Judgment 53/2004 **President of the State of Equatorial Guinea et al v. Royal Bank of Scotland International Limited and Systems Design Limited (Intervenor) – Royal Court (Civil action file 840) – 3 November, 2004**

Norwich Pharmacal disclosure order – application inter partes – Intervenor's application for discharge or stay of ex parte order made on 30th April, 2004 – held that the Royal Court is not precluded, in principle, from granting Norwich Pharmacal relief when no substantive proceedings are contemplated in Guernsey – exercise of discretion – order of 30th April stayed – Plaintiffs must consider what mechanisms might be put in place to give the Court control over information if it were to be disclosed

IN THE ROYAL COURT OF GUERNSEY

The 3rd day of November, 2004 before Andrew Christopher King Day, Esquire, C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

Between:

THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA — Plaintiffs

and

THE PROCUREUR OF THE STATE OF EQUATORIAL GUINEA

and

THE ROYAL BANK OF SCOTLAND INTERNATIONAL (A COMPANY INCORPORATED IN JERSEY) — Defendant

and

SYSTEMS DESIGN LIMITED — Intervenor

Whereas on 7th, 13th, 21st September, 2004, the Lieutenant Bailiff heard the Plaintiffs' *inter partes* application for a *Norwich Pharmacal* disclosure order against the Defendant, and the Intervenor's applications to discharge the order made, *ex parte* on 30th April, 2004, or alternatively to stay such order and heard thereon Advocates A.M. Merrien, N.J. Barnes,

Counsel for the Plaintiffs and Intervenor respectively and the Defendant not appearing (it having a neutral role in the proceedings);

The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and ORDERED that the said order of 30th April 2004 be stayed with liberty to apply (including liberty to apply as to costs)

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text
3rd November, 2004

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

THE PRESIDENT OF THE STATE OF EQUATORIAL GUINEA — **Plaintiffs**

and

THE PROCUREUR OF THE STATE OF EQUATORIAL GUINEA

and

THE ROYAL BANK OF SCOTLAND INTERNATIONAL (A COMPANY INCORPORTATED IN JERSEY) — **Defendant**

and

SYSTEMS DESIGN LIMITED — **Intervenor**

Judgment of Day L.B. on the Plaintiffs' *inter partes* application for a *Norwich Pharmacal* disclosure order against the Defendant, and the Intervenor's applications to discharge the order made, *ex parte* on the 30th April, 2004, or alternatively to stay such order.

Advocate A.M. Merrien appeared for the Plaintiffs.

Advocate N.J. Barnes appeared for the Intervenor.

The Defendant did not appear, it having an entirely neutral role in the proceedings.

Hearing dates: 7th, 13th, 21st.September, 2004
Judgment handed down: 3rd November, 2004

Legislation and Texts:

Matthews and Malek – Disclosure - Second Edition (2001), Second Supplement (2003).

Collins – The Territorial Reach of Mareva Injunctions (1989) 105 LQR 262.

Gee – Mareva Injunctions and Anton Pillar Relief – Fourth Edition 1998.

Cases referred to:

Norwich Pharmacal Co. v. Commissioners for Customs and Excise [1973] 1 WLR 164; [1974] AC 133.

Mackinnon v. Donaldson Lufkin & Jenrette Securities Corporation and others[1986] 1 AER 653

Orr v Diaper (1876) 4 Ch. D.92.

Upmann v Elkan (1871) 7 Ch. App 130

Mercantile Group AG v. Aiyela (1994) QB 366.

P v. T (1997) 1 WLR 1309.

British Steel Corporation v. Granada Television Ltd. (1981) 1AER 417.

Ashworth Hospital Authority v. MGN Ltd. (2002) 1 WLR 2033.

Reiner v. Salisbury (1876) 2 Ch. D 378.

Dreyfus v.Peruvian Guano Co. (1889) 41 Ch. D151.

Channel Tunnel Group v. Balfour Beatty (1993) AC 334.

Omar v. Omar (1995) 1 WLR 1428.

Republic of Haiti v. Duvalier and others (1990) QB 202.

Seed International Ltd. v. Tracey and others Guernsey C of A (Civil Appeal No. 341 – 18/12/2003)

Grupo Torras SA v. Sheik Fahad Al-Sabah and others 21st March 1997 unreported.

A v. C (1981) 1 QB 956.

Babanaft International Co. SA v. Bassatne (1990) Ch. 13

Derby & Co Ltd v. Weldon (No. 1) (1990) Ch. 48.

Gidrxslme Shipping Shipping Co. Ltd. v. Tantomar Transporters Maritimos Lda: The Naftilos LS (1995) 1 WLR 299

This judgment relates to the parameters in this Bailiwick of that which is commonly described as the *Norwich Pharmacal* jurisdiction, and, crucially I believe for the first time, in relation to proceedings instituted outside the jurisdiction. I acknowledge that it is lengthy (no doubt inordinately so), but I must extend it further by expressing my thanks to Counsel for their assistance, given with commendable brevity, in identifying the issues and their submissions in this case. However, this case also illustrates the necessity (indeed duty) for Counsel to leave unturned as few stones as possible in trying to assist the Court.

A. Background

Factual

1. On or about the 7th March, 2004, one Simon Francis Mann ("Mr. Mann") and sixty or more others (apparently citizens of the Republic of South Africa) were arrested in Harare, Zimbabwe. A day later a Servaas Nicolaas du Toit ("Mr. du Toit") and others (also South African citizens) were arrested in Malabo, Equatorial Guinea. The arrests in both countries were made, effectively though not necessarily directly, in relation to an alleged attempted *coup d'état* in Equatorial Guinea. Subsequent to his arrest, Mr. Mann was interviewed by, and made a full statement to, a Mr. Page ("Mr. Page") a partner in Penningtons, solicitors, acting for the Plaintiffs (at the Chikurubi Maximum Security Prison in Zimbabwe). Mr. du Toit was similarly interviewed by and made statements to Mr. Page in custody in Equatorial Guinea.

2. I must say that I find the fact that these interviews took place at all to be somewhat peculiar. I have treated with considerable circumspection the statements made by both gentlemen which have been produced to me, on oath, by Mr. Page, explaining the fact of, and the circumstances in which, those statements were made. I have no need to review in detail the information provided by Mr. Mann and Mr. du Toit with regard to the organisation leading up to the alleged *coup*, save to identify the various companies with which they apparently are associated and which feature to a greater or lesser extent in the relevant events.

3. Triple Option Trading ("TOT" – a South African company) is owned as to one-half by Mr. du Toit and as to the other half by three individuals in Equatorial Guinea; Military Technical Services Incorporated ("MTSI" – based in South Africa), is owned or half owned by Mr. du Toit; Logo Limited or Logo Logistics Limited ("Logo" – variously described as being registered in Cyprus or the Caribean), has Mr. Mann, at least, as a director; and the Intervenor (registered in the Bahamas), with which it is alleged Mr. Mann is or may be concerned. The latter two companies both have the same business address in St. Peter Port, from which Hansard Trust Company Limited and Hansard Management Services Limited (generally "Hansard") operate, of which more later. Also involved, it is said, was a Zimbabwean entity, Zimbabwe Defence Industries (ZDI), as also a Mr. Eli Calil ("Mr. Calil") who features in the English proceedings to which I will be referring.

4. A written contract has been produced to the Court entered into between Logo and MTSI relating to the recruitment of mercenaries ("the recruitment agreement"), as also a contract

between ZDI and Logo/MTSI (for whom Mr. Mann and Mr. du Toit signed respectively) for the supply of military equipment and ammunition in Harare, ("the equipment agreement"). Importantly, copy documents appear to have been obtained by Mr. Page which indicate payments being made, via an intermediary bank in Paris, by the Defendant on behalf of Logo (on three occasions) and the Intervenor (once) for the credit of TOT, such transactions being dated the 5th January, the 16th January, the 17th February and the 2nd March, 2004, respectively ("the banking transactions").

5. On the basis of this information, it is alleged that the objective of all these activities was an attempted *coup* in Equatorial Guinea, in the preparation for which Mr. Mann and Mr. du Toit played a major role, involving the recruitment of personnel, the purchasing of armaments, equipment and transport, together with tactical organisation and the organising and securing of funding. The further participation by Mr. du Toit was allegedly anticipated in the *coup* itself, apparently scheduled to take place in Equatorial Guinea on the 8th March, 2004, the object of which was apparently to replace the present President of the Republic, by abduction and death if necessary, with a Mr. Severo Moto, currently in exile in Spain.

6. It should be emphasised at this stage that the Intervenor denies the allegation of an attempted *coup*.

7. I understand that Mr. Mann has now been prosecuted in Zimbabwe for criminal offences relating, *inter alia*, to the unauthorised landing of the mercenaries at Harare airport and/or weapons offences, and sentenced to 7 years imprisonment. (Whether that was a lenient sentence, and whether that leniency was shown, as has been alleged, because Mr. Mann was sentenced on the basis that the destination of the plane, its passengers and contents was a security company in the Democratic Republic of Congo, I know not). Nor do I know what criminal proceedings may have been instituted against Mr. du Toit in Equatorial Guinea, or indeed what has happened to him, other than the fact that, according to Mr. Page, whilst Mr. du Toit was in custody in that Republic in March of this year, he was the subject of criminal investigations.

8. In view of the apparent connection of Mr. Mann and Mr. du Toit with Logo, the Intervenor, MTSI and TOT, the Plaintiffs decided to seek disclosure from the Defendant of more information with regard to the person or persons behind Logo and the Intervenor, as well as more detail with regard to the banking transactions and the source and destination of any funds which they may have held on behalf of those entities and, directly

or indirectly, by Mr. Mann and Mr. du Toit. Thus the Plaintiffs made application in turn to the Courts of the Isle of Man, Jersey and then Guernsey for what they considered to be appropriate orders.

Procedural

9. The Order made *ex parte* by this Court on the 30th April ("the 30th April Order") followed application (filed on the 23rd April) which was supported by an affidavit from Mr. Page with copies of the purported statements of Mr. Mann and Mr. du Toit, of the recruitment agreement, of the equipment agreement and of the banking transactions. Confirmation was also provided, as requested, with regard to the intention to bring civil proceedings against Mr. Calil, resident in London, against Mr. Moto, resident in Spain, against other financiers whose identity it was hoped to establish, and perhaps also against Mr. Mann and du Toit, though such action against the latter two was unlikely, in view of the fact that they were the subject of criminal proceedings. The contemplated civil proceedings were very much aimed at the financiers and organisers of the alleged attempted *coup d'etat*, rather than the mercenaries themselves who were and/or would have been directly involved. The proceedings contemplated would be based on the tort of civil conspiracy. There was also the possibility that the Plaintiffs might seek injunctive relief against Mr. Moto at least.

10. The main thrust of the 30th April Order was to require the Defendant to provide, within three working days, full information regarding the current and historic beneficial owner(s) of Logo and the Intervenor; within five working days to provide copies of any documents relevant to establishing that identity; also within that timescale to provide documentation identifying all incoming and outgoing transactions of any account held in the name(s), or for the benefit, of Logo, the Intervenor, Mr. Mann and Mr. du Toit, showing the origin and destination of all funds passing through such accounts(s); and to provide the name(s) of those sending or receiving such funds; the whole since the 1st January, 2003. Copies of any documents contained in any safety deposit box held by the Defendant in the name of any of the four named parties were also to be produced. Leave was granted to use the disclosed information within Equatorial Guinea, Spain, Jersey, England and Wales for any civil proceedings (and only civil proceedings) that the Plaintiffs might be advised were appropriate.

11. For completeness I should add that, as already indicated, prior proceedings had been instituted both in the Isle of Man and in Jersey. The Order made on the 14th April, 2004, by the High Court of Justice in the Isle of Man (Chancery Division), on the *ex parte*

application of the Plaintiffs, was in very similar terms to the 30th April Order, namely the provision of information as to the ownership of Logo and the Intervenor, of details relating to the bank accounts of the named parties, and of details of any transactions which may have taken place through them; as also copies of any documents held in any safe deposit boxes. Leave was similarly granted to use information supplied for the purpose of civil proceedings in the same jurisdictions as specified in the Guernsey Order. In the event the Manx Order was nugatory, as the branch of the Defendant in the Isle of man had no information to impart.

12. In Jersey, the proceedings took a different course, in that the Order of that Royal Court, of the 26th April, provided for an *inter partes* hearing towards the end of May, involving the participation, if they were so minded, of Logo, the Intervenor, Mr. Mann and Mr. du Toit, relating to the same provision of information from the Defendant as had been ordered in the Isle of Man, and was to be ordered in Guernsey. In the meantime, the Order of the 26th April was to operate as an immediate restraint upon any access to any safe deposit boxes which the Defendant might hold in respect of the named parties. In the event, nothing further materialised before the Jersey Court (I understand), as the Defendant in Jersey had neither information nor documents to provide.

13. On the 13th May, the 30th April Order was amended, by consent of the Plaintiff and Defendant, to extend the time limits in which certain matters had to be done; and the second schedule to the Order was amended to include a further undertaking *"to commence a civil action in one of those stated jurisdictions no later than the 30th June, 2004".*

14. On the 14th May (the review date of the *ex parte* 30th April Order), the Intervenor applied to have it discharged, pending the hearing of which the Defendant was to be, and was, prohibited, by order, from disclosing any information to the Plaintiffs relating to the affairs of the Intervenor. It appears that, arising I understand by the attempt of the Plaintiffs to serve notice of the 30th April Order on Logo at the Hansard offices, which service was not accepted although that on the Intervenor was, some confusion had resulted on the Plaintiffs' part as to the correct identity and corporate description of Logo. That would seem to be the reason why Logo, unlike the Intervenor, has not sought to intervene in these proceedings. In the ensuing weeks various directions were given by the Court. It should also be noted that the Plaintiffs changed their advocates in Guernsey on a number of occasions, so that Mr. Merrien is in fact the fourth advocate from different firms to appear. On the 19th August the Intervenor made a further application, namely that the 30th April Order merely be stayed until further order (with the prohibition against disclosure to

continue). That application was made in the light of the most recent twist which the English proceedings had taken, to which proceedings I now turn.

15. The proceedings in the High Court in London were instituted on the 30th June by the Plaintiffs against Logo, the Intervenor, a Mr. Greg Wales (resident in England), Mr. Mann, Mr. Calil (resident in England) and Mr. Moto. The claim alleges a conspiracy. I cite it in full:-

> *"Between the months of March, 2003, and March, 2004, in England and other places the Defendants agreed with each other and/or with persons unknown ("the conspirators") to combine with the common intention of causing injury to the Claimants ("the conspiracy") by maliciously overthrowing and/or effecting the overthrow of the lawful government of Equatorial Guinea ("EG") by acts which are crimes in England and EG, namely unlawful force and by unlawfully abducting and/or injuring and/or murdering the First Claimant or causing the same to be effected ("the coup") with a calculated view of (a) profiting financially from the coup and (b) replacing the First Claimant with the Sixth Defendant (a citizen of Equatorial Guinea living in exile in Spain)".*

16. The acts then particularised, as being carried out in pursuance of the conspiracy, relate to the events in the twelve months preceding March this year, including various meetings between the individual defendants, the alleged engagement by Mr. Moto of Mr. Mann (acting for himself and others) to organise the preparations for the *coup* in return for lucrative rewards, the transfer of monies and the provision of funds, the recruitment of personnel and the obtaining of equipment and transport, etc. The alleged loss and damage arising to the Plaintiffs relates to the increased level of security in the Republic and the cost of the detention and trial of conspirators, together with a claim for exemplary damages. Further, the Plaintiffs claim injunctive relief to restrain further conspiracies to overthrow the government in Equatorial Guinea.

17. It would appear that on the 27th July judgment by default was entered against Mr. Calil (he and Mr. Wales, the only parties resident in England, being the only defendants who had been served with the proceedings). On the 28th July that default judgment was set aside and the Plaintiffs were ordered to file and serve, no later than the 31st August, amended particulars of claim which, *inter alia*, were to distinguish more clearly the causes of action of the First Plaintiff separately from those of the Second Plaintiff, and the action was stayed forthwith pending disposal of the criminal charges against the defendants or some

of them or pending further order in the meantime. On the 4th August the Plaintiffs applied for the orders of the 28th July to be reviewed.

18. On the 15th September, Mr. Calil applied to strike out the statement of case of both Plaintiffs, for summary judgment against the Plaintiffs, and for such other or further relief as the Court deemed just and equitable. On the 16th September the High Court ordered that the stay of the action contained in the order of the 28th July be discharged forthwith, that the time-limits with regard to providing clearer particulars of the claim be extended to the 31st October (with defences to be filed by the 21st November), and that Mr. Calil's application of the 15th September be adjourned generally with liberty to restore.

19. It is appropriate at this stage to refer to what I would describe as the international criminal aspects of this case, which, *inter alia*, may involve requests for information, evidence, or extradition. That there might be such aspects in this case has been self-evident to me from the beginning. Some very limited information has been provided by Mr. Merrien (I am in no way suggesting that he is able to provide more) with regard to a communication sent by the solicitors, Penningtons, on behalf of the government of Equatorial Guinea, to the anti-terrorist branch in London in the middle of May, 2004. More importantly, Her Majesty's Procureur has been able, kindly and helpfully, to provide further information, the effect of which is that though initial contact has been made with the anti-terrorist authorities in London, such requests, and consideration of them, are at a very early stage. The English authorities have not formally been notified by the Plaintiffs of the English civil proceedings, and at this stage have no intention of seeking to intervene. Further, Her Majesty's Procureur informed the Court that no formal request has been received, to date, by the Law Officers in Guernsey in respect of the Guernsey connected entities referred to in Penningtons' communication to the anti-terrorist branch (and indeed in the civil proceedings in London), though the possibility of such a formal request being received could not be ruled out should the English authorities themselves in due course agree to provide assistance.

20. I must also say something about the burden of proof with regard to the various applications which are before me. In general course, when an order has been made *ex parte* (whether of a freezing or disclosure nature, for example) and is thereafter re-visited on an *inter partes* basis, and whether because the full hearing was originally anticipated and the *ex parte* order was made solely on a temporary basis, or whether application is made to discharge the *ex parte* order, the burden remains on the original applicant to satisfy the Court, to the civil standard, that the order should be made, or in effect confirmed (see, for example, Seed).

21. In this case, of course, as Mr. Merrien rightly points out, the person seeking the discharge of the order is the Intervenor, who was not the object of the original order (that object being the Defendant). Nevertheless, I am satisfied that the Plaintiffs have to satisfy me that the Order in the terms of that of the 30th April should be made. The situation with regard to the application to stay, effectively to run in conjunction with the stay of the English proceedings and no more, is different. However, the Intervenor's position with regard to stay can no longer be sustained, as Mr. Barnes honestly submitted, because the basis for the Guernsey stay application has disappeared, there no longer being a stay of the English proceedings. Thus the question of burden of proof in that regard is now totally academic.

22. I will be addressing later the evidence, or in my view the purported evidence, which has been placed before me. It is pertinent at this stage merely to identify it. In addition to the affidavit of Mr. Le Page of the 23rd April, with its extensive enclosures, filed in support of the original application, there is an affidavit (sworn on the 9th June) by a Mr. Blows, a chartered accountant, and director of the Hansard Companies, which, he says, provide and trust and administrative services, one of those companies so administered being the Intervenor. A volume of documentation also accompanies that affidavit. In response there are two further affidavits from Mr. Page (of the 29th June and 23rd August respectively), which address (*inter alia*) the arguments of a legal or similar nature advanced by Mr. Blows, together with further documentation..

B. **The issues**

23. Central to this application is the allegation that the Defendant Bank has become involved, wholly innocently, in the wrongful acts of others. Thus it is under a duty, which can be legally enforced, to provide relevant information to those, who can be broadly described as victims of those wrongful acts, of relevant information with regard to them. An application for disclosure of that nature has come to be described as *Norwich Pharmacal*, the jurisprudence in respect of which has been steadily developing since the House of Lords came to their decision in the case that gives its name to this type of disclosure jurisdiction, some 30 years ago ("*a new chapter in our law*" – Lord Denning MR in BSC).

24. The further legal issue which arises is that, as primarily argued by Mr. Barnes, whatever may be the exact current boundaries of the *Norwich Pharmacal* relief, and the circumstances in whch it may be applicable, no assistance can be given in support, or in respect, of proceedings which are contemplated or underway in another jurisdiction.

25. Furthermore, Mr. Barnes argues, even if the *Norwich Pharmacal* jurisprudence is available to assist litigants, or even more widely to victims of wrongful acts, in other jurisdictions, it is not appropriate to make any such order in the circumstances of this case. This is in contrast, of course, to the arguments advanced by Mr. Merrien (on whose clients, as I have stated, the burden lies) that the facts justify the order for disclosure as requested. Both Counsel are agreed, rightly, that if in principle the relief is available to assist the Plaintiffs in this case, then it is a matter of discretion, to be judicially exercised, whether it should be applied on the particular facts.

C. The legal principles relating to disclosure (*Norwich Pharmacal)* relief

Generally

26. The starting point, naturally, must be the principle enunciated by the House of Lords in Norwich Pharmacal itself. The facts were, to summarise the headnote, that the Appellants were the owners and licensees of a patent for a chemical compound. It appeared that the patent was being infringed by illicit importations of the chemical compound manufactured abroad, that is to say each importation involved a tortious infringement of the Appellant's rights. They tried but with little success, to discover the identity of the importers. To obtain the names and addresses of the importers, they brought actions against the Commissioners of Customs and Excise alleging infringement of the patent and seeking orders for the disclosure of the relevant information, the Customs, arising from their statutory duties, effectively having control of imported goods from the moment when they enter until the time when the consignee obtains clearance and removes the goods. On appeal to the House of Lords, the Appellants abandoned the contention that they had a cause of action for infringement of their patent by the Commissioners themselves, and the appeal proceeded on the basis that the case was and always had been an action solely for discovery. The House of Lords granted the relief sought.

27. The principle enunciated by their Lordships has been described as having been *"disinterred"* (see Hoffmann J in MacKinnon at p. 661 c), in that the most recent English authority to which the Appellants could refer in support of their contention was Orr (1876), which in turn led to Upmann (1871), their Lordships in Norwich Pharmacal much relying upon the views expressed by Lord Romilly M.R. (at first instance) and Lord Hatherley L.C. (on appeal) in the latter case. As Lord Reid said, in enunciating the principle (at p. 175 B):-

> *"*(They) *seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their*

wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.".

28. Hoffmann LJ in Mercantile Group (at p. 5 of his judgment) summarised the effect of the decision in Norwich Pharmacal, as expounded in later cases, as being that the jurisdiction to order disclosure against the third party existed when two conditions were satisfied, namely that the third party must have become mixed up in the transaction concerning which the discovery is required, and secondly that the order for the discovery did not offend against the "mere witness" rule.

29. With regard to that rule Lord Reid (in Norwich Pharmacal at p. 174 B) stated:-

"I think that there has been a good deal of misunderstanding about this rule. ……. But the foundation of the rule is the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondent cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information.".

30. I next turn to P v. T, the headnote being as follows:-

"Where justice cannot otherwise be done, a plaintiff is entitled to discovery against a defendant in order to obtain information for use in bringing proceedings against a third party, even though it cannot be ascertained, without the information sought, that the third party has committed a tort against the plaintiff (post, p. 1318 D-F).

Where, therefore, in an action against his former employer the plaintiff sought an order that the employer disclose precise details of allegations made against him which formed the basis for his dismissal and the identity of the person who made the allegations in order that he might use the documents and information so provided in an action against that person:-

Held, granting the relief sought, that, since knowledge of the relevant facts could not be acquired without the assistance of the order sought, and although the elements of the torts of malicious falsehood or defamation remained to be made out, justice demanded that the plaintiff should be in a position to clear his name if the allegations made against him were false (post pp. 1318 H - 1319 B).

Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] A.C. 133. H.L. (E) applied.

31. That case, therefore, established the principle that the *Norwich Pharmacal* principles, in respect of third party discovery, could be extended so as to obtain information as to whether a tort (a wrongdoing) had been committed or not, and if so of what nature (in contrast to the Norwich Pharmacal situation where there could be no real argument but that a tort had been committed by someone).

32. In British Steel Corporation, the Corporation sought (and obtained) an order that the defendant television company disclose the names of those who had supplied documents, confidential and belonging to the Corporation, which were used in a national broadcast in relation to the steel strike of 1980.

33. I turn to Ashworth Hospital. The facts, as recorded in the headnote, were as follows:-

*"A convicted murderer (*Ian Brady, one of the Moors murderers*) detained in custody at a secure hospital managed by the claimant authority was on hunger strike and conducting a media campaign about his treatment. An article was published in the defendants' newspaper (*the Daily Mirror*) containing verbatim extracts from the patient's medical records. The information had been supplied to the defendants by an intermediary, who had been paid for it, and it was probable that an employee at the hospital had supplied the intermediary with a printout from the hospital's computer database. The employee would in so doing have been in breach of his duty of confidentiality under his contract of employment. The hospital authority, having attempted unsuccessfully to identify the informant, applied for orders against the defendants (i) requiring them to deliver up to it all medical records or copies or extracts therefrom in their possession, power, custody or control relating to the hospital's care or treatment of the patient, (ii) restraining them from publishing, distributing or otherwise disseminating information contained in those records and (iii) requiring them to explain how they had come to be in such possession or control and identifying any employee and others involved. The judge ordered the defendants to serve a witness statement on the authority explaining how they had come to be in*

possession or control of the records and identifying any employees and other persons involved. The Court of Appeal dismissed the defendants' appeal.

On appeal by the defendants-

Held, dismissing the appeal, that disclosure of the identity of an informant might be ordered against a person who, though not himself guilty of civil or criminal wrong, was involved in wrongdoing by the informant; that it was not necessary, for disclosure to be ordered, that the claimant intended to bring legal proceedings against the informant, provided that some other legitimate purpose in seeking disclosure was identified; that disclosure of a journalist's source of information would not be ordered " in the interests of justice" within section 10 of the Contempt of Court Act 1981unless that was a necessary and proportionate response in the circumstances of the case; but that, in view of the need for the integrity of the authority's records to be protected and the authority's need to identify and punish the informant, the disclosure ordered by the judge had been justified (post, paras 1-5, 26, 30, 34, 42, 45-47, 49, 59-62, 66-69, 73).

34. Necessarily, as that case involved a potential contempt of court by a newspaper, the speeches of their Lordships were, to a greater or lesser extent, concerned with Section 10 of the Contempt of Court Act, 1981 and Article 10 of the European Convention (freedom of expression), matters which of course do not arise in this case. Helpful reviews, however, were provided, of the current extent of the Norwich Pharmacal jurisprudence, and the reason why it was to be extended further in the circumstances of that case. As it is short, I cite the speech of Lord Slynn of Hadley almost verbatim, as follows:-

"[1] My Lords, I fully agree with my noble and learned friend Lord Woolf CJ that this appeal should be dismissed for the reasons he gives. His analysis of the case law and the principles involved to my mind makes two things in particular abundantly clear. The first is that the jurisdiction recognised in Norwich Pharmacal Co v Comrs of Customs and Excise [1973] 2 All ER 943, [1974] AC 133 to order disclosure of, inter alia, the identity of a source of information or documents does not depend on whether the person against whom the order is sought has committed a tort, a breach of contract or other civil or criminal wrong. It is sufficient but, it is important to stress, also necessary that that person should be shown to have 'participated' or even been 'involved' in the wrongdoing which is at the basis of the application for discovery….

[2] This latter requirement together with the residual discretion of the court as to whether it is right that an order should be made in all the circumstances provide a safeguard against an unjustified order for discovery.

[3] The second point is that it is not a necessary precondition of the exercise of the jurisdiction that the applicant should have begun, or had an intention to begin, legal proceedings in respect of the allegedly wrongful act – in cases like these against the source. My noble and learned friend's reference to the speeches in British Steel Corp v Granada Television Ltd [1981] 1 All ER 417, [1981] AC 1096 and in particular to the judgments of Lord Denning MR and of Templeman LJ [1981] 1 All ER 417 at 439, 443, [1981] AC 1096 at 1127, 1132 respectively) in the Court of Appeal seems to me to establish this point conclusively….

[4] …

35. The leading speech was delivered by Lord Woolf C.J., with whom all their Lordships agreed. The requirement that the person from whom discovery was sought must have been involved in the wrongdoing, he described as being not stringent, merely significant. It distinguished that party from a mere onlooker or witness (at para. 35), and provided justification for an intrusion upon a third party. The protection for the third party, more generally, was that the jurisdiction to order disclosure was discretionary; thus the need for involvement could be described as a "threshold requirement" (para 36). Further, the innocent third party could be indemnified for their costs, while at the same time recognising that the inconvenience of being embroiled in proceedings, through no fault on their part, could be avoided.

36. Lord Woolf further concluded that the *Norwich Pharmacal* jurisdiction to order disclosure of sources extended beyond situations where the information to be disclosed has required for purposes other than existing or intended proceedings. He stated (at para. 44):-

"{44) It is clear that in the Norwich Pharmacal case itself, Lord Reid was contemplating situations where the intention of the claimant, once the source had been identified, was to bring proceedings against the source. The language used by Lord Reid can be explained by the fact that in that case, it was the intention of Norwich Pharmacal *to bring proceedings. It is also to be noted that in the final paragraph already cited from his speech Lord Reid was taking a commonsense non-technical approach when justifying the jurisdiction. Furthermore, the other speeches do not link the jurisdiction to any requirement that the information should be*

available to the individual who has been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings…

(45) Certainly, in the Norwich Pharmacal case there was no real issue as to this possible limitation on the Norwich Pharmacal jurisdiction. In the latter case of British Steel Corp v. Granada Television Ltd (1981) 1 AER 417, however, the point arose directly.

In the Court of Appeal Lord Denning MR in my view correctly regarded the Norwich Pharmacal case as opening "a new chapter in our law" and then went on to add:-

> *"Counsel for Granada suggested that this was limited to cases where the injured person desired to sue the wrongdoer. I see no reason why it should be so limited. The same procedure should be available when he desires to obtain redress against the wrongdoer, or to protect himself against further wrongdoing."*

(46) Templeman LJ's remarks are even more apposite; he stated:-

> *"In my judgment the principle of the Norwich Pharmacal case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of the cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress. In the present case BSC state that they will not finally determine whether to take legal proceedings or whether to dismiss the employee or whether to obtain redress in some other lawful manner until they have considered the identity, status and excuses of the employee. The disclosure of the identity of the disloyal employee will by itself protect BSC and their innocent employees now and for the future and is essential if BSC are to redress the wrong."*

(47) In their Lordships' House Lord Wilberforce and in particular Lord Frazer of Tullybelton were clearly of the view that the order could be made even if information was not required for the purposes of bringing an action against the informant.".

37. Lord Woolf was also clearly of the view that the jurisdiction enables an individual who has caused harm by wrongdoing, wrongdoing in which the third party defendant has become involved, to be identified.

> *"If the law (*Lord Woolf continued at para. 53*) has developed so as to enable, in the appropriate circumstances, the wrongdoer to be identified if he has committed a civil wrong I can find no justification for not requiring the wrongdoer to be identified if he has committed a criminal wrong. To draw a distinction between civil and criminal wrongs can only be justified if, contrary to the views I have already expressed, disclosure can only be ordered to enable civil proceedings to be brought against the wrongdoer. If the victim of the wrongdoing is content that the wrongdoer should be prosecuted by the appropriate prosecuting authority I cannot see any objection to his obtaining the identity of the wrongdoer to enable that to happen. The prosecution may achieve for the victim the remedy which the victim requires just as dismissal of an employee can do so. The more restrictive approach attaches excessive significance to the historic origins of the jurisdiction. If this approach had been adopted to the jurisdiction to grant injunctions, freezing orders (Mareva) injunctions would never have been developed from the late 1970's onwards.".*

38. Lord Woolf then continues:-

> *(57) The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise is illustrated by the decision of Scot V.C. in P v. T...*
>
> *(58) What I have said in relation to the disclosure of the identity of the source with a view to possible criminal proceedings does not detract from the requirement that the person from whom disclosure is sought must have been involved whether innocently or otherwise, in the wrongdoing which would in these circumstances be criminal. It is this requirement that means the Norwich Pharmacal jurisdiction does not offend the general principle that at common law there is no legal duty to provide the police with information or otherwise to assist them with their enquiries..*

> *(59) ……. the arguments Mr. Brown (*for MGM) *placed before their Lordships for not adopting the non-technical approach, which I regard as being correct, was that if the disclosure was not linked with proceedings which would actually be brought, there would be no means of the court protecting a defendant against misuse of the material which was discovered.*
>
> *(60) I agree that this is a matter for concern. However this concern will be met if an order for disclosure is not made unless a claimant has identified clearly the wrongdoing on which he relies in general terms and identifies the purposes for which the disclosure will be used when it is made. The use of the material will then be restricted expressly or implicitly to the disclosed purposes unless and until the court permits it to be used for another purpose.".*

39. I believe the relevant principles which can be distilled from the authorities, so as to be applicable in this jurisdiction, can be summarised 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 (Merchantile 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).

Application of *Norwich Pharmacal* relief to foreign proceedings

40. I turn now to Mr. Barnes' primary submission with regard to the legal principles. He puts it, succinctly, in this way:- this Court does not have jurisdiction to grant *Norwich Pharmacal* relief where no substantive proceedings are contemplated in Guernsey. For that submission he relies on this statement of principle set out in Matthews and Malek (at paragraph 2.13 in the section relating to *Norwich Pharmacal* orders):-

> *"The disclosure must be sought in aid of legal proceedings contemplated to be taken in England" (*for which read Guernsey*).*

For completeness I would add the statement continues to be made in the edition published after, and which clearly takes into account of, the decision in Ashworth. In addition, the authors acknowledge that although the Civil Jurisdiction and Judgment's Act ,1982, by section 25 (as amended) (which of course has no application in this jurisdiction) has extended the power of the English courts to grant "interim relief" in support of substantive proceedings in another state, this section expressly does not apply to applications for provision to obtain evidence (the author's emphasis). This exception itself has been restrictively construed so as not to extend to applications for information needed in order to obtain a freezing (*Mareva)* injunction, but otherwise it appears, to the authors, to prevent *Norwich Pharmacal* relief being ordered in relation to foreign proceedings.

41. The authority principally cited in support of Mr. Barnes' primary submission is Reiner. The facts in that case were that the plaintiff was about to commence proceedings against the Crown and the defendant, as the Secretary of State for India, to recover land in that in country. The plaintiff applied in England for the discovery and inspection of documents of title held by the defendant, which were essential to the claim. In view of its subject matter, the substantive action had to be taken in India. Accordingly, it was held that any application for discovery had to be made in that jurisdiction also, the defendants being just as much parties in India as England and where the courts, in the words of Malins V.C., were "*armed with legal and equitable jurisdiction with regard to discovery, and every other doctrine inherent in the courts of this country".* The application was dismissed.

42. Dreyfus was cited to similar effect. In that case, an action was instituted in Belgium for damages arising from the discharge of three ship loads of guano by the defendants in Antwerp. The plaintiff sought discovery from the defendant in England by way of interrogatories, or otherwise, in relation to all dealings by the defendant with the cargoes, and such further or other order in aid of the Belgium action as the nature of the case might require. The application was dismissed, Kay J upholding the principle which he believed to be well established (save for what appeared to be perhaps one maverick case, that of Crowe v. Del Rio (1769 Ch.).

43. Mr. Barnes also helpfully informed me that the researches which he had undertaken suggested that in none of the sixty or so *Norwich Pharmacal* reported cases since 1974 (which he had been able to trace), was he able to find one which had a foreign element, namely in which the disclosure sought might lead to information which would found foreign proceedings, or that the information sought related to matters taking place abroad. Equally, and conversely, he honestly accepted that there was no case which revealed a refusal of jurisdiction on the grounds of the foreign element. It was, however, he observed, surprising that in those thirty or so years no potential plaintiff in foreign proceedings or in proceedings with a foreign subject matter had sought *Norwich Pharmacal* relief, as far as he could discover.

44. I am not at all satisfied that the principle stated in Matthews and Malek, even if correct in relation to the law of England and Wales, is or should be the law of Guernsey, and therefore determinative of this issue and of this case. I think one has to turn to first principles.

45. I am mindful of the cautionary advice of Lord Cross of Chelsea in Norwich Pharmacal that the lawyer of today can at best have only a superficial understanding of the procedure

developed when law and equity were administered in separate courts. Nevertheless, it seems to me that in both the cases cited in support of Mr. Barnes' submission, the parties involved were either already parties to the proceedings or were to be parties in what could only be foreign proceedings. Thus I find neither decision surprising, on their facts. The discovery sought was to help resolve the issues in that action.

46. That is in clear contrast to *Norwich Pharmacal* relief, where the purpose is potentially to assist a claimant to obtain information of, and redress for, a wrongdoing in which the respondent has been mixed up, whether or not as a wrongdoer. If, therefore, the purpose of the relief is to assist a victim of a wrongdoing to correct it, then, subject to one major reservation, I see no reason in principle to preclude the provision of the information and therefore potential remedy, merely because corrective action is/or may be to take place outside the jurisdiction.

47. The jurisdiction in England and Wales to grant injunctions, freezing and disclosure orders has developed steadily in the last thirty years or so, including, to a greater or lesser extent, orders being made ancillary to, or potentially to enable, substantive proceedings being taken abroad, and the like. The jurisdiction in Guernsey has been similarly developed, but less extensively, and not always along identical lines. At least by analogy I consider it helpful, briefly, to review, those developments. That was, indeed, the argument advanced by Mr. Merrien, with his helpful reference to Mercantile Group, Channel Tunnel Group, and, particularly perhaps, Omar (use of documents disclosed in England in foreign proceedings aimed at following and tracing certain bearer shares). For my part, I also look to the guidance provided in the instructive analysis conducted recently in Seed by the Guernsey Court of Appeal.

48. In that case the Royal Court granted a *Mareva* injunction freezing bank accounts in Guernsey, which order was ancillary to substantive proceedings which had been commenced in the Netherlands in which allegations, *inter* alia, of fraud were made. In conjunction with the freezing order, the Royal Court made a disclosure order (disclosure was not apparently available in the Netherlands) requiring the provision of copies of documents and records in relation to certain bank accounts held by a bank, including, importantly, details of transfers in and out of the accounts (my emphasis). The order sought was not on the basis of Norwich Pharmacal. On appeal, the defendant/appellant argued that no order for disclosure should have been made at all, and certainly not in terms which went wider than those of the freezing order itself, that is wider than what was required for the policing of the freezing order in relation to assets in Guernsey. Thus objection was taken to details of transfers out of the relevant accounts in Guernsey.

49. The Court of Appeal decided, firstly, that a disclosure order, ancillary to a freezing order, could be made even where there was no proprietary claim (Republic of Haiti); secondly, that it was appropriate to make a disclosure order in the circumstances of Seed, because without it the freezing order would be "toothless", to echo the words of Lord Steyn in Grupo Torras; and, thirdly, the Court held that a disclosure order could be made, wider in scope than the associated freezing order, though a strong case would have to be made out before any such wider such disclosure order was made. However, so as to provide control by the Royal Court of the use to which disclosed information and documents might be put, the Court of Appeal, in confirming the disclosure order made by Rowland D.B., varied it so that it expressly provided: that the documents or information obtained were only to be used for the purpose of legal proceedings between the parties, unless the Royal Court otherwise directed; and that in the event that the documents or information enabled the plaintiffs to commence new proceedings in a foreign jurisdiction, the plaintiffs had first to seek leave from the Royal Court to commence such proceedings.

50. Southwell J.A.in giving the judgment of the Court extensively reviewed English authorities relevant to the issues in Seed; for example, A v. C, Republic of Haiti, Babanaft International, Grupo Torras, Derby & Co, (*"I would only urge that in this field the court should scrutinise very carefully any submission that its powers are circumscribed more narrowly than the justice of the case demands* "– per Neill L.J. (at p. 94) and Gidrxslme Shipping. Southwell J.A. also referred to a passage in the article by Mr. Lawrence Collins (at p. 297), which was cited with approval by Steyn L.J. in Grupo Torras, and in particular emphasised:-

> *"The practical consequence is that it is really the Mareve injunction which is ancillary to the disclosure order, rather than the traditional relationship in which it was the disclosure order which was ancillary to the Mareva injunction.".*

51. As Southwell J.A observed – *"it is the disclosure order which gives teeth to the freezing order. This applies as much to freezing orders limited to one jurisdiction, as it does to world wide orders.".*

52. A theme throughout these authorities which Southwell J.A. was at pains to emphasise, was *"the prevention of an abuse".* That must be so, in my respectful view, just as much in principle with regard to a self-standing *Norwich Pharmacal* disclosure order as much as to a disclosure order which is, in effect, merely ancillary to a freezing order (or the reverse).

53. Southwell J.A. also emphasised the importance of the special circumstances of this small Island community as an important finance centre. After identifying the relevant local statutory provisions relating to injunctions, he stated (at para. 41):-

> *"In exercising this jurisdiction the Courts of Guernsey need to keep in mind the special circumstances of a small island community and the needs of the financial services established in the Island, particularly the need to maintain the highest standards of probity in circumstances in which legal proceedings concerning funds held in Guernsey are likely to be pursued in larger jurisdictions rather than in Guernsey. In this regard it is material to have regard to the similar considerations which led to the Jersey Court of Appeal to decline to follow the decision of the House of Lords in the Siskina (1979) AC 210, in Solvalub Ltd v. March Investments Ltd (1996) JLR 361. The Jersey Court of Appeal held that a freezing order could be made in respect of assets in Jersey in circumstances in which the substantive proceedings would be in another jurisdiction and there was no cause of action arising in Jersey."*

54. Southwell JA proceeded to cite with approval part of the judgment given by Sir Godfray Le Quesne JA (for the Jersey Court of Appeal) in which, after identifying the importance of Jersey as a financial centre he stated:-

> *"if the Royal Court were to adopt the position that it is not willing to lend its aid to courts of other countries by temporarily freezing the assets of Defendants sued in those other countries, that in my judgment would amount to a serious breech of a duty of comity which courts in different jurisdictions owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the Courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success. Those local circumstances, in my judgment, explain why the law on the particular point under consideration should have developed as it appears to have developed in the authorities to which I have referred.".*

55. Southwell JA continued:-

> *"Guernsey is in this respect similar to Jersey and we are certain that the consideration set out by Sir Godfray Le Quesne should equally underlie the exercise of the Guernsey Court's jurisdiction to make interim orders… In our judgment in future the Courts of Guernsey should, when in the circumstances of a particular case*

justice requires the making of appropriate freezing and disclosure orders, proceed to exercise the discretionary jurisdiction to make such order.".

56. I naturally accept that the facts in Seed and the issues involved, as similarly in Solvalub, were totally different to those in this case. Nevertheless it seems to me that, if I am correct in my belief that justice may require that *Norwich Pharmacal* relief can be made available, in appropriate circumstances, in Guernsey to assist corrective action outside the jurisdiction, a relevant factor may be the need to avoid creating the reputation that Guernsey is a safe haven for the non-disclosure of information which might otherwise assist in the establishment of liabilities elsewhere – evasion in effect.

57. Linked to Mr. Barnes' primary submission is his further submission that any discovery to be ordered in this case should be the province of the High Court in London, now seized of the substantive proceedings (to which, I would note, the Defendant is not a party). It may be that some of the information being sought by the Plaintiffs might (my emphasis) be obtained by way of an appropriate disclosure order in that jurisdiction against the Intervenor (which could of course only relate to information which the Intervenor has), though that possibility is pure conjecture. I very much doubt, even were it to materialise, that the results would be wholly or even particularly satisfactory as far as the Plaintiffs are concerned. What the Plaintiffs are interested in is information which the Defendant may have regarding parties whose identity (by definition) is at the moment unknown to them.

58. In the context of this submission, Mr. Merrien rightly referred me to MacKinnon. The facts were that a *subpoena* had been served and an order obtained *ex parte* under section 7 of the Bankers Books Evidence Act, 1879, on the London branch of a U.S. (New York) bank. (In the instant case I know not if the Defendant has a branch in England and Wales). Hoffmann J set aside both the *subpoena* and the order and said (at p. 658 b):-

"The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement on a foreigner, and, in particular, on a foreign bank.

The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction…".

59. Hoffmann J. later turned to the *Norwich PharmacaI* jurisprudence (at p. 661 c onwards) where he stated:-

> *"Norwich Pharmacal is therefore an exceptional case in which a bank can be named as a defendant solely for the purpose of obtaining discovery and without there being any cause of action against it.*
>
> *It seems to me that for the purposes of the jurisdictional rules now under consideration, Norwich Pharmacal is much more akin to the subpoena directed to a witness than the discovery required of an ordinary defendant. It is a general duty imposed on persons who become "mixed up" in tortious acts to produce evidence and documents* before trial *comparable with the general duty of all persons who have relevant knowledge or documents to give evidence* at the trial. *(*The judge's emphasis*). It is therefore also an exercise of sovereign authority and not merely a condition of being allowed to take part as a plaintiff or defendant in an English trial* (my emphasis). *In the United States there is a general right to discovery from third parties but the fact that this process is characterised as discovery does not alter its nature for the purposes of international jurisdiction…".*

60. As Gee states (at p. 363) the English court, as a matter of discretion, will *"as a general rule refrain from requiring disclosure of documents or information from the English branch in relation to an account at the foreign branch".* Moreover, an application made directly to a foreign court to order disclosure of information from a bank about an account held abroad would be (Gee at the same page) *"entirely proper, and would be viewed by the English Court as entirely proper. There can be no objection in principle to the Plaintiffs obtaining information abroad which can be used to preserve the relevant assets either abroad or within the jurisdiction".* The authority for that proposition is Republic of Haiti, where the English court itself made orders directed to obtaining information about assets in England and Wales when the substantive proceedings were taking place in France.

61. It seems to me that any order requiring the Defendant to produce evidence, in Guernsey, as is sought by the Plaintiffs, is, essentially, the prerogative of this Court. Thus, even if opportunities might arise within the English proceedings themselves for obtaining some evidence from the Intervenor, that does not, indeed cannot, preclude the Plaintiffs in principle from seeking a *Norwich Pharmacal* disclosure order directly in this Court. I remind myself, again, of the words of Lord Reid - *"if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun…so the Appellants can never get the information",* (that information relating to the identity of other potential conspirators in the *coup*).

62. I also reject Mr. Barnes' further submission that the proper route by which to acquire the evidence which the Plaintiffs seek is to be found in the provisions of the Evidence (Proceedings in Other Jurisdictions) Act, 1975, and that this is so whether the evidence sought is in respect of any bank accounts which the Defendant may hold in the name of the Intervenor, or in respect of other information which might identify others. I agree with Mr. Merrien that it is up to a party how it seeks to obtain evidence. Whether it is successful or not is a different matter.

63. I must now turn to the major reservation which I have. A court exercising an equitable jurisdiction, such as the making of disclosure orders, would be expected to seek to retain control over the use of the order made. The principle is clearly illustrated in Seed, and the provisos which the Court of Appeal required be added to the disclosure order in that case. With regard to *Norwich Pharmacal* relief, Lord Woolf in Ashworth (at para. 60 already cited) specifically addressed the concern expressed as to the need to protect a defendant against misuse of the material which it had disclosed. His conclusion was that no order for disclosure be made unless a claimant, in addition to identifying clearly the wrongdoing on which he relied in general terms, identified the purposes for which the disclosure would be used when made; so that the use of the material could or would then be restricted, expressly or impliedly, to the disclosed purposes, unless or until the court permitted it to be used for any other purpose.

64. However, it seems to me that this matter, or aspect of the jurisdiction, important as it is, relates not to whether in principle discovery should never be ordered in this jurisdiction for the purposes of overseas proceedings, but rather is a factor, undoubtedly a major factor, to inform the exercise of this Court's discretion whether or not to order such discovery (for which, see for example Republic of Haiti, to which I refer again later).

65. In conclusion, therefore, based on principle and with the assistance of authority,I reject Mr. Barnes' primary submission. There is nothing in principle to preclude this Court from entertaining a *Norwich Pharmacal* discovery application which relates to existing (or indeed anticipated) foreign proceedings.

D. Exercise of discretion

66. I turn therefore to the question as to whether, in the circumstances of this case, I should exercise my discretion to grant the relief sought in favour of the Plaintiffs, bearing in mind the principle that I must be satisfied that it would be just and convenient to do so. I take into account a variety of matters, and Counsels' submissions thereon.

67. There has been little, if any, challenge to the facts. That does not mean that they are all accepted, and most particularly that they relate to an alleged attempted *coup* in Equatorial Guinea. I again emphasise (as I did near the beginning of this judgment) that the Intervenor denies the allegation of an attempted *coup*. It is merely that the alleged facts, with regard to the activities of certain gentlemen in Africa and elsewhere in the early part of this year, and their objectives, are incapable of resolution by this Court. It is in that context that Mr. Barnes accepted, I think correctly, that the wrongdoing alleged in this case would appear to be sufficient to support a *Norwich Pharmacal* application.

68. Two of the wrongdoers, Mr. Mann and Mr. du Toit, are known, at least to some unconfirmed extent, arising from the statements which they apparently made whilst in custody in Zimbawe and Equatorial Guinea respectively. I believe that, almost certainly if not inevitably, there were others involved with differing parts to play. Equally, the Defendant, I think, is likely to have information to impart with regard to the transfer of monies on behalf of the Intervenor and Logo to TOT, those entities apparently being associated with either Mr. Mann or Mr. du Toit, at least.

69. It is not unreasonable conjecture (if you like, an arguable or good arguable case) that the Defendant has other information, including the contents of any safe deposit boxes, which might assist in establishing who else might be connected with the Intervenor and Logo, or other of the named entities, or with regard to bank transfers both into and out of accounts. All of which information, Mr. Merrien submits, is relevant to try and identify further conspirators in the *coup*, and thus to bring them to account in the interests of justice.

70. In my assessment, the "threshold" requirement referred to by Lord Woolf is satisfied. There is an identified wrongdoing in which the Plaintiffs were potential victims and the Defendant became involved, innocently, by the provision of banking facilities for those, it would seem, who have no other connection whatsoever with this jurisdiction.

71. The legal proceedings which the Plaintiffs originally anticipated, without identifying the specific venue, have now materialised in the High Court in London. I have to acknowledge that I have been somewhat bemused, throughout the course of these proceedings, at the rather bizarre concept of the government of a country seeking an injunction (as was indicated from the start) to restrain persons from participating or becoming involved, to a greater or lesser degree, in a *coup d'état;* as also with the concept of damages, as now claimed, *inter alia*, in respect of loss arising from investigating a conspiracy against that government, the increased level of security and the detention and trial of conspirators.

72. However, if that is the way in which the government of Equatorial Guinea seeks to proceed before the High Court in London, it is a matter solely for that court as to how it views the validity of those proceedings. To the best of my understanding, notice has only been served on two of the Defendants – the English residents subject to the control of the English courts – and the proceedings are very much at a preliminary stage. Applications, by Mr. Calil, to strike out the claim, and for summary judgment to be given against the Plaintiffs, have yet to be heard. It would not be right on my part to allow my own wry reaction to the nature of those proceedings to influence, to any serious extent, my decision as to whether or not to grant this disclosure application, if I am satisfied that the threshold has been passed, which I am.

73. On the other hand, I acknowledge the submission of Mr. Barnes, that in view of the international aspects, and perhaps ramifications, of this case, the proper avenues to be used were those formally established for the provision of mutual assistance between states. That, in Mr. Barnes' description, was the proper scenario for a debate as to what should be provided by way of information. The civil courts were not the proper forum for the resolution of matters which were properly the province of international diplomacy and co-operation. I have some sympathy for that view. However, it is clear from the assistance which H.M. Procureur has helpfully provided that, whilst some avenues are being explored for the provision of assistance at a formal level, the United Kingdom government is not seeking to intervene, at least at this stage, in the civil action which has been instituted in London. Moreover, it cannot be doubted that in principle there is nothing wrong in a state seeking assistance from the civil courts in another jurisdiction (see Republic of Haiti), in the same way and subject to the same rules as any other litigant. Indeed any attempt to bend those rules would be unacceptable. I also discount the international aspect as a factor in the exercise of my discretion.

74. I must deal next with one minor matter. The Plaintiffs have positively stated they would be seeking a freezing order in respect of any sums which might be held in Guernsey on behalf of the Intervenor or Logo (see para. 17 of Mr. Page's second affidavit). This statement was made almost simultaneously with the institution of proceedings in England and in the context of the argument advanced by the Intervenor that the fact that no application had been made for a freezing order cast doubts on the genuineness of the Plaintiffs stated intentions to bring substantive proceedings elsewhere. That argument has been overtaken by events. However, no application for a freezing order has yet been made in Guernsey. The matter is insignificant in the wider scheme of things, but

illustrates, so the Intervenor argues, the lack of genuine legitimate intention on the Plaintiffs' part.

75. I turn to the nature of what I described as the purported evidence – information is a more neutral world – which the parties introduced by way of documentation attached to the various affidavits. The purpose was clearly to denigrate the other party and to challenge their *bona fides*.

76. Thus the Intervenor produced documents in relation to such matters as the human rights record of the President and government of Equatorial Guinea, the independence or otherwise of the judiciary, and the prevalence of torture or otherwise, such documentation emanating variously from the United Nations, the U.S. Department of State or Amnesty International. All of which was intended to support the fears strongly expressed by the Intervenor that the real purpose of the Plaintiffs was to obtain evidence which could subsequently be used for extradition or similar purposes, or subsequent trial in Equatorial Guinea, or otherwise.

77. For their part, the Plaintiffs mount their attack in this way. They question why the Intervenor (a simple provider of trust and company administration services according to Mr. Blows) is apparently resisting the application so strenuously; they cast suspicion over what are the real activities of Hansard, who may be behind it or closely associated with it, as also their motives and credentials; and they suggest that those really involved have or may have wide-ranging interests in exploiting the raw materials which are to be found, for example, in Africa, and have an established record of association with mercenaries in that continent.

78. None of this impresses me. Even if such documentation had any serious evidential value, I could not possibly start to evaluate it, still less take it into account. Accordingly, I ignore it. It is not, however, beyond the cognisance even of Guernsey judges that there may be many parts of the world (not excluding Europe) where the respect by governments for basic human rights and the rule of law may leave something to be desired; that the natural resources in sub-Sahara Africa, including now oil, have attracted not just the curiosity of others for centuries; and that the activities of armed mercenaries have not been unknown in more recent decades.

79. None of which is to detract from the merit of what is the Intervenor's basic case (apart from its legal arguments). Its essential concern relates to the use which might be made of any information which the Defendant provided; and urged that undertakings given by the

Plaintiffs, or likely compliance with any restrictions which this Court might impose with regard to the use of that information, be viewed with extreme caution.

80. In law, I accept, a foreign state is not subject to the control of this Court. That is a relevant consideration; and was a matter addressed in Republic of Haiti. Staughton L.J. (at p. 217 C) said this:-

> *"As to discretion in connection with the information order, Mr. Gee's objection is as to the use which the republic may make of the information obtained. It gave an undertaking to Knox J., as I have said, not to use the information without leave of the court; and it has three times applied for and obtained that leave. But it is said that the court would have no sanction which could be imposed if the republic were to break that undertaking in the future. This was not taken into account by the judge; but he can scarcely be blamed for that, as the point was not raised before him. Kerr L.J. in the* Babanaft *case did not agree that, as a general rule, such an undertaking should be required. But Neill L.J. and Nicholls L.J. differed from Kerr L.J. on that point; and Nicholls L. J. said that normally the court will need to be satisfied that it has a sufficient degree of control over the plaintiff to secure compliance with the undertaking.*
>
> *It is difficult to see how, as a matter of law, the court could ensure that it had that degree of control over the Republic of Haiti, short of requiring a bank guarantee in a very large sum which could be called on in the event that the undertaking was broken. But I doubt if the court should make such a demand on a foreign sovereign state, or assume that it would be at all likely to break an undertaking given to the court. The republic has complied scrupulously with its undertaking in the past. And if it were to come about that the undertaking were broken in the future, I would expect that foreign court, particularly those in the European Community, would take that into account in exercising any discretion they may have in proceedings between the republic and the Duvalier family. I do not consider that, in this case, the discretion to order disclosure of information ought to have been exercised against the republic because it is not in law subject to the control of the English courts.*

81. The facts in that case, it must be emphasised, were of course very different to those in the instant case; they involved attempts, and no doubt successive attempts, by the Republic to freeze assets, by court order, in jurisdictions where they were found to be held. Clearly the type of factors which Staughton L.J. considered outweighed the fact that the Republic of Haiti was not subject to the control of the English courts – its scrupulous compliance

with its previous undertakings and the potential control by a foreign court in any further proceedings between the Republic and the Duvalier family which came before it, do not arise (have not arisen) in the instant case. He did, however, express doubts that a court should assume that a foreign country would break any undertaking it gave.

82. The information which might be disclosed in this case could conceivably lead to a variety of much wider scenarios than existed in Republic of Haiti. On the criminal side, the information might provide the basis for extradition proceedings (not just in the British Isles); it might lead to sovereign states, other than Equatorial Guinea, themselves instituting investigations and proceedings against those who are within their respective territories. South Africa, purely by way of example, has its Foreign Military Assistant Act by which, I understand, the country seeks to establish legislative controls over mercenary activities.

83. On the civil side, information provided in Guernsey might lead to litigation, both substantive and interlocutory (of a similar *Norwich Pharmacal* nature) in jurisdictions other than England and Wales (or Equatorial Guinea and Spain, as is now provided).

84. It must at least be a possibility that if relevant information with regard to other participants in the attempted *coup* in Equatorial Guinea becomes available, it will be disseminated. What realistic expectation can there be that this court, whether directly or indirectly, will be able thereafter to control its use?.

85. In argument, Mr. Merrien stated that it was in the interests of justice that the conspirators be "brought to account". That, is my view, is far too wide and uncertain a purpose to justify disclosure. 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 Intervenor, Mr. Mann and Mr. Moto. If those proceedings were to be halted, in either or both of 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.

86. The further consideration which weighs with me heavily is the suspicion, at least, that parties, some known and some as yet unknown, are using this jurisdiction, with which they have no connection, for purposes which involve wrongdoing. It is not solely the reputation of Guernsey as a finance centre which is central to my thinking. It is

additionally the thought that, if there is information available in this jurisdiction to assist a victim of wrongdoing to identify other participants in it, it should be made available to enable the victim to seek redress for the wrongdoing. That is very much at the heart of the *Norwich Pharmacal* jurisdiction.

E. Conclusion

87. I am satisfied that the Defendant, albeit innocently, may have information to which the Plaintiffs are entitled, to assist them in identifying further those who may have been party to a wrongdoing of which the Plaintiffs were potential victims. In that sense, therefore, for the reasons already given and on the authorities which I believe are of assistance, I am satisfied that in all the circumstances of this case it is just and convenient, in principle, that this application should be granted in the general terms sought, even though the use to be made of any such information would be outside this jurisdiction. However, notwithstanding that all due respect must be accorded to the claimant as, effectively, a sovereign state (see Republic of Haiti), though acknowledging that it is not subject to the control of this Court, I believe that concerns are justified, certainly at this stage, as to the possible use of information which might be disclosed by the Defendant (see the clear and persuasive guidance of Lord Woolf in Ashworth). 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.

88. I think the truth of the matter is that the Plaintiffs (on whom the onus must lie) have not given sufficient thought as to what mechanisms might be put in place with regard to this Court retaining some effective control over the use of the information disclosed. It is not for me to make any tentative suggestions. It is an exercise which must now be addressed by the Plaintiffs if they wish to pursue this application further. I appreciate that it may well be a difficult exercise, which merely highlights the reasons why I have these concerns. In addition, it may be that the terms of any order could benefit from some slight refinement.

89. My decision, therefore, is that the 30th April Order be stayed, with leave to apply. That leaves the door open to the Plaintiffs to return with specific proposals as to how this Court might be enabled to retain some effective control over the use of information if it were to be disclosed. This has the additional merit, I believe, of awaiting developments in the English proceedings, including any formal applications with regard to the obtaining of evidence.

90. I will hear any applications of an ancillary nature which might arise from this decision; as also as to costs.

91. As a postscript, I would add that the fact that the effect of my decision is to reverse my earlier decision as contained in the 30th April Order, demonstrates, if nothing else, the wisdom, except in the rarest cases, of not adjudicating upon such applications on an *ex parte* basis.