so as to add leave to use it in any other *Norwich Pharmacal* application in other jurisdictions in support of the English proceedings.

48. On the same day (10 December 2004) the Lieutenant Bailiff gave leave to appeal the judgment and order of 3 November 2004, and stayed the order of 30 April 2004 as amended until 16 December 2004. On 15 December 2004 this Court granted the application of SDL and Logo for a stay of the judgments and orders of 3 November and 9 and 10 December 2004 and ordered the Bank not to make disclosure pending the hearing of the appeal.

49. The hearing before this Court took place on 16 and 17 February 2005. In the course of the hearing

(1) The Court gave leave to Advocate Barnes acting for SDL and Logo to amend their notice of appeal so as to ensure that the issues raised before this Court were covered by the notice.

(2) The Court drew to the attention of Advocate Merrien acting for the Plaintiffs the serious allegations concerning Mr Page contained in the affidavits filed on behalf of SDL, especially the two affidavits of Mr Kerman. The Court expressed to Mr Merrien some concern that Mr Page as an English solicitor had made almost no attempt to answer those allegations. Mr Merrien submitted to the Court a draft sixth affidavit of Mr Page with an application for leave to swear and adduce it in evidence. The Court gave Mr Merrien leave, subject to removal of those parts of the draft affidavit which raised new issues, and which would have almost inevitably led to an application by Mr Barnes for an adjournment to enable him to file evidence in reply. The matters set out in Mr Page's sixth affidavit as sworn and filed were matters which should have been dealt with by Mr Page in affidavits filed in the Royal Court during the hearings in that Court between 7 and 21 September 2004 in response to Mr Kerman's first affidavit filed on 7 September 2004 (when there was sufficient time to prepare and submit an affidavit before the Lieutenant Bailiff) and in December 2004 when the hearings of 9 and 10 December 2004 could have been adjourned to enable Mr Page to respond to Mr Kerman's second affidavit. Mr Page's sixth affidavit dealt at length with the reasons why that affidavit should be considered, answers to Mr Kerman's First Affidavit, Mr Mann's denial of involvement in the coup d'état, the trial in Equatorial Guinea, the Evening Standard article, and Mr Kerman's Second Affidavit, and also dealt with why the original application was ex parte.

(3) The Court heard brief submissions from Advocate Mark Ferbrache acting for the Bank, who assisted the Court on the chronology of events between 30 April and 7 May 2004. Mr Ferbrache was not asked to, and did not, deal with the point that the disclosure by the Bank on 7 May 2004 was of accounts of Logo, its customer, which was not until 9 December 2004 involved in the Guernsey proceedings.

(4) In an article in The Times newspaper on 16 February 2005 a further leak to the media apparently made by someone on the Plaintiffs' behalf appeared.

50. At the close of the hearing we reserved our judgment, and made an order in these terms pending judgment or further order.

“1. That the stay already ordered shall be extended.

2. That the originals, and any copies, whether made in paper or electronic form or otherwise, of the documents supplied by the Royal Bank of Scotland

International on 7<sup>th</sup> May 2004, whether in the hands of Mr H C M Page of Penningtons, or their Counsel, or the Respondents, or of any other advisors of the Respondents, or any other person to whom copies of those documents may have been supplied by any of the above, wherever such documents may be situated, and including, if possible, any copies of those documents which have been lodged with the High Court, are to be recovered forthwith by Mr Page and placed in a safe at Penningtons' London offices, and are not to be removed therefrom without the leave of this Court, and that this has been done is to be verified by a further affidavit, sworn by Mr Page, to be lodged with this Court within 14 days from today.

3. That, without the leave of this Court, the Respondents or their legal or other advisors or anyone else on their behalf are not to make any use of the documents or the information contained therein.

4. That notwithstanding the provisions of paragraphs 2 and 3 above, Guernsey Counsel shall be permitted to retain in their safekeeping any relevant documents which they currently have in their files.”

51. Since the hearing the following have occurred:

(1) A seventh affidavit of Mr Page has been filed without objection from Mr Barnes exhibiting Mr Page's notes of the meeting with Mr Mann in the Zimbabwe maximum security prison on 6 April 2004, and correcting his sixth affidavit in so far as it had dealt with the use made by the Plaintiffs of the information disclosed by the Bank on 7 May 2004 from Logo's bank accounts. That information had been used in drafting the original and the amended versions of the Particulars of Claim in the English Action brought by the Plaintiffs.

(2) An eighth affidavit of Mr Page has been provided, ostensibly to show compliance with the terms of paragraph 2 of this Court's order of 17 February 2005 (paragraph 50 above). As appears from paragraph 5 of this eighth affidavit, the order had not been fully complied with at the date when the affidavit was sworn (4 March 2005), as the Attorney General of Equatorial Guinea had not by then returned to Mr Page originals and all copies of the relevant documents.

(3) Recently leave has been sought to adduce in evidence a ninth affidavit of Mr Page dated 17 March 2005. In so far as by this document the Plaintiffs seek to place before the Court a large number of further factual allegations, leave to file the affidavit is refused. All these allegations could have been put forward long before, whether in September to December 2004 before the Royal Court, or before the hearing in this Court; and to admit them in evidence now would inevitably lead to having to give Mr Barnes' clients a full opportunity to respond, with the likelihood of consequent further long delay in this Court being able to reach its decision. But we do give leave to file a brief affidavit containing paragraphs 3 and 4 dealing with what has happened in relation to this Court's order of 17 February 2005. These paragraphs show that the Plaintiffs have failed to comply with that order. They have not provided the copy documents to Mr Page. It is alleged that those copies in the President's office have been

destroyed, though this has not been verified. It is alleged that there were no copies held by the government of Equatorial Guinea. No reference is made to the copies which presumably were in the possession of the Attorney-General himself.

(4) A written application was made by Mr Merrien for the Plaintiffs on 4 March 2005 for a variation of the order of 17 February 2005 so as to enable the Plaintiffs to make “ongoing use of the documents and/or information already used in the said Particulars of Claim [in the English Action]” including use in any amendment of the Particulars of Claim. Although this Court took the view on his written application that this should be refused, not least because it appeared to be designed entirely to subvert the order of 17 February 2005 by enabling continued use of the information to be made in the English Action in advance of our judgment being handed down, at the request of Mr Merrien a formal decision has been deferred until the Court reconvenes to deliver judgment.

52. In the history set out above we have not dealt at length with either (1) the various “admissions” said to be Mr du Toit’s or Mr Mann’s and relied on by the Plaintiffs, or (2) the Particulars of Claim in the English Action in their present “draft amended” form. We will return to these documents when considering the issues before this Court for determination.

### **Norwich Pharmacal relief in aid of foreign proceedings**

53. Mr Barnes submitted that *Norwich Pharmacal* relief can be granted by the Courts of Guernsey in aid of legal proceedings in the Guernsey Courts, but not in aid of proceedings in other jurisdictions. Mr Barnes relied principally on 19<sup>th</sup> century decisions by the English Chancery Courts in which a bill of discovery was refused because sought in aid of proceedings in another jurisdiction: for example, *Bent v Young* (1838) 9 Sim 180 per Shadwell VC; *Reiner v Marquis of Salisbury* (1876) 2 Ch D 378 per Malins VC; *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D per Kay J. The only case in Guernsey dealing with this type of relief which he cited was *Novo Nordisk A/S et al v Banco Santander (Guernsey) Ltd: Richard Adler intervening* (2000) 2 ITEL 557 Hancox L-B. But in that case Hancox L-B did not have to deal with the question we are now considering. Reference was also made to the decision of Sir de Vic Carey sitting as Deputy Bailiff in *News International plc v Clinger* (10 May 1996, unreported), in which Sir de Vic emphasised the need for great care before making orders which cut across a bank’s confidential relationship with its customer: but in that case also the issue we are considering did not arise.

54. Mr Merrien argued that there is no such limitation on the powers of the Guernsey Courts. He relied on an extensive citation of English authorities, and also on the decision of the Jersey Royal Court in *IBL Ltd et al v Planet Financial & Legal Services Ltd et al* 1990 JLR 294 per Tomes DB in

which the grant of *Norwich Pharmacal* relief in support of English proceedings was accepted in reliance on numerous English authorities.

55. In our judgment this issue can be dealt with briefly. The jurisdiction to make orders based on *Norwich Pharmacal* principles in aid of proceedings in other countries is, we consider, one available to the Courts of Guernsey, just as much as the jurisdiction to make Mareva freezing orders and Anton Piller orders. Such jurisdiction is essential given the role of financial service provision on this Island. For the reasons stated in paragraphs 41 and 42 of this Court's judgment in *Tracey et al v Seed International Ltd* (18 December 2003, Civil Appeal 341, Judgment 55/2003, unreported) the ability to make orders relating to money, documents or information in Guernsey in support of proceedings in other jurisdiction is a necessary factor given the successful development of Guernsey financial services. Frequently litigation relating to assets in Guernsey is current in another jurisdiction, especially in England. The Guernsey Courts must ensure that Guernsey does not become a safe haven for those who may wish to evade financial liabilities. As recent cases have shown, the 19<sup>th</sup> century English cases do not prevent the English courts from applying *Norwich Pharmacal* principles in support of other jurisdictions: a fortiori they do not prevent the Courts of Guernsey. The same result was reached by the Court of Appeal in Gibraltar in *Secilpar SL v Fidelity Trust* (24 September 2004).

56. In our judgment, therefore, the Royal Court had the jurisdiction to make a *Norwich Pharmacal* order in support of proceedings in England, provided that in all the circumstances such an order was necessary and appropriate.

#### **The ex parte order of 30 April 2004**

57. The jurisdiction of the Royal Court to make ex parte, without notice orders is undoubted. But it is a jurisdiction only to be exercised (1) where the grounds for granting the order sought are sufficiently clear; and (2) where there is a clear and imperative need for the order to be made immediately and urgently so as to preserve the position as between the disputing parties until such time as they can conveniently all be brought before the Court for the issues to be argued on the basis of whatever evidence each party wishes to place before the Court.

58. These principles apply with considerable force to a *Norwich Pharmacal* application. What the plaintiff seeks is the disclosure to him of information or documents. If the information or documents are disclosed by virtue of an ex parte order, without the other disputing party or parties having been given the opportunity to adduce evidence and to argue against the grant of the order, that means that the plaintiff has obtained ex parte the relief which, in the usual way, he would obtain only after trial. The potential for injustice if an ex parte order is made inappropriately is obvious.

59. In our judgment no *ex parte* relief should have been given on 30 April 2000 in this case for the following, among other, reasons. Notwithstanding what has been stated by Mr Page there was no urgency. Assuming the Plaintiffs' case to be true, they wanted the information for the purposes of civil proceedings in England, as opposed to criminal proceedings in any jurisdiction; there were no civil proceedings yet launched in England; and any such civil proceedings would take a long time to bring to trial. The nature of any such civil proceedings would be novel (we will return to this point later when considering the English Action which was actually commenced). There was time to convene the parties having a right to maintain their records with the Bank as confidential so that they could be heard before any order was made. Immediate disclosure of the information would give the Plaintiffs all that they could obtain if they took the Guernsey proceedings to trial. The Royal Court could not be certain on the information before it that disclosure of the information would be necessary and appropriate. The Royal Court could not be sure that the limited evidence placed before it by the Plaintiffs (in particular the statements of Mr Mann and Mr du Toit) would, if fully examined, provide sufficient support for the grant of the Norwich Pharmacal relief. The Royal Court could not be sure that it was not committing an injustice by granting the relief *ex parte*.

60. These reasons can be further elaborated by reference to the facts now before this Court.

(1) The evidence contained in or exhibited to Mr Page's first affidavit showed no basis for urgent relief. It showed that the Plaintiffs wished at some stage to bring civil proceedings in England against the perpetrators of the alleged conspiracy against the Plaintiffs and the government of Equatorial Guinea, and to use the information so as to identify further conspirators beyond those already known to them, and to strengthen their case in such proceedings. There was no indication when such proceedings would be likely to be launched: indeed, when on 13 May the *ex parte* order was varied to include an undertaking by the Plaintiffs to commence civil proceedings in England (an undertaking which should have been required on 30 April 2004 if the order was to be made *ex parte*) the Plaintiffs merely undertook to commence such proceedings by no later than 30 June 2004. There was therefore ample time for all parties to be convened, and no justification for an order to be made *ex parte* on the basis of urgent need. Mr Page's explanations in his sixth affidavit (see para 49(34)) take matters no further.

(2) On their face the statements of Mr Mann and Mr du Toit exhibited to Mr Page's first affidavit appeared to amount to full confessions as to their involvement in a conspiracy against the government of Equatorial Guinea. The evidence before the Royal Court in September and December 2004 showed that that might not be the case. Once the matter was open to be tested by evidence answering Mr Page's evidence, the allegations were made that those confessions were obtained by torture or duress or threats of torture or duress. There were also put in evidence, first, Mr Mann's undoubted voluntary statement denying any part in such conspiracy

and maintaining that the arms were being bought to defend a mine in the Congo, and secondly, his conviction in Zimbabwe on that basis. So it can now be seen that the simple picture presented by Mr Page's first affidavit is in truth a more complex one. To have accepted Mr Page's evidence at face value, as the Royal Court did on 30 April 2004, can now be seen to have been incorrect.

(3) Information was to be disclosed by the Bank on 7 May 2004, giving the Plaintiffs to that extent the final relief which they otherwise could have obtained only after a trial. Given the time availability, that was neither appropriate nor just.

(4) In fact the information related to the bank accounts of Logo. At that time Logo was neither a party to the proceedings, nor a person in respect of whom relief was sought by the Plaintiffs. Mr Mann in his dealings concerning arms had used the company name Logo Logistics Limited. It is not clear whether that was simply the use of a convenient name, or whether there is another company so named.

61. In our judgment, for the reasons we have summarised, an ex parte order should not have been made on 30 April 2004. That conclusion would in the ordinary way lead to a decision that the order should be discharged. But since an order might nevertheless be made once the matter had been heard inter partes (as it was in September and December 2004), we proceed to consider the decisions made by the Lieutenant Bailiff in November and December 2004.

## The Royal Court Judgment of 3 November 2004

62. The Lieutenant Bailiff summarised the relevant principles concerning the grant of *Norwich Pharmacal* relief in paragraph 39 of his judgment as follows:

- “(i) The order for discovery must not offend against the “mere witness” rule (subject to Lord Reid’s gloss), that is, it must not be for the purpose of obtaining pre-trial discovery of what a witness may say if called at trial.
- (ii) The third party must have become involved (in its widest sense) in the wrongdoing concerning which discovery is required. That involvement does not have to be to the extent that the third party could or should be joined as a party to the substantive proceedings, as his involvement may be wholly innocent (as it usually is).
- (iii) The person seeking discovery must identify, at least generally, the wrongdoing about which he complains.
- (iv) The information which can be sought is wideranging, for example the identity of wrongdoers (*Norwich Pharmacal*), the existence or nature of a wrongdoing (P v T), the identity of a mole within an organisation (*BSC*), or the location of assets upon which a judgment might be enforced (*Mercantile Group*).
- (v) The impugned conduct has to be such as to be recognised as wrongful in the eyes of the law, whether or not categorised as criminal conduct or the infringement of a civil right which the law can protect (whether tortious, breach of contract, etc).
- (vi) It is not a prerequisite of the exercise of the jurisdiction that the person seeking discovery has started or intends to start civil proceedings in respect of the wrongdoing. It is sufficient that he has a legitimate interest to protect, whether by way of seeking redress (in its widest sense) or by lawful protection against further wrongdoing. The intended use to be made of such information may involve civil proceedings or criminal proceedings, or be for other legitimate purposes, such as disciplinary action against an employee (*Ashworth*).
- (vii) It is incumbent upon such claimant, however, to identify the purposes for which the disclosure will be used when made, so that the Court is enabled to restrict the use of the material expressly or implicitly for the disclosed purposes.
- (viii) The power to order discovery is discretionary. The Court should not so order unless it is satisfied that it is just and convenient to do so (on the basis of, or by analogy with, s.4 of the 1987 Law).”

63. We agree with the principles as stated in (i) to (vii), except that the reference to criminal proceedings in (vi) may well be incorrect. The second sentence in (viii) in our judgment puts the threshold for the grant of an order too low. The test is that the plaintiff must show that the making of the order is essential and necessary to assist the plaintiff in achieving justice. It has to be kept in mind that (1) the order would be usually against a third party innocently involved in the wrongdoing of others, and (2) where the third party is a bank (as is frequent in the case of applications for such orders), the order would be destructive of the obligation of strict confidentiality owed by a bank to its customers. No *Norwich Pharmacal* type order should be made by the Royal Court unless the plaintiff

establishes that it is essential and necessary for such purpose for the order to be made. In this respect we consider that the Lieutenant Bailiff did not correctly direct himself as to the legal principles to be applied by him in this case.

64. Turning to the factual circumstances relevant to the exercise of the Royal Court’s discretion, the Lieutenant Bailiff had before him, in summary, the following evidence:

(1) Mr Page’s first affidavit containing and exhibiting evidence as to the attempted coup, including the alleged confession statements of Mr du Toit and Mr Mann (which the Lieutenant Bailiff in his judgment at 3 November 2004 said he treated with “considerable circumspection” (para 31)), contract documents as between Logo Logistics Ltd and Military Technical Solutions CC of 11 February 2004, a quotation from Zimbabwe Defence Industries (Pvt) Ltd to Military Technical Services Incorporated (apparently a British Virgin Islands Company controlled by Mr du Toit) and bank statements of ToT (another company of Mr du Toit) showing payments to or from SDL and Logo.

(2) Mr Blows’ affidavit of 9 June 2004. His evidence raised two principal points:

(a) the *Norwich Pharmacal* discovery appeared to be sought in order to obtain evidence in support of criminal proceedings and not civil proceedings, and reliance in support of this point was placed on the evidence exhibited relating to the Equatorial Guinea government’s alleged bad record on human rights;

(b) anyway no civil proceedings had as yet been started against any of the known and alleged conspirators.

The evidence exhibited was a report of 25 February 2003 of the United Nations Special Rapporteur on the independence of judges and lawyers in Equatorial Guinea.

(3) Mr Page’s second affidavit in response to Mr Blows (see paragraphs 17-21 above), in which Mr Page indicated that civil proceedings would be commenced by 30 June 2004, that the information sought in Guernsey was needed in support of such civil proceedings against “those who instigated and financed the plot and conspired to this effect and yet are sitting safely in London (and elsewhere) letting the others face the consequences”. Mr Page answered the report of the UN Special Rapporteur by evidence of his own visit to the prison in Equatorial Guinea where Mr du Toit and others were detained and what he describes as the relatively good conditions of their detention. He also exhibited the personal letter said to have been written from prison by Mr Mann.

(4) Mr Page's third affidavit of 23 August 2004 (see paragraphs 27-28 above), in which he dealt with the possibility of a criminal investigation in the United Kingdom, and the position of Hansard, and exhibited pages from the US dollar account of Logo disclosed by the Bank on 7 May 2004.

(5) Mr Kerman's first affidavit filed (as indicated above) on the first day of the hearing on 7 September 2004. It appears that, though this affidavit was admitted in evidence and read by the Lieutenant Bailiff, he decided to put it on one side and not to have regard to it in reaching his decision. In our judgment that approach was erroneous. Having admitted the affidavit in evidence it was incumbent on the Royal Court to take due account of the allegations in the affidavit (irrespective of whether the Court could decide which allegations are true and which false), particularly since the Plaintiffs failed to answer it in the period from 7 to 21 September 2004 when the further hearings took place. We have summarised what Mr Kerman alleges in paragraph 31 above. We need to add only these points:

- (a) the denial by Mr Mann that he had taken part in any attempted coup in Equatorial Guinea (and the similar denial by Mr Severo Moto) cast doubt on the previous evidence to the contrary by Mr Page and on the alleged confessions on which Mr Page had relied;
- (b) the circumstances in which Mr Page had seen Mr Mann in prison on 6 April 2004 were strongly challenged, and it was alleged that Mr Mann had not been correctly treated by Mr Page;
- (c) the exhibited report of the International Bar Association Human Rights Institute (if correct) showed that the rule of law played little part in Equatorial Guinea, that the use of torture and other ill-treatment was endemic, and that there was serious concern about the fairness of the trial of 144 alleged plotters in an earlier alleged coup in 2003: this report raised concerns about the alleged confessions of Mr du Toit relied on by Mr Page;
- (d) the exhibited report of Amnesty International showed (if correct) that those imprisoned in relation to the alleged earlier coup in 2003 had been tortured to extract purported confessions, had been unfairly tried, had been held in prison in harsh conditions without adequate food or medical treatment, and two of the prisoners (of whom one was aged 80) had died: this report raised similar concerns about Mr du Toit's alleged confessions;

- (e) the exhibited press reports (if correct) indicated that Mr du Toit and the others detained in Equatorial Guinea had not had proper access to legal representation, that purported confessions had been obtained from them by torture, that one detainee had died as a result of torture, that the alleged coup was in fact denied and the arms and men were destined to guard a diamond mine in the Congo, and that the regime of the President in Equatorial Guinea had been notorious for its brutality and lack of any recognition of elementary human rights;
- (f) the exhibited US Senate report (if correct) indicated that the President's regime involved serious corruption by the President, his family and associates (involving their abstraction of much of the country's oil revenues), and serious abuses of human rights including the use of torture;
- (g) the exhibited article in the London Evening Standard dated 26 August 2004 has already been described (see paragraph 29 above).

65. In our judgment the Lieutenant Bailiff erred in deciding to take no account of the information and allegations in Mr Kerman's first affidavit and his exhibits. There was, as we have pointed out above, time for Mr Page to respond to Mr Kerman before the hearings ended on 21 September 2004, and since the judgment was not handed down until about 7 weeks after that, Mr Page could have been given the opportunity, if the Plaintiffs so wished, to respond after 21 September 2004. Yet he did not do so until we gave him the opportunity to do so in the course of the hearings before this Court.

66. Because the legal test as set out in paragraph 63 above was not correctly set out, and because the Lieutenant Bailiff decided not to take the contents of Mr Kerman's affidavit and his exhibits into account, it is necessary for this Court itself to reconsider the exercise of the discretion as at 3 November 2004.

67. The Lieutenant Bailiff ordered a stay of the order ex parte of 30 April 2004. The principal issue, therefore, as at 3 November 2004 was whether the order should have merely been stayed, or should have been discharged.

68. The first matter to which we need to refer here is the claim made in the English Action. The original Particulars of Claim appear to have been seen by the Lieutenant Bailiff in September 2004: see paragraphs 15-18 of his judgment of 3 November 2004. He certainly regarded that claim with considerable scepticism (see para 71) but he said that was entirely a matter for the English Courts (para 72). We have had placed before this Court a draft amended version of the Particulars of Claim. Though strictly this version is relevant to the decisions on 9 and 10 December 2004, and only the

original version to the decision on 3 November 2004, it is convenient to consider the draft amended version at this point.

69. The main features of this version are as follows:

(1) the claimants are the President, and the Republic of Equatorial Guinea represented by the Attorney-General;

(2) the defendants are as stated in paragraph 22 above: in particular it is Logo, not Logo Logistics Ltd, which is included as a defendant. By the intended amendment much detail is given about the Third to Sixth Defendants. In particular it is said that Mr Moto harbours ambitions to be President of Equatorial Guinea and it is alleged that he was party to previous coup attempts in relation to Equatorial Guinea;

(3) the claims are founded on an alleged conspiracy by which between March 2003 and March 2004 the defendants and others unknown agreed to combine with the intention of causing injury to the claimants by (i) maliciously overthrowing the lawful government of Equatorial Guinea by criminal and unlawful force, (ii) unlawfully abducting, injuring or murdering the President, (iii) doing this with a calculated view of (a) profiting financially, commercially and/or politically from the coup, and (b) replacing the President with Mr Moto, alternatively intending to inflict severe emotional distress on the President, alternatively intending seriously to assault the President;

(4) the facts relied on in support of the claims in (3) above appear to include, indiscriminately, all or almost all of the payments or receipts shown in the sheets of bank account statements disclosed by the Bank in respect of Logo. These include payments among the defendants and companies associated with them. They also include a number of payments which (without explanation and we received none) would appear not to be connected with any alleged attempt at a coup, for example, payments to persons bearing Chinese names (although they are alleged to have been so connected). Extensive reliance is placed on the private letter purportedly written by Mr Mann to which we have already made reference.

(5) the acts of the defendants are said to have caused damage; in the case of the President, to have put him in fear of the infliction of a battery on him, alternatively in fear of his life by which he suffered and continues to suffer severe emotional distress; in the case of the Republic, the cost of an investigation into the conspiracy, the expense of increased security in the Republic, and the expense of the detention and trial of the conspirators in prison in the Republic.

(6) It is alleged that Mr Mann and the other conspirators would have profited by US \$ 16 million; and would have profited politically and financially by Mr Moto becoming president instead of the President; Mr Wales and Mr Calil would have profited from Mr Moto's patronage as President.

(7) Exemplary damages are claimed by each claimant.

(8) An injunction is sought restraining the defendants from doing any act to overthrow the government of Equatorial Guinea or to injure or remove the President, other than by lawful and democratic means..

70. Such a civil claim is a novelty: usually any such attempted coup against a government favourably viewed by HM Government is met by action by the police and prosecuting authorities of the United Kingdom. But it is not for this Court to rule on the claim: that is for the English Courts. But this is not to say that this is entirely a matter for the English Courts as the Lieutenant Bailiff considered (see para 68 above). We consider that our task is twofold:

(1) to assess whether the English Action affords a sufficiently strong foundation for the grant by the Guernsey Courts of the order for disclosure sought by the Plaintiffs;

(2) to assess whether the nature of this civil claim provides any support to Mr Barnes' submission that the real aim of the Plaintiffs is to secure information of use in criminal proceedings.

71. In our judgment, after fuller analysis than was carried out in the Royal Court, the Particulars of Claim in the English Action do not go near to affording an appropriate foundation for the grant of such disclosure order. As regards the claim by the President, the factual allegations in the documents exhibited to Mr Blows' affidavit and in Mr Kerman's two affidavits and exhibits are relevant (and should have been taken into greater account in this regard by the Lieutenant Bailiff). The President's claim for damages for "severe emotional distress" and for having reasonable fear of "battery" has to be viewed in the light of the allegations in the reports of Amnesty International, the US State Department and others showing that the President seized power by murdering his uncle (the then president) when in fear of his own murder, and has since ruled as a despot, without regard to the rule of law, or democratic institutions (such as free elections), and through a regime which uses torture to procure confessions as a systematic feature of its legal system, and in which the judiciary is not independent but under the control of the President's political party, and the President has been faced with various previous coups including the one in 2003 mentioned above and the attempted coups in which Mr Moto allegedly participated. Those reports were not answered in any adequate respect in the affidavits of Mr Page. These reports will all need to be answered in the English proceedings. Taken at their lowest

they show that, prima facie, the President who claims to be suffering emotional distress, is a ruler by dictatorship to whom coups are regular features, and who himself came to power by a bloody coup. Further, the claim that Mr Moto and the other defendants would profit from the replacement of the President by Mr Moto provides some support for the reports (including the report from the US Senate committee minority) which indicate that the President, his family and his associates have milked Equatorial Guinea of much of that country's oil revenues. All this would require the President and the Republic to provide extensive discovery of the political situation in Equatorial Guinea and for the President to provide full discovery of the financial dealings by him, his family and his associates which we have little doubt would be not forthcoming. Failure to provide discovery of any of these matters might of itself be sufficient for the Claimants to be struck out by the English Courts. This Court cannot regard the claim by the President as an individual as a serious claim for the purposes of a request for *Norwich* Pharmacal relief.

72. As regards the claim by the Republic of Equatorial Guinea, the claim for damages represented by the expenses of investigation, increased security, and the detention and trial of alleged conspirators, similarly cannot be regarded for the present purposes as a serious claim. Given the regularity of attempted coups against the President, and the alleged use of torture to extract confessions, no (or minimal) additional expense under any of these heads would be likely. As to the claim that the conspirators would have profited by replacing the President with Mr Moto, we repeat what we have set out in this regard in paragraph 71 above. Again, the Republic would have to provide full discovery.

73. As to the injunction sought against repetition of the alleged coup, the utility of any such injunction would in any event be doubtful, particularly because there is no democratic means of replacing the President, according to the reports. There must be a strong possibility that such an injunction would anyway be refused by the English Courts, on the ground that any such an injunction (with its worldwide effect) would be unenforceable and unpoliceable by the English Courts.

74. We conclude, therefore, that the claim in the English Action is not such a claim as would justify the Courts of Guernsey making a disclosure order in support of that claim.

75. Turning to the second issue in paragraph 70 above, the nature of the claims in the English Action is, in our judgment, such as to give rise at least to a strong suspicion that these civil claims have been put forward primarily as a means of securing information in Guernsey or elsewhere for the purposes of criminal proceedings in Equatorial Guinea or elsewhere or to try and force the UK authorities to institute such proceedings.

76. This conclusion is also relevant to the issue whether the Royal Court could, in reality, exercise any control over the use of the disclosed information by the Plaintiffs. Mr Barnes in this connection

pointed to the disclosure to the London Evening Standard of information and a document which had been disclosed by the Bank. The President is a Head of State, and the Attorney-General represents the State and its present government. In reality no effective control could be exercised. Proceedings for contempt would be of no avail. Even a monetary penalty would be of little use, given the fact that the only security ordered is £2,500 to cover the costs of the Bank (which Advocate Mark Ferbrache told this Court were well in excess of that sum).

77. When there is added to these conclusions the factor that anyway no order should have been made *ex parte*, the conclusion which the Royal Court should have reached in September and November 2004 was that the order of 30 April 2004 be discharged, not merely stayed.

### **The Royal Court Judgments of 9 and 10 December 2004**

78. At 9 December 2004 the Lieutenant Bailiff had before him the fourth affidavit of Mr Page (see paragraph 42 above), which carried the evidence no further, except for the offer of a specific undertaking.

79. The Lieutenant Bailiff also received on that day (9 December 2004), in addition to the Plaintiffs' formal application and the Attorney General's undertaking (see paragraph 44 above) Mr Kerman's second affidavit. It appears that the Lieutenant Bailiff admitted this affidavit in evidence, but then did not take it into account. Given the contents of this affidavit and its exhibits (we have summarised the factual allegations in them at some length in paragraph 43 above), we consider that that was not the appropriate course to take. Mr Kerman's first affidavit of 7 September 2004 had not been answered by Mr Page in his fourth affidavit of 16 November 2004, though Mr Page plainly had both opportunity and time to make a full answer if the Plaintiffs had wished to do this. Mr Kerman's second affidavit added much to the information already before the Royal Court, particularly the allegations of Mr Mann (i) as to how previous statements had been obtained from him by duress and torture, (ii) as to the one admittedly voluntary statement denying the coup conspiracy and putting an entirely different complexion on his actions, and (iii) as to how Mr Page with Ministers of the Equatorial Guinea government had succeeded in interviewing him (see paragraph 43(4) above), and the further reports from the IBA and Amnesty International. In the light of this further information the Lieutenant Bailiff should have had greater regard to both of Mr Kerman's affidavits in reaching his decisions. That he failed to do so again puts on the shoulders of this Court the requirement to exercise the discretion afresh.

80. In our judgment, in the light of all this material, the conclusion to which the Royal Court should properly have come was, as in September-November 2004, to discharge the *ex parte* order and make no fresh order. The material then before the Royal Court made an even stronger case for the conclusions which we have set out in paragraphs 68-77 above.

## Conclusions

81. We have, in view of all that we have set out above (including the further evidence placed before us since the hearing), reached the unanimous conclusion that the orders of 30 April, 3 November, and 9 and 10 December 2004 are to be discharged, and the Plaintiffs' applications against the Bank for *Norwich Pharmacal* disclosure are to be dismissed.

82. As the Lieutenant Bailiff appears from paragraph 91 of his November 2004 judgment to have acknowledged, the ex parte order of 30 April 2004 should not have been made, and in our judgment as we have made clear ought not to have been applied for ex parte. The fact that it was applied for ex parte, and that no less than four Advocates supported its continuance, indicates to us that the way in which the practice of applying for ex parte orders has evolved in this jurisdiction needs to be re-assessed by the Royal Court and the position made clear to the Bar of Guernsey.

83. The Court will hear brief argument as to the terms of the order when this judgment is handed down, and also any applications as to the costs of these proceedings.