Judgment 18/2007 **(1) President of the State of Equatorial Guinea (2) Procureur of the State of Equatorial Guinea v (1) The Royal Bank of Scotland International Limited (2) Logo Limited (3) Systems Design Limited – Royal Court (Civil Action File 840) – 26th June 2007**

Norwich Pharmacal disclosure order – application by the Interveners for the Order of the Royal Court to be set aside and discharged – review of proceedings to date in the Courts of Guernsey and of England and before the Privy Council – English Court of Appeal, in parallel proceedings, had held that none of the pleaded claims (which arose from the Claimants' exercise of sovereign power) were enforceable in the Courts of England – appeal pending to the House of Lords – Interveners' application refused – Order of the Royal Court to remain in force but stayed until further order

(See Judgments 53/2004, 17/2006 and 41/2006)

IN THE ROYAL COURT IN THE ISLAND OF GUERNSY

Civil 840

The 26th day of June 2007 before Geoffrey Robert Rowland, Esquire, Bailiff

(1) THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA

(2) THE PROCUREUR OF THE STATE OF EQUATORIAL GUINEA

Claimants

AND

(1) THE ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED

Bank

(2) LOGO LIMITED

(3) SYSTEMS DESIGN LIMITED

Interveners

Whereas on the 3rd January 2007 the Bailiff considered an application to set aside and discharge an order granted by the Lieutenant Bailiff Day on 30th April 2004 and heard thereon Advocates S.H. Davies, A.M. Merrien and M.G. Ferbrache counsel for the Interveners, the Claimants and the Bank respectively the Bailiff this day handed down judgment in the terms attached hereto and REFUSED the application and ORDERED that the said order shall remain in force, but stayed until further order.

S M D ROSS
Her Majesty's Deputy Greffier

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IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**(3) THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA**	**Claimants**
	(4) THE PROCUREUR OF THE STATE OF EQUATORIAL GUINEA	
	AND	
	(2) THE ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED	**"Bank"**
	(2) LOGO LIMITED	**"Interveners"**
	(3) SYSTEMS DESIGN LIMITED	

Before Geoffrey Robert Rowland, Bailiff

Counsel

Mr Mark Ferbrache The Bank
Mr. Simon Davies The Interveners
Mr. Alan Merrien The Claimants

Judgment handed down: 26th June 2007

Background

1. The issue in this application made by the Interveners is whether the Royal Court should set aside and discharge an Order granted by Lieutenant Bailiff Day on 30th April 2004 subsequently varied by Orders dated 13th May 2004, 3rd November 2004 and 9th and 10th December 2004 (the Norwich Pharmacal Order).

2. The Bank represented by Advocate Mark Ferbrache generally has played a passive role throughout the proceedings.

3. The first Claimant is and was at the material times the President of Equatorial Guinea and the second Claimant is its Attorney General. Both Interveners have a place of residence in Guernsey although not incorporated in the jurisdiction and have an account with the Bank. They are said to be beneficially owned by Mr Simon Mann.

4. The application in Guernsey arose from an alleged conspiracy to overthrow the government of the African state of Equatorial Guinea by means of a private coup, to seize control of the state and its valuable assets, to kill or injure the First Claimant and to install a new President in place of the First Claimant. The conspiracy is alleged to have taken place in 2003 and 2004. The coup failed. On about the 7th March 2004 Mr Mann and other mercenaries were detained by the

Zimbabwe authorities before they and the munitions they were taking with them could be loaded on an aircraft and taken to the capital of Equatorial Guinea. The following day a Mr du Toit, whom it is alleged had agreed to assist in the intended coup, and others were arrested in Equatorial Guinea. Mr Mann has been convicted of offences in Zimbabwe relating to unlawful procurement of munitions and sentenced to imprisonment. Mr du Toit and others arrested in Equatorial Guinea were prosecuted and convicted in October 2004 and received long sentences of imprisonment.

5. The application to the Royal Court for Norwich Pharmacal relief was initially made on an ex parte basis against the Bank. The Claimants were investigating the funding of the coup and believed that the Interveners had been involved. The Interveners deny involvement

Order of 30th April 2004

6. Lieutenant Bailiff Day ("the Lieutenant Bailiff") granted an Order which in summary required the Bank to disclose inter alia:

   (i) information and documents concerning the beneficial ownership of both Interveners;

   (ii) documents identifying incoming and outgoing transactions in bank accounts in the names of the Interveners, Mr Mann and Mr du Toit.

7. Paragraph 2 of the Order gave the Claimants leave to use the information supplied to them to pursue others in Guernsey, Equatorial Guinea, Spain, Jersey and England and Wales, in any civil action but not in criminal proceedings. In Schedule II to the Order, the Claimants gave various undertakings to the Royal Court, including at paragraph 6 an undertaking to use the information only for the purposes of civil legal action in the jurisdictions mentioned and specifically not to use it in any criminal proceedings. That day the Order was served on Hansard Limited, ("Hansard") a Guernsey company carrying on business as managers and administrators. It accepted service on behalf of Logo Limited but not Systems Design Limited which had been mis-described in the Application and Court Order. Neither company applied at that time, as they were entitled to do, to have the Order set aside. On 7th May 2004 the Bank had disclosed a number of documents to the Claimants.

Order of the 13th May 2004

8. On 13th May 2004 the wording of the Order of 30th April was amended by consent of the Claimants and the Bank to extend the time limits and the Claimants undertook in the second schedule "to commence civil action in one of those stated jurisdictions no later than 30th June 2004".

Order 14th May 2004

9. On 14th May (the review date of the ex parte Order of 30th April) Systems Design Limited applied to the Court to discharge or stay the Order of 30th April 2004 and to prohibit the Bank from disclosing any further information to the Claimants pending the hearing of that application.

10. The application was adjourned for a substantive hearing.

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30th June 2004

11. On 30th June 2004 proceedings in the High Court in London were instituted by the Claimants against the Interveners and others.

19th August 2004

12. On 19th August 2004 Systems Design Limited made a further application, namely that the Order of 30th April merely be stayed until further Order with the prohibition against disclosure to continue.

Substantive Hearings of the Interveners' Application to Discharge

13. On 7th, 13th and 21st September 2004 the Royal Court heard the application to discharge or stay. Logo Limited was also joined. The Interveners principal submission was that the court had no jurisdiction to grant a Norwich Pharmacal Order as no substantive proceedings were contemplated in Guernsey. This submission was rejected by the Lieutenant Bailiff on 3rd November 2004.

14. The Interveners alternative submission related to the court's discretion to grant relief. Counsel did not raise with the Lieutenant Bailiff the propriety of enforcing the public law of a foreign state and whether if the Court did not have jurisdiction to enforce it whether it could grant a Norwich Pharmacal Order to assist the Government of Equatorial Guinea in assembling evidence to bring such proceedings elsewhere than in Guernsey. The Lieutenant Bailiff was evidently bemused by the claims made by the Claimants in the proceedings in England. He queried whether the civil courts were the proper forum for matters which were properly the province of international diplomacy and cooperation. He observed that that was a matter for the High Court in England after hearing the full facts because he was unable to resolve the question of whether the government of Equatorial Guinea was an oppressive tyranny or not and whether it could be trusted to honour its undertakings. He concluded that he had been entitled to grant the relief sought but taking into account the Interveners' concerns about the use to which disclosed material might be put he concluded that there was a need to consider possible control measures.

15. It was clear that the Lieutenant Bailiff was prepared to permit disclosure only for the purposes of the proceedings in the High Court in England. The Lieutenant Bailiff Ordered that the Order of 30th April should be stayed with liberty to apply.

Further Hearing 9th December 2004

16. The Claimants who had applied to lift the stay had proffered certain undertakings to satisfy the Lieutenant Bailiff's concerns. The Interveners argued that the Claimants undertakings should not be accepted contending that in Zimbabwe, where Mr Mann had been arrested, a statement made by Mr Mann had been procured by torture. The Lieutenant Bailiff was mindful that in dealing with a Norwich Pharmacal Order he could not resolve whether the criticisms advanced by the Interveners were justified. The Lieutenant Bailiff no doubt mindful that fundamental justiciability issues and other issues were to be determined in the High Court in England persuaded himself that the Claimants should be provided with any further information available in Guernsey for the purposes of the English High Court proceedings, subject to the terms of the Order which he made. The stay was lifted.

Appeal to the Guernsey Court of Appeal

17. The Interveners gave notice of appeal. Before the Guernsey Court of Appeal they relied at the outset on the ground that the Royal Court would not retain control over the possible use of the information. The Court of Appeal clearly wished to explore whether the facts before the Lieutenant Bailiff supported the grant of a disclosure Order even though the Interveners ground of appeal was limited.

18. The Interveners amended their application and it was granted. The Court of Appeal Ordered that the Orders of 30th April, 3rd November and 9th and 10th December 2004 were to be discharged and the Claimants' applications against the Bank for Norwich Pharmacal disclosure were dismissed.

Appeal to the Judicial Committee of the Privy Council

19. The Claimants petitioned the Judicial Committee of the Privy Council for leave to appeal from the decision of the Guernsey Court of Appeal. Special leave to appeal was granted on 9th June 2005. The Interveners submitted to the Privy Council firstly that the Lieutenant Bailiff had wrongly ignored evidence adduced by the Interveners which was gravely damaging to the integrity of the Government of Equatorial Guinea and secondly that he had mistaken the threshold for the grant of Norwich Pharmacal relief. The appeal was heard on 11th – 12th January 2006. The Privy Council handed down its judgment on 27th February 2006. The Privy Council criticised the way in which the Court of Appeal had exercised its appellate authority in that it had acted as if it was exercising original jurisdiction and stated that the Guernsey Court of Appeal should have confined itself to the ground on which the Intervener's had based their appeal, that is to say the appeal against the exercise of the Lieutenant Bailiff's discretion.

20. The Privy Council allowed the Claimant's appeal with costs and advised that the Order of the Lieutenant Bailiff should be reinstated. However their Lordships with respect to the proceedings in the Royal Court at paragraphs 23 – 27 expressed disquiet on the subject of the fundamental matter of jurisdiction and said this –

> *"23 Their Lordships cannot however part with this appeal without expressing disquiet at the fact that no argument was addressed, whether to the courts in Guernsey or to the Board, on the question of whether the Lieutenant Bailiff lacked jurisdiction to make the Order which he did on the ground that it could be regarded as the enforcement, direct/or indirect, of the public law of a foreign state. (Dicey and Morris, Conflict of Laws (13th ed) Rule 3(1) at vol 1, p. 89). As Lord Denning MR said in Attorney-General of New Zealand v Ortiz [1984] AC 1, 21 (a passage approved by Lord Goff of Chieveley in Re Norway's Application (Nos 1 and 2) [1990] 1 AC 723, 807-808):*
>
> > *"By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority."*
>
> *24. It appears to their Lordships well arguable that the claims which the appellants say they wish to make in the English proceedings represent an exercise of sovereign authority, namely the preservation of the security of the states and its ruler. The apprehension and trial of suspects, the imposition of security measures, obtaining diplomatic assistance: these heads of damage alleged by the appellants in the English proceedings can*

all be regarded as aspects of sovereign authority. And if a claim for damages will not lie, neither will a claim for an injunction: see Associated Newspapers Group Plc v Insert Media Ltd [1988] 1 WLR 509. As the High Court of Australia said in Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30, 46, the application of the rule depends upon whether the "central interest" of the states bringing the action is governmental in nature. In that case, which concerned the Spycatcher book, the court held that notwithstanding the private law character of the cause of action (confidentiality) and the relief sought (an injunction), the claim arose out of "an exercise of the prerogative of the Crown, that exercise being the maintenance of the national security"."

25. *Some discussion of the same principle is to be found in Emperor of Austria v Day and Kossuth (1861) 3 De G & F and J 217, where Lord Campbell LC (at p 232) regarded it as axiomatic that a court of equity would not grant an injunction to restrain someone from doing acts "to effect a revolution" in another country. Lord Justice Turner likewise said (at p 250) that an English court had no jurisdiction to interfere with acts intended "for the purpose of promoting revolution and disOrder in the Kingdom of Hungary". The appellants argue that their claims are personal and proprietary: threats to the safety of the President and the property of the states as well as the expense of suppressing a coup. But there can be few revolutions which are guaranteed not to cause any injury or damage or that can be suppressed without putting the ruling power to expense. It may therefore be that the question is not whether the claim is framed by reference to personal injury or damage to property but whether as the Australian High Court said, the "central interest" of the state in bringing the action is governmental in nature.*

26. *There are sound reasons of policy for the rule that the courts should not become involved in providing remedies, whether by way of injunction or compensation, for foreign governments faced with revolutionary activities. As their Lordships have said, the Lieutenant Bailiff rightly declared himself unable to resolve the questions of whether the government of Equatorial Guinea was an oppressive tyranny or not and whether it could be trusted to honour its undertakings. To refuse to provide assistance on such grounds to the government of a state with which Her Majesty has friendly diplomatic relations would be invidious. For this very reason, the principle is to refuse to assist in enforcing the public law of any foreign state. As Kingsmill Moore J said in Buchanan Ltd v McVey (Note) [1955] AC 516, 529, "safety lies only in universal rejection". Likewise in Moore v Mitchell (1929) 30 F. (2d) 600, 604, Learned Hand J said:*

    "To pass upon the provisions for the public Order of another States is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic States to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

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> *27. That is not to say that there should not be international co-operation in dealing with violence against the states or the financing of terrorism. On the contrary, the need for such co-operation has become more evident in recent years. It is however arguable that the proper branches of government to make decisions of this kind are the legislature and the executive. The United Kingdom is a party to international conventions which provide for mutual co-operation in such cases and the government of Equatorial Guinea has in fact requested assistance under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1035 UNTS 167, entered into force Feb, 20, 1977) and the Convention for the Suppression of the Financing of Terrorism (UN Doc A/54/49 (Vol 1) (1999), entered into force 10 April 2002). Their Lordships do not know how productive this request has been."*
>
> *28. Their Lordships have recorded these arguments in Order to make it clear that, despite not having been presented, they have not been overlooked. But they consider that it is not open to them, any more than it was to the Court of Appeal, to decide the case upon a point which has not been raised by the parties. They will accordingly humbly advise Her Majesty that the appeal should be allowed with costs and the Order of the Lieutenant Bailiff reinstated. Since, however, the same questions in relation to English law are likely to come before the English Court of Appeal, their Lordships think that the Order should be suspended until that court has decided whether the appellants have a cause of action enforceable in English law. If it appears that they do not, it will be open to the respondents to apply to the Royal Court for the Lieutenant Bailiff's Order to be discharged."*

21. The Privy Council remarks were obiter. They had not heard argument on these points from Counsel.

22. The Privy Council having reinstated the Lieutenant Bailiff's Order stayed further execution of it pending the determination of the appeal to the Court of Appeal in England in the main action.

Proceedings in the Queens Bench Division of the High Court in England

23. In the proceedings which the Claimants commenced against the Interveners and four other defendants (collectively referred to hereafter in proceedings in the Queens High Court and the Court of Appeal in England as ("the Defendants") the First Claimant sought damages, including exemplary damages, for (a) conspiracy to injure, (b) assault; and (c) intentional infliction of severe emotional distress. The Second Claimant sought damages, including exemplary damages, for conspiracy to injure. Both Claimants also sought an injunction to restrain the Defendants from conspiring in England and Wales to harm the Claimants or their property. All the Defendants were served with proceedings, but no substantive Defences have yet been entered. Instead, the Interveners and the Fourth and Fifth Defendants issued applications to strike out the Particulars of Claim.

24. The principal grounds relied on by the Defendants in support of their strike out application were as follows:

    (1) For a claim of conspiracy to injure by unlawful means, they submitted that it was an essential ingredient of the tort that the unlawful means relied on should provide the claimant

with an independent cause of action against at least one of the Defendants; that requirement was not met since the coup attempt had collapsed before a military attack could be executed.

(2) They further submitted that pecuniary or economic loss or damage was an essential ingredient of the tort of conspiracy, so the First Claimant's claim for damages for severe emotional distress did not disclose a cause of action.

(3) In addition they submitted that the claims for damages for intentional infliction of harm by unlawful means should be struck out on the grounds that there was no such tort in English law.

(4) Finally, they submitted that, on the facts alleged, the First Claimant's claim for damages for assault was unsustainable.

25. Davies J Ordered that –

> *"The Claimants' claims for damages, including exemplary damages, for assault, conspiracy and intentional infliction of harm by unlawful means, be struck out as against all the Defendants."*

26. Davies J refused, however, to strike out the claim for an injunction to restrain the Defendants from conspiring to effect or from carrying out or financing within the jurisdiction of the Court any attempt (i) to use unlawful force on the Claimants; or (ii) to murder, harm, assault, abduct or trespass on the person or property of the First Claimant or his family or any of the citizens of the Second Claimant; or (iii) to injure or damage by unlawful means the property or commercial interests of the Second Claimant or any of its citizens; or (iv) to misappropriate the property of the Second Claimant (in particular oil installations within Equatorial Guinea): or (v) to overthrow the recognised government of the Second Claimant by force or other unlawful means.

27. On 14th November 2005 the Claimants were granted permission to appeal to the Court of Appeal in England on limited grounds which were extended on 25th January 2006. On 14th February 2006 permission was sought by some of the Defendants to cross appeal against the decision of Davies J not to strike out the claim for an injunction. On the 27th February the Privy Council gave its judgment in the Guernsey Norwich Pharmacal proceedings, As a consequence the Defendants notices of appeal were amended to take account of this governmental interest point. The appeal and cross appeals were argued in May 2006 before Sir Anthony Clark MR and Dyson and Moses LJJ.

28. Sir Sydney Kentridge QC who also appeared for the Claimants before the Privy Council emphasised that the dicta of the Privy Council were made without the benefit of argument from him and were wrong. Sir Sydney asserted that in substance the Claimants' claims were private law claims for pecuniary loss which are not based on public law. The Defendants asserted that the Claimants in substance were exercising sovereign authority.

29. On the issue of principle, the Court of Appeal at paragraph 50 said this –

> *"50. Having heard detailed argument, we are unable to accept Sir Sydney's submission that the views, expressed by the Privy Council in the paragraphs*

just quoted are wrong. The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise of assertion of a sovereign right. If so, then the court will not determine or enforce the claim. On the other hand, if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it. As we see it, that was the broad distinction of principle which the court was seeking to draw in the Emperor of Austria case. In deciding how to characterise a claim, the court must of course examine its substance, and not be misled by appearances: see, for example, Huntington v Attrill [1893] AC 150."

30. The Court of Appeal, at paragraphs 56 and 57 on the facts underlying the claims said this –

"56 It is necessary to look at all the circumstances to see whether in substance the losses which are the subject of the claim have been suffered by virtue of an exercise of sovereign authority. If the losses have in truth been suffered as a result of the claimants' ownership of property, then the fact that the claimants are a foreign state and its president would not render their claims non-justiciable.

57 In our judgment, the claims that are pleaded in the present case are not founded on the claimants' property interests. The alleged losses arose as a result of decisions taken by the claimants to protect the state and citizens of Equatorial Guinea. The defence of a state and its subjects is a paradigm function of government. As Laws LJ said in International Transport Roth GmbH v Secretary of States for the Home Department [2202] EWCA Civ 158, [2003] QB 728 paragraph 85:

> *"The first duty of government is the defence of the realm. It is well settled that executive decisions dealing directly with matters of defence, while not immune from judicial review (that would be repugnant to the rule of law), cannot sensibly be scrutinised by the courts on grounds relating to their factual merits…"*

31. The Court of Appeal went on to hold (at paragraph 63) that none of the pleaded claims were enforceable in the courts in England. Just as a claim for taxes is an extension of sovereign power so too is a claim for relief (damages and an injunction) arising from the Claimants exercise of sovereign power in responding to the alleged attempted coup by the Defendants. The Court of Appeal expressed themselves fortified by the policy considerations referred to by the Privy Council at paragraph 26 of their judgment.

32. The Court of Appeal therefore dismissed the appeal and upheld a cross appeal on the ground that the Claimants' claims for damages and an injunction were non-justiciable. The Court held that the claims amounted to "an extension of sovereign power" (Judgment Paragraph 63) and that the action "has been brought as an integral part of the second claimant's attempts to protect itself from revolution" (Judgment, para 67). The Court also held that the First Claimant's claims for damages for assault and for distress disclosed no reasonable cause of action (Judgement paragraphs 82 and 101). The Court of Appeal therefore advised that all claims be struck out. In light of its decision on justicability, the Court of

Appeal declined to express any views on other issues raised on appeal, namely issues relating to the ambit of the tort of conspiracy and whether there was a tort of intentional infliction of harm by unlawful means. The Court, however, anticipated that if its decision on justicability were overturned on appeal to the House of Lords the matter might be remitted to it for judgement on the remaining issues (Judgment, paragraph 103). It refused the Claimant's application for permission to appeal to the House of Lords on the issue of justiciability. The Court of Appeal judgment did not give rise to a stay of its Order hence the proceedings were at that stage final and the Court of Appeal would only deal with the case further if it was remitted to it by the House of Lords.

Application for Leave to Appeal to the House of Lords – granted 22nd May 2007

33. The Claimants sought leave of the House of Lords to appeal only against the decision of the Court of Appeal that their claims are non-justiciable. They submitted that if leave to appeal was allowed and their appeal on justicability was successful then the matter should be remitted to the Court of Appeal for determination of the issues outstanding as suggested in paragraph 103 of the Court of Appeal judgment.

34. On 22nd May 2007 the House of Lords granted leave to appeal. Therefore I do not refer to submissions made by Counsel on the likelihood of their Lordships granting leave to appeal.

Mr Davies' twofold submission

35. The grounds on which the Interveners argument was brought before me in this court may be summarised as follows:

    (a) the Privy Council envisaged that the Norwich Pharmacal Order would be discharged if the English Court of Appeal held that there were no claims enforceable before the High Court of England and Wales; and

    (b) the continued existence of the Norwich Pharmacal Order is open to and has been the subject of, attempted abuse by the Claimants and their solicitor Mr Page.

Mr Davies' submission on ground (a)

36. Dealing with submission (a) the Interveners adopted the arguments made obiter in paragraphs 23 to 27 of the Privy Council's judgment on the justicability point. Alternatively, they submitted that the analysis adopted by the English Court of Appeal in the English after hearing full argument on the issue of justicability leads to the same result as the view expressed by the Privy Council.

37. Mr Davies submitted that the Privy Council's judgment specifically tied the fate of the Norwich Pharmacal Order to the English Court of Appeal decision. The current position is that the Claimants have no claims that are enforceable in English law notwithstanding that their application for leave to appeal has been made to the House of Lords. He argued that the decision of the Court of Appeal in England was a final determination of the strike out application. He asserted that the Claimants' application in Guernsey had been pursued in Order to identify wrongdoers in Order to assist the Claimants in their pursuit of the civil proceedings in England and the Norwich Pharmacal Order was maintained specifically in Order to provide information for use only in these proceedings. He

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referred to para 85 of the 3rd November 2004 judgment of the Lieutenant Bailiff in relation to the purpose for which disclosure was sought –

> *"……..However, the specific purpose is now stated to be limited to the English proceedings and the possible addition of parties thereto. Those proceedings are at a very initial stage ....it is unknown at this stage whether the English court will allow the action to proceed against them."*

38. In paragraph 87 of his judgment, he stated

> *".....In so stating, I recognise that Mr Merrien has given assurances that any information his clients might obtain would be used solely in relation to the English proceedings and indeed has produced a letter from the Second Plaintiff that such information would not be used in criminal proceedings"*

39. When the Claimants made application in November 2004 to lift the stay on the Norwich Pharmacal Order imposed by the Lieutenant Bailiff, Mr Page, the Claimants' solicitor in his Fourth Affidavit dated 16th November 2005 at paragraph 14 stated as follows:

> *".....Furthermore, I believe that the court's concern about the preliminary nature of the English proceedings are misplaced and given the nature of the proceedings it is plain that the undertakings are linked to the prosecution of the English proceedings. If for any reason the English proceedings failed then that is the end of the use of the documents by the plaintiffs unless a further application to vary the undertaking is made to this court."*

40. Mr Davies submitted that the stay of the Norwich Pharmacal Order was lifted at the hearing before the Lieutenant Bailiff on 9th and 10th December 2004, expressly on the basis that the disclosure could only be used in relation to the English proceedings. Indeed paragraph 2 of the Norwich Pharmacal Order was amended to make it clear that any information obtained could only be used in relation to the proceedings in the English courts. Paragraph 2 as amended stated as follows:

> *"Leave is hereby granted to the Plaintiffs to use the information supplied to them by the Defendant in connection with:*
>
> *(a) the civil proceedings currently being pursued by the Plaintiffs in the High Court of England against Logo Limited and others under number HQ04X02003 or any applications ancillary thereto, including any applications relating to the joinder of parties (the "English proceedings") and*
>
> *(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."*

41. This was further backed up by an undertaking in virtually identical terms given to the Royal Court by the Attorney General of Equatorial Guinea on behalf of the Claimants -

> *"I, the undersigned, Attorney General ("Procureur") of the Republic of Equatorial Guinea, hereby undertake on behalf of the Plaintiffs:*

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 and any applications relating to the joinder of other parties ("the English proceedings")."

42. Mr Davies submitted that following the termination of the English proceedings, there was no use to which any disclosure under the Norwich Pharmacal Order could be put by the Claimants that would not be a breach of the terms of that Order or the undertakings associated with it; He also submitted that the Privy Council recognised that it would not be right to allow the Norwich Pharmacal disclosure if the English proceedings were not justiciable before the English High Court. The Privy Council had indicated that if the Claimants did not have a cause of action enforceable in English Law then *"....it will be open to the respondents to apply to the Royal Court for the Lieutenant Bailiff's Order to be discharged."* The implication was clear that the Royal Court ought not to have given assistance in the first place. The law of Guernsey and that of England would not be different on such matters. The use by the Claimants of any disclosed material in any proceedings which the Claimants may commence in Spain or elsewhere would not suffice.

43. Mr Davies pointed out that the Bank is licensed and registered by the Guernsey Financial Services Commission and regulated by it. By virtue of that fact and the provision of anti-money laundering legislation, it would retain relevant documentation for a period of six years. It followed that if the Lieutenant Bailiff's Order was discharged the effect would be neutral. I enquired whether the Bank would be willing to give an undertaking to retain documentation for six years. Subsequently a letter was received from Mr Davies stating that it had been established that the Bank would be prepared to provide an undertaking to the Royal Court irrevocably to retain and not destroy any documents and/or other material that would be disclosable pursuant to the Norwich Pharmacal Order for not less than the minimum retention period of six years as defined in the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Regulations 2002.

Mr Merrien's submissions on ground (a)

44. Mr Merrien submitted that by reinstating the Order of the Lieutenant Bailiff the Privy Council had accepted that if the English proceedings were held to be valid in England then the Norwich Pharmacal Order should stand. The Court of Appeal in England had expressly contemplated circumstances in which the House of Lords might remit the case to that Court of Appeal. In light of its decision on justiciability the Court of Appeal in England had declined to express a view in relation to the issue relating to the ambit of the tort of conspiracy and whether there was a tort of intentional infliction of harm by unlawful means. The Court of Appeal anticipated that if its decision on justicability were overturned on appeal to the House of Lords, the matter might be remitted to it for judgment on the remaining issues (Court of Appeal judgment para 103).

45. Mr Merrien also referred to paragraph 85 of the Lieutenant Bailiff's judgment of 3rd November 2004 (emphasis provided)

" 85 ……However, the specific purpose is now stated to be limited to the English proceedings, and the possible addition of parties thereto. Those

proceedings, as already observed, are at a very initial stage. Only the English defendants have so far been served (to the best of my knowledge). It is unknown at this stage whether the English court will allow the action to proceed against them. It is equally not known to what extent, if at all, the English court will entertain proceedings against Logo, the Intervener, Mr Mann and Mr Moto. If those proceedings were to be halted, in either or both those eventualities, the stated objective for which disclosure is requested here might or would fall. It could, therefore, be premature for this court to make the Order as requested."

46. He submitted that the proceedings had not been finally halted because an application for leave to appeal to the House of Lords was at that time still pending and therefore it would be premature to discharge the Lieutenant Bailiff's Order.

47. Applying similar reasoning and logic he contended that when Mr Page in para 14 of his affidavit of 16th November 2004 had referred to the English proceedings he had not intended that the words be limited to a particular stage in the proceedings. It was too early for the Interveners to contend that the proceedings in England had failed. Paragraph 3 of the Lieutenant Bailiff's Order contemplated that an application for a variation might be made at anytime.

48. With reference to the judgment of the Privy Council and its obiter view on justiciability he took issue with Mr Davies' assertion in para 8 of his skeleton argument that the Privy Council had envisaged that if the Court of Appeal in England found for the Interveners then they 'could apply and ought to succeed in discharging the Norwich Pharmacal Order'. The Privy Council at para 28 had stated no more than that *"it will be open to the respondents to apply to the Royal Court for the Lieutenant Bailiff's Order to be discharged"*. The Privy Council had suspended the Order until the Court of Appeal in England had determined the issue.

49. The Privy Council could not properly be construed as indicating that the Royal Court should discharge the Order at a time when an application for leave to appeal to the House of Lords awaited determination. The possibility of an appeal to the House of Lords had not been canvassed and hence the view of the Privy Council on the matter was not known.

50. Mr Merrien further submitted that I should have regard to the fact that leaving the Order in place until the House of Lords had determined the case would have a wholly neutral impact on the Interveners because a suspension is in place. The Bank, a licensed institution, will respect the Court Order. The content of the limited information which had been disclosed in May 2004, is already in the public domain because the media had taken an interest in the case and published that information. It followed that there was no good cause at this time for the Order to be discharged.

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Mr Davies' submissions on ground (b)

51. Mr Davies' strongest point under ground (b) focused on the conduct of Mr Page, a solicitor, instructed by Equatorial Guinea. Grave concerns were expressed concerning his conduct. Mr Davies referred to Mr Page's affidavit of the 16th November 2004 when he had said this – (emphasis provided)

> *"14. Furthermore I believe that the court's concern about the preliminary nature of the English proceedings is misplaced given the nature of the undertakings. It is plain that the undertakings are linked to the prosecution of the English proceedings. If for any reason the English proceedings failed then that is the end of the use of the documents by the plaintiffs unless a further application to vary the undertaking is made to this court."*

52. In particular Mr Davies cited the fact that the Bank had reported in a hearing before me on 2nd November 2006 that the Bank's Advocate had received an approach by Mr Page for the Bank to disclose documents. The e-mail of 30th October 2006 sent by Mr Page (referring to the Court of Appeal judgment in England) read as follows:

> *"Dear Mark, here is the judgment. You will see that the English Court had decided that it has no jurisdiction. Consequently we have commenced proceedings in Equatorial Guinea. Even if the English Court is correct (we may appeal) there are proceedings in Equatorial Guinea, one of the countries envisaged by the original Order of the Guernsey Royal Court which has been reinstated by the Privy Council. Consequently, on any view our clients are entitled to the documents. Please confirm I can collect them this week. Best regards, Henry."*

53. He asserted that Mr Page must have known that the Norwich Pharmacal Order could only have effect if the English proceedings contained causes of action which were enforceable in English law and his approach to the Bank's Advocate was all the more disturbing.

54. Mr Davies also referred to what he had categorised as previous disturbing conduct throughout the proceedings including the publication of already disclosed information in England. He also referred to the failure of the Claimants to observe the Order of the Court of Appeal in England to make interim costs Order payments.

Mr Merrien's submission on ground (b)

55. Mr Merrien argued that if the Lieutenant Bailiff's Order remained in place then it would not be abused. The Claimant's would respect the Order and he reiterated that the impact of it remaining in force would be neutral.

56. With reference to the e-mail sent to the Bank's Advocate by Mr Page on 30th October 2006 he submitted that Mr Page may have been mistaking the position or could have been acting tongue in cheek. It was a matter of fact that the Bank did not make any disclosure and would not do so.

57. Mr Merrien acknowledged that there had been a copy of a Royal Bank of Scotland bank transaction report published in the Evening Standard in London but he did not accept that it had been leaked by the Claimants. There was no indication on the face of the published document that it was a copy tendered as an exhibit.

58. With respect to the Interveners' claim that the Claimants had not discharged cost Orders of the Court of Appeal in England he justified his clients' delay by countering that the Interveners themselves had not been punctilious in discharging court Orders imposed on them.

59. Mr Merrien submitted that it was in the interests of the parties to defer consideration of any further matters until the outcome of the proceedings in the House of Lords was known as their would be a saving on costs which would otherwise be incurred.

Future Applications

60. Mr Davies indicated that if successful in obtaining a discharge of the Order he would at a future hearing seek the return of the documents disclosed to the Claimants in May 2004, costs and also raise recompense issues.

Decision

61. Following inter partes argument, the Lieutenant Bailiff had put in place a more restrictive Order than the original Order granted 30th April 2004 which had permitted the Claimants to use the information supplied to them, by the Bank to pursue others, in a number of jurisdictions in civil actions only. The Lieutenant Bailiff had subsequently expressed doubts whether the High Court in England would entertain the Claimants' claim and he contemplated that the stated objective for which disclosure had been requested might or would fall (Judgment of 3rd November 2004 paragraph 85). It is clear that paragraph 2 of the Lieutenant Bailiff's original Order as amended by the Order of 10th December 2004 provides leave for the use of disclosed information supplied to the Claimants' outside the jurisdiction in the civil proceedings being pursued in the High Court in England and not in proceedings elsewhere. Mr Merrien had accepted this point but had contended that application could be made to the Royal Court to vary it.

62. It is to be recalled that the Privy Council obiter had considered that the Claimants' claims might well fail because it was well arguable that they represented an exercise of sovereign authority and the Privy Council went on to say that if a claim for damages will not lie then neither will a claim for an injunction (paragraph 24). In reinstating the decision of the Lieutenant Bailiff they noted that as

> *"the same questions in relation to English law are likely to come before the English Court of Appeal, their Lordships think that the Order should be suspended until that court has decided whether the appellants have a cause of action enforceable in English Law."*

63. It would have been unconventional and somewhat extraordinary for their Lordships in the Privy Council to speculate hypothetically in their judgment whether a further appeal to the House of Lords might be pursued by the Claimants if there were to be an adverse decision in the Court of Appeal and so their Lordships intimation needs to be read in its full context. I have concluded that on this ground the Order of the Lieutenant Bailiff should remain in force until the outcome of the Claimants' appeal in the House of Lords is known.

64. Paragraph 3 of the Order provides for an application to be made by "the Defendant (or anyone notified of this Order)". I do not interpret the Claimants to fall within this category. The Claimants could at any time make application to vary the Order without the benefit of Paragraph 3 but having regard to the history of applications to this Court to which I have referred. I do not consider that the Court should at

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any time hereafter entertain an application to vary the Court's Order to permit disclosure of information for the purpose of proceedings in Equatorial Guinea, Spain or anywhere else if the Claimants' claim in England is not justiciable there because it would equally not be justiciable in Guernsey.

Risk of Abuse

65. Mr Page in his affidavit of 15th December 2006 showed no contrition with respect to the content of his e-mail of 30th October 2006 to the Bank's Advocate. That is troubling. It is a matter of concern that a solicitor should show no contrition and seek to justify his actions in the face of his own affidavit of 16th November 2004 and the content of the amended Order of the court currently in place. He did not suggest that the e-mail should not have been treated seriously. However on learning of his actions which were rightly drawn to my attention by the Advocate for the Bank and for the avoidance of any doubt a further Order was issued by me on 2nd November 2006. That Order provided that the Order of the Lieutenant Bailiff of 30th April 2004 as amended shall be stayed until further Order of the Court and that the Bank shall not dispose of or otherwise deal with any documentation it would be obliged to disclose pursuant to the Order of 30th April until further Order of the Court. That Order should deal adequately with any concerns that the Interveners may have regarding the disclosure of any further information. Furthermore, Mr Merrien advised the Court that he had expressed concern to Mr Page and reminded him of the terms of the Court Order and the need to obey its terms.

66. On issues of failure to comply with Orders of the Court of Appeal in England on costs these matters are best left to the Court of Appeal in that jurisdiction to deal with in the event of non-compliance. Although I have taken account of the delay of the Claimants in complying with Court of Appeal costs Orders I do not consider that they are sufficient evidence of likely future abuse to support a submission that I should set aside the reinstated Order.

67. Furthermore there was insufficient evidence before me to satisfy me that the information published by the Evening Standard newspaper had originated from the material already disclosed by the Bank to the Claimants.

68. I have therefore concluded that on balance this ground (b) must also fail. The Order will remain in force but stayed until further Order.

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