[2007 JLR 201]

MACDOEL INVESTMENTS LIMITED, SUN DIAMOND LIMITED, DURANT INTERNATIONAL CORPORATION and KILDARE FINANCE LIMITED v. FEDERAL REPUBLIC OF BRAZIL and SIX OTHERS

COURT OF APPEAL (Bailhache, Bailiff, Smith and Jones, JJ.A.): March 19th, 2007

Civil Procedure—disclosure—Norwich Pharmacal order—non-party mixed up in and facilitating wrongdoing (albeit innocently) may incur no personal liability but has duty to disclose full information—Norwich Pharmacal order, to enable plaintiff to bring action, may be made for disclosure of identity of alleged wrongdoer; information as to whether plaintiff has cause of action; or whereabouts of traceable funds, if real prospect will assist in recovery—no restriction on type of case and order made if justice requires disclosure

Civil Procedure—disclosure—Norwich Pharmacal order—may be made against non-party if reasonable suspicion mixed up in and facilitated wrongdoing—prima facie evidence not required

The first and second respondents applied to the Royal Court for a disclosure order against the third to seventh respondents.

The first and second respondents, the Federal Republic of Brazil and the Municipality of São Paulo, sought disclosure from the third to seventh respondents ("the banks") of information and documents concerning the Jersey bank accounts of the appellants ("the companies"). The companies were allegedly connected with M who was a prominent figure in Brazil and the subject of criminal investigations concerning allegations of corruption, embezzlement of public funds and money laundering during his time as Mayor of São Paulo. The first and second respondents alleged that some of the money of which the Municipality had been defrauded had been paid into the companies' bank accounts in Jersey and sought information about those accounts from the banks to enable them to discover the whereabouts of the funds and to consider whether they could bring proceedings against M and others to recover them.

The first and second respondents applied to the Royal Court for a *Norwich Pharmacal* order, submitting that it had power to make such an order for the disclosure of the requested information and documents as the banks had become mixed up in the alleged wrongdoing of M and

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others. The companies opposed the order, submitting *inter alia* that a *Norwich Pharmacal* order could only be made to identify an alleged wrongdoer.

The Royal Court (Birt, Deputy Bailiff and Jurats Le Brocq and Newcombe) ordered the banks to make the disclosure sought (in proceedings reported at 2006 JLR 478). It found that there was *prima facie* evidence that M and others had defrauded the Municipality of large sums of money and that a substantial proportion of the proceeds had been transferred to Switzerland. It also found that there was a sufficient suspicion that the funds had been transferred from Switzerland to the companies' bank accounts in Jersey to justify ordering the banks to make disclosure. There was a real prospect that the disclosed information and documents would enable the first and second respondents to trace the funds of which the latter had been defrauded. The court held that a *Norwich Pharmacal* order was not restricted to identifying an alleged wrongdoer and could be made to enable a plaintiff to determine whether he had a cause of action against a wrongdoer or to discover and preserve traceable funds.

The companies appealed, submitting that the Royal Court had erred in making the order because (a) the disclosure sought did not fall into the type of case in which *Norwich Pharmacal* relief was available; and (b) mere suspicion and inference that the funds had been transferred to their Jersey bank accounts, and that the banks were therefore mixed up in the frauds, was insufficient to justify making the order, as at least *prima facie* evidence was required.

Held, dismissing the appeal:

(1) The Royal Court had not erred in ordering the banks to disclose the information and documents concerning the companies' accounts as it had been satisfied first, that the first and second respondents were the victims of the alleged frauds and, secondly, that the banks had become mixed up in and facilitated the frauds (albeit innocently). Furthermore, it had considered that there was a real prospect that the information and documents sought would enable the first and second respondents to locate and preserve the proceeds of the frauds and to consider whether proceedings could be brought to recover them. A *Norwich Pharmacal* order, which was intended to enable a plaintiff to bring an action against a wrongdoer, could be made against a third party who, through no fault of his own, had become mixed up in and facilitated another's wrongdoing. The third party might incur no personal liability but he owed a duty to the plaintiff to provide full information, which included not only the identity of the alleged wrongdoer but also other information relating to whether the plaintiff had a cause of action against the wrongdoer or to the discovery and preservation of traceable funds. The Royal Court's power to make a *Norwich Pharmacal* order was not therefore restricted to certain "types of case" and the determinative question in an individual case would be whether justice required the requested disclosure to be ordered. The Jersey

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courts were aware that the Island's reputation as a major financial centre might suffer if they were not willing to assist victims of wrongdoing to obtain redress (paras. 26–28; paras. 37–40; para. 54).

(2) The Royal Court had been entitled to hold that the banks had a duty to assist the first and second respondents by disclosing the requested information, on the basis that there was a reasonable suspicion that the proceeds of the alleged frauds had been paid into the companies' accounts and that the banks had therefore become mixed up in and facilitated the wrongdoing. *Prima facie* evidence to that effect was not required. It was not unjust to make a *Norwich Pharmacal* order against a third party based merely on a reasonable suspicion that he had become mixed up in another's wrongdoing because it could be very difficult or impossible for a plaintiff to adduce *prima facie* evidence of that fact, even if, as in the present case, he could adduce *prima facie* evidence of wrongdoing. Furthermore, an order would only be made if there were no other source of information that could assist the plaintiff, and the third party's innocence would be recognized by making the plaintiff responsible for his costs. If, however, the Royal Court had found that there was *prima facie* evidence that the funds had been transferred into the companies' Jersey bank accounts, it could also have made the order, even if that evidence was a matter of inference (para. 22; paras. 47–54).

(3) The official *Law Reports* published by the Incorporated Council of Law Reporting for England and Wales was the most authoritative series of law reports in that jurisdiction. If a case had been reported in those reports, the Jersey courts would expect it to be cited from that source. Parties should only use other series of reports if a case had not been reported in the official reports (para. 59).

Cases cited:

(1) *A* v. *C*, [1981] Q.B. 956; [1980] 2 All E.R. 347; [1980] 2 Lloyd's Rep. 200, applied.
(2) *Arab Monetary Fund* v. *Hashim (No. 5)*, [1992] 2 All E.R. 911, applied.
(3) *Ashworth Hosp. Auth.* v. *MGN Ltd.*, [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193; [2002] UKHL 29, applied.
(4) *Bankers Trust Co.* v. *Shapira*, [1980] 1 W.L.R. 1274; [1980] 3 All E.R. 353; (1980), 124 Sol. Jo. 480, applied.
(5) *Carlton Film Distributors Ltd.* v. *VCI PLC*, [2003] F.S.R. 47; [2003] EWHC 616 (Ch.), considered.
(6) *Durant Intl. Corp.* v. *Att. Gen.*, 2006 JLR 112, *dictum* of Sumption, J.A. considered.
(7) *Grupo Torras S.A.* v. *Royal Bank of Scotland PLC*, 1994 JLR 41, applied.
(8) *IBL Ltd.* v. *Planet Fin. & Legal Servs. Ltd.*, 1990 JLR 294, applied.
(9) *London & Counties Secs. Ltd.* v. *Caplan*, English Ch. D., May 26th, 1978, unreported, applied.

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(10) *Lucas, In re*, 1981 J.J. 83, applied.
(11) *Mediterranea Raffineria Siciliana Petroli S.p.A.* v. *Mabanaft G.m.b.H.*, English C.A., 1978 M No. 4019, December 1st, 1978, unreported, applied.
(12) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 2 All E.R. 943, applied.
(13) *P* v. *T Ltd.*, [1997] 1 W.L.R. 1309; [1997] 4 All E.R. 200, applied.
(14) *Plummer* v. *May* (1750), 1 Ves. Sen. 426; 27 E.R. 1121, considered.
(15) *Qatar (State)* v. *Al Thani*, 1999 JLR 118, referred to.

D. Steenson for the appellants;
N.M. Santos-Costa for the first and second respondents.

1 **JONES, J.A.,** delivering the judgment of the court:

Introduction

In this action, the respondents, the Federal Republic of Brazil and the Municipality of São Paulo, seek disclosure of certain documents in connection with the investigation of civil claims against Paulo Maluf and others.

2 In their Order of Justice, the respondents aver that Mr. Maluf was the Governor of the State of São Paulo between 1979 and 1983 and Mayor of the City of São Paulo between 1993 and 1996. The allegations against him involve conspiracy, corruption, embezzlement of public funds and money laundering in connection with two major public works projects that were undertaken in São Paolo when he was Mayor. It is averred that the price of the works was fraudulently inflated and the excess, running into hundreds of millions of US dollars, was diverted into the hands of Mr. Maluf and/or individuals or entities associated with him, including members of his family, via bank accounts in Switzerland and Jersey. The associated individuals and entities are referred to in the pleadings as "the connected persons."

3 At the outset of the action, the respondents convened Citibank NA, Deutsche Bank International Ltd., Deutsche International Custodial Services Ltd., Deutsche International Corporate Services Ltd. and Deutsche International Trustee Services (CI) Ltd. as the first to fifth defendants ("the banks"), respectively. The appellants were subsequently convened as the sixth to ninth defendants.

4 The disclosure sought is of documentation relating to accounts held with the banks in the names of the appellants and certain other individuals and entities, including Mr. Maluf. The appellants have opposed the application, whilst the banks have submitted to the wisdom of the court.

5 The respondents aver that they wish to investigate and, if justified, bring proprietary and/or personal civil claims against Mr. Maluf and some

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or all of the connected persons in whatever jurisdiction appears to be the appropriate one when all the facts are established. They claim, also, that the disclosure orders which they seek are just and necessary in order to give effect to their equitable right to trace their money.

6 By Act of Court, dated November 1st, 2006, the Royal Court ordered disclosure in the terms sought. It is against that order that this appeal is taken.

The court's power to order pre-trial discovery

7 It has long been established in the law of England and Wales (*Plummer* v. *May* (14) (1 Ves. Sen. at 426; 27 E.R. at 1122, *per* Lord Hardwicke, L.C.)) that a person cannot be made a defendant to an action—

> "who is merely a witness, in order to have a discovery of what he can say to the matter . . . But as against a party interested, the plaintiff is entitled to have a discovery from him, if he is charged to be concerned in the fraud . . ."

That principle is known as the "mere witness rule."

8 Coexisting with the mere witness rule, however, is what Lord Reid has described (*Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (12) ([1974] A.C. at 175)) as "a very reasonable principle" which is that—

> ". . . if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

It is convenient to refer to that *dictum* as "Lord Reid's statement of principle."

9 In *Bankers Trust Co.* v. *Shapira* (4), the plaintiff sought disclosure of information in order to enable it to trace funds that had allegedly been obtained by fraud. The identity of the alleged wrongdoers was known. In ordering disclosure, the Court of Appeal of England and Wales expressly adopted and applied Lord Reid's statement of principle. In the course of his judgment, Lord Denning, M.R., with whom Waller and Dunn, L.JJ. agreed, said ([1980] 1 W.L.R. at 1282):

> "So here the Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men: and they come under a duty to assist the Bankers Trust Co. of New York by giving them and the

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> court full information and disclosing the identity of the wrongdoers. In this case the particular point is 'full information.'"

10 In *P* v. *T Ltd.* (13), Scott, V.-C. held that Lord Reid's statement of principle encompassed the provision of information to a plaintiff for the purpose of assisting him to determine whether an unidentified alleged wrongdoer had, in fact, committed a tort against him.

11 In *Arab Monetary Fund* v. *Hashim (No. 5)* (2), Hoffmann, J. described *Bankers Trust* as an application of the *Norwich Pharmacal* principle in aid of tracing claims ([1992] 2 All E.R. at 914). He then sought to determine the limits of the *Bankers Trust* jurisdiction as follows (*ibid.*, at 918):

> "They must, I think, be deduced from the reasoning upon which that jurisdiction, like the *Norwich Pharmacal* jurisdiction, is distinguished from the 'mere witness' rule. It rests upon the proposition that unless the assets in question can be located and secured, the ultimate determination of ownership of those assets may be frustrated by their removal or dissipation and there will be no point in calling on the third party at the trial to produce the required documents or give the requested information. In my judgment, therefore, the first principle of the *Bankers Trust* case is that the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim."

12 Lord Reid's statement of principle has been adopted as part of the procedural law of Jersey. In *IBL Ltd.* v. *Planet Fin. & Legal Servs. Ltd.* (8), the Royal Court considered that the principle applied equally to information aimed at establishing what form of action the plaintiff could bring as it did to information concerning the identity of the alleged wrongdoer.

13 In *Grupo Torras S.A.* v. *Royal Bank of Scotland PLC* (7), Bailhache, Deputy Bailiff said this (1994 JLR at 48):

"In our judgment, it can now be asserted that in Jersey, although as a general rule no independent action for discovery will lie against a person against whom no reasonable cause of action can be alleged or who can be called as a mere witness in the substantive trial, the rule does not apply where (a) without discovery of the information in the possession of the person against whom discovery is sought no action can be begun against a wrongdoer; and (b) such person has himself, albeit innocently, been involved in any acts of the wrongdoer so as to facilitate them. In such circumstances, although he might have incurred no personal liability, he is under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer."

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Proceedings in the Royal Court

14 In the Royal Court, the appellants argued that the *Norwich Pharmacal* jurisdiction was confined to giving discovery for the purpose of identifying the wrongdoer and that, since the identity of the alleged wrongdoer in this case is known, the Royal Court had no power to grant relief on the *Norwich Pharmacal* principle. They contended that what the respondents were attempting fell within the *Bankers Trust* jurisdiction, but that the respondents had not produced sufficient evidence that traceable proceeds of the frauds had been paid into the appellants' accounts at the banks in Jersey. Even if the Royal Court had the power to order discovery, the appellants submitted, it should exercise its discretion not to order disclosure.

15 The Royal Court opened its consideration of the relevant law by quoting Lord Reid's statement of principle. Applying what it determined to be the applicable law to the facts of this case, the court said (2006 JLR 478, at para. 31):

"The evidence satisfies us that there is *prima facie* evidence that one or more members of the Maluf family have been guilty of fraud to the prejudice of the Municipality. We also consider that there is sufficient suspicion that proceeds from some of these frauds have passed to accounts in Switzerland and from there to the accounts of the companies in Jersey to justify an order that the banks give discovery about the accounts so as to enable the Municipality to locate and preserve traceable funds and to decide whether it has grounds to bring actions against the companies or others in Jersey or elsewhere to recover the funds. The Municipality needs to discover the whereabouts of the funds of which it has been defrauded and, adopting the test laid down in *Arab Monetary Fund*, we think there is a real prospect that the information from the banks will assist in this process."

The Royal Court declined to exercise its discretion not to order disclosure, on the view that "the interests of justice point strongly in favour of giving the [respondents] the relief which they seek" (*ibid.*, at para. 33).

The appellants' grounds of appeal and contentions

16 The appellants' first ground of appeal is in these terms:

"That the learned Deputy Bailiff erred in law when he held that the first and second respondents or each of them had satisfied the conditions necessary to invoke the discretion of the court to order the disclosure they seek. In particular, the judge erred in holding that mere suspicion that proceeds from the alleged frauds against the

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second respondent have passed to accounts in Switzerland and from there may have passed to accounts of the third to seventh respondents in Jersey, where the evidence is a matter of inference and the first and second respondents do not have the necessary paper trail to prove that some (that is to say, any) of the proceeds of the alleged frauds are now to be found in the said accounts in Jersey, is sufficient to justify the disclosure order."

17 In their written contentions in support of that ground, the appellants point to the fact that, in the course of its judgment, the Royal Court expresses the view that the *Norwich Pharmacal* and *Bankers Trust* jurisdictions overlap to a very considerable extent and that the latter has, in practice, been almost entirely subsumed by the former. The appellants contend that the two jurisdictions are separate and distinct, serving different functions. *Norwich Pharmacal*, they submit, "is essentially concerned with the practicalities of getting litigation started, whereas *Bankers Trust* is concerned with ensuring it has a substantive ending." Consequently, argue the appellants, the Royal Court was wrong to order disclosure because (a) the *Norwich Pharmacal* jurisdiction does not provide a legal basis for the type of disclosure ordered, and (b) the evidence is "insufficiently strong to warrant" disclosure under the *Bankers Trust* jurisdiction. The appellants call this "the disclosure ground."

18 The appellants' second ground of appeal is to the effect that, even if the Royal Court had power to order disclosure, it erred in the exercise of its discretion in doing so. This is referred to as "the discretion ground." Finally, they say, the Federal Republic has no sufficient interest to bring these proceedings under Jersey law and that disclosure should have been refused for that reason. This is called "the proper party ground."

The respondents' contentions

19 In addressing the disclosure ground, the respondents contend that the Royal Court was satisfied "that there

is *prima facie* evidence" of the passage to Switzerland and Jersey of the Municipality's allegedly stolen funds. "It just so happens" they say, "that some of the evidence is from inference." The respondents draw support for that argument from what they claim is said in the judgment:

> "The Royal Court explains that as there is no paper trail showing that funds were transmitted from Switzerland to Jersey 'it is a matter of inference . . . [t]hat some of the proceeds of the frauds are now to be found in the accounts of the companies with the banks in Jersey.'"

20 Turning to the discretion ground, the respondents argue that the question at issue is whether, in all the circumstances, an order in the terms

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sought is a necessary and proportionate response to what they describe as "the plaintiff's conundrum." They submit that it is.

21 Finally, the respondents argue that the proper party ground is misconceived because it proceeds on an assumption that the question of the Federal Republic's participation in these proceedings is only a question of Jersey procedural law. The issue, they say, is one of comity and should be determined by permitting the Federal Republic to be a plaintiff.

Discussion

The disclosure ground

22 If the respondents were well founded in their submissions to the effect that the Royal Court was satisfied that there is *prima facie* evidence that the allegedly stolen funds were moved from Switzerland to Jersey, it would go a long way to defeating the appellants' challenge to the Royal Court's decision on the disclosure ground. We agree with the respondents that it would be immaterial if the Royal Court determined that there was such evidence as a matter of inference. It is commonplace in the courts to decide questions of fact by drawing inferences from other facts.

23 As we read its judgment, however, the Royal Court did not express itself satisfied that there was such *prima facie* evidence. Nowhere does it say, as the respondents claim, "it is a matter of inference . . . [t]hat some of the proceeds of the frauds are now to be found in the accounts of the companies with the banks in Jersey." The words used are these (2006 JLR 478, at para. 6):

> "Suffice it to say that we are satisfied that there is *prima facie* evidence that Mr. Maluf and others have committed the frauds referred to earlier; that the Municipality has been defrauded of large sums as a result thereof; that a substantial proportion of the proceeds was paid to Switzerland and elsewhere outside Brazil; and that some of the proceeds may have found their way into the accounts of the companies held in Jersey. However, some of this is a matter of inference. The plaintiffs do not at this stage have the necessary paper trail to prove that some of the proceeds of the frauds are now to be found in the accounts of the companies with the banks in Jersey."

24 We read that passage to mean that the evidence is to the effect that:

(i) Mr. Maluf and others *did commit* the frauds;

(ii) the Municipality *has been* defrauded of large sums as a result;

(iii) a substantial proportion of the proceeds *was paid* to Switzerland; but only

(iv) some of the proceeds *may have* found their way to Jersey.

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25 In our view, that meaning is plain, having regard not only to the words used in para. 6 but also to the Royal Court's observation at para. 31 of the judgment, that there is "sufficient suspicion" that funds were moved from Switzerland to the accounts of the companies in Jersey to justify the order sought. It is, therefore, necessary for us to consider whether the Royal Court applied the correct test in determining whether or not it had power to order disclosure in the circumstances of this case.

26 The appellants are correct to say that in the Royal Court's judgment it makes the observation (2006 JLR 478, at para. 28) that ". . . it may well be the case that the ancient equitable jurisdiction [to protect and preserve trust funds] has in practice been subsumed almost entirely by the *Norwich Pharmacal* jurisdiction . . ." It is clear to us, however, that its decision does not turn on those observations. Instead, the Royal Court determined the question that it had to decide by applying Lord Reid's statement of principle to the facts of the case. It is convenient to repeat it here ([1974] A.C. at 175):

> ". . . [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

27 It is instructive to notice that Lord Reid does not enunciate the principle in terms of the rights of the person who is seeking disclosure. Instead, he points to a duty owed to that person by the person who holds the information. That duty is to assist the "person who has been wronged" and it arises because the person who holds the information has come by it in the course of, albeit unwittingly, facilitating the wrong. It is performed by giving "full information." The particular information that was sought in *Norwich Pharmacal* (12) was the identity of the wrongdoer and it is to be expected that the principle would be expressed by reference to the facts of the case under consideration. But, in our opinion, the scope of the principle is not extended if the purpose of the disclosure which is sought in any particular case is, for example, to determine the location of embezzled funds or the methodology of the fraud rather than the identity of the wrongdoer. In our judgment, where disclosure is sought from a defendant who is alleged to have become innocently mixed up in wrongdoing, the determinative question in any particular case is whether justice requires discovery to be ordered.

28 We are strengthened in that view by having regard to what Lord Reid tells us is the policy imperative that underlies the statement of principle. It is that ". . . justice requires that he [the information holder] should co-operate in righting the wrong if he unwittingly facilitated its perpetration" ([1974] A.C. at 175).

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29 In the modern English cases, the requirement to meet the demands of justice is frequently cited as good reason to order discovery, whether or not *Norwich Pharmacal* (12) is expressly referred to. In *A* v. *C* (1), for example, the plaintiff sought discovery as ancillary to a *Mareva* injunction. In granting the relief sought, Robert Goff, J. said this ([1981] Q.B. at 960):

> "If the court were to deny itself the right to exercise this jurisdiction in aid of the *Mareva* injunction, it could prevent the *Mareva* jurisdiction from being effective to achieve its purpose; for a plaintiff, faced with lack of knowledge of the value of a specified asset of a particular defendant, may, in the examples I have given, be deterred from giving his undertaking in damages with the result that he is unable to obtain the relief. In any event, in the examples I have given, *the information may be necessary in the interests of justice* to ensure that the jurisdiction is properly exercised." [Emphasis supplied.]

30 In the course of his judgment, Robert Goff, J. referred to *London & Counties Secs. Ltd.* v. *Caplan* (9). In that case, the plaintiffs alleged that the defendant had defrauded them of about £5m. Templeman, J. made an order restraining the defendant from disposing of or otherwise dealing with his assets and in addition ordered that a certain bank (not a party to the action) should produce to the plaintiffs all documents relating to any account or accounts maintained by or on behalf of the defendant. The disclosure order was made with the purpose of enabling the plaintiffs to trace property acquired by the defendant and so to take steps to seize that property if it derived from their assets. The action was described by Templeman, J. in this way:

> ". . . [A] case of interlocutory relief granted to preserve the assets which were the subject of the litigation and are the subject of criminal proceedings. It is a case where, unless effective relief is granted, *justice may well become impossible* because the evidence and the fruits of crime and fraud may disappear." [Emphasis supplied.]

31 In *Bankers Trust* (4), Lord Denning said ([1980] 1 W.L.R. at 1281):

> "Having heard all that has been said, it seems to me that Mustill J. was too hesitant in this matter. *In order to enable justice to be done*—in order to enable these funds to be traced—it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] A.C. 133." [Emphasis supplied.]

32 In *Arab Monetary Fund* v. *Hashim (No. 5)* (2), Hoffmann, J. conducted an illuminating broad review of what he described as "a

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rapidly developing jurisprudence," of which *Norwich Pharmacal* (12) and *Bankers Trust* were a part. He said ([1992] 2 All E.R. at 913):

> "The last 20 years have seen a judge-made revolution in English civil procedure. Under pressure from the increase in cases of commercial fraud, the courts have provided plaintiffs with remedies and investigative powers which previously, if they existed at all, were available only to the police. In many large cases involving allegations of fraud and embezzlement, the greater part of the early interlocutory stages of the action is concerned with endeavours to trace assets against which claims can be made. The function of the judge at this stage is not so much to decide or even define the issues between the parties as to supervise an investigation by the plaintiff. On the plaintiff's application, usually in the first instance ex parte, the judge issues orders freezing assets, appointing receivers of companies, requiring defendants to permit searches for evidence, demanding documents and information from defendants and third parties. It is a remarkable fact that this whole panoply of remedies, frequently trenching upon principles of civil procedure previously regarded as settled, has been created by the judiciary without any statutory assistance. In the case of the Mareva injunction, s.37(3) of the Supreme Court Act 1981 provided a statutory basis for a

jurisdiction which the courts had already assumed. But other remedies are the result of a rapidly developing jurisprudence where the limits of the court's powers at any given moment may not be easy to determine."

33 When Lord Reid's statement of principle first came to be invoked in Jersey, it was the underlying policy imperative identified in para. 28 above that seems to have persuaded the court to adopt and apply it. In *In re Lucas* (10), the Royal Court ordered discovery of documents by a person not a party to an action of defamation in which the defendant was pleading justification. After quoting Lord Reid's *dictum*, Crill, Deputy Bailiff continued (1981 J.J. at 86–87):

"The whole point of an action of this sort is to be sure, as far as the Court can be, that there will be no denial of justice to litigants before this Court . . . I fail to see that the present action can in any way be said to be other than assisting the course of justice. *It would be a denial of justice*, in my view, seeing that Mr. Lucas has pleaded justification, if he is unable to examine those parts of the rate list on which he bases his defence." [Emphasis supplied.]

34 In *IBL Ltd.* v. *Planet Fin. & Legal Servs. Ltd.* (8), the Royal Court conducted a full review of the English authorities. After rejecting a submission to the effect that the order for disclosure that had been granted and which the defendants sought to have reversed extended the *Norwich*

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Pharmacal principle, Tomes, Deputy Bailiff observed (1990 JLR at 314): ". . . [E]ven if we are so doing, we must not be afraid to do so in the interests of justice."

35 Finally, in *Grupo Torras S.A.* v. *Royal Bank of Scotland PLC* (7), as we have seen, the Royal Court (Bailhache, Deputy Bailiff) applied Lord Reid's statement of principle, which it described as "the *Norwich Pharmacal* principle" (1994 JLR at 45). The defendants argued (*ibid.*, at 51–52) that *Norwich Pharmacal* relief ". . . was a very strong remedy which cut across the duty of confidentiality owed by banks to their customers and should not be given lightly." The Royal Court expressed agreement with that proposition, but continued (*ibid.*, at 52): "*Norwich Pharmacal* relief is, however, a remedy which is available in the interests of justice to enable a person who has been wronged to get information."

36 The approach which the appellants invite us to take in determining whether or not the Royal Court had jurisdiction to grant the order sought in this case is to consider whether the disclosure which is sought here can be said to fall within the scope of the "*type of case* in which *Norwich Pharmacal* relief is available." [Emphasis supplied.] They do that, principally, by reference to the English cases.

37 We reject the approach suggested by the appellants. It does not appear to us that the courts of England and Wales have restricted the application of the *Norwich Pharmacal* jurisdiction to cases in which the facts are similar. We note the words of Lord Woolf, C.J., in *Ashworth Hosp. Auth.* v. *MGN Ltd.* (3) ([2002] 1 W.L.R. 2033, at para. 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 Sir Richard Scott, V.-C. in *P v. T Ltd.* [1997] 1 W.L.R. 1309 (where relief was granted because it was necessary in the interests of justice albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action)."

38 In any event, whilst the cases in which the *Norwich Pharmacal* jurisdiction has been developed in England and Wales provide useful guidance on how Lord Reid's statement of principle may be applied, the courts of Jersey are in no sense bound by the scope of the jurisdiction that may have been delineated *de facto* by the circumstances of these cases.

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Nor are these courts constrained by the limits which may be placed on the application of the principle in the different social and economic conditions that may prevail from time to time in England and Wales (see, generally, *State of Qatar* v. *Al Thani* (15)). They will have regard to, amongst other things, the policy considerations which shape the law of Jersey and the social and economic context in which it operates.

39 We are conscious that, as the Court of Appeal of Jersey remarked in *Durant Intl. Corp.* v. *Att. Gen.* (6) (2006 JLR 112, at para. 1, *per* Sumption, J.A.):

"Over the last half-century, Jersey has become a major financial centre, providing trust and banking facilities for an extensive international clientele . . . It has for some time been the policy of the legislature and of the executive agencies exercising statutory powers that the commercial facilities available in Jersey should not be used to launder money or mask criminal activities here or anywhere else."

Although these remarks were made in the context of an action that concerned the provision of assistance by

the authorities in Jersey to foreign prosecutors, they have relevance in the sphere of civil litigation, where the courts are conscious that Jersey's reputation as a major financial centre might suffer if it were not willing to assist victims of wrongdoing to obtain redress.

40 Against that background, in applying Lord Reid's statement of principle to the facts of this case, the Royal Court had to be satisfied (i) that the respondents were the victims of wrongdoing, and (ii) that the banks had become mixed up in the wrongdoing.

41 On the material before it, the Royal Court found that, *prima facie*, the Municipality is the victim of a fraud perpetrated by Mr. Maluf and, therefore, that it qualifies as a "person wronged" as defined by Lord Reid. These findings are not challenged by the appellants. As we have seen, however, they do take issue with the Royal Court's conclusion (2006 JLR 478, at para. 31)—

> ". . . that there is sufficient suspicion that proceeds from some of these frauds have passed to accounts in Switzerland and from there to the accounts of the companies in Jersey to justify an order that the banks give discovery about the accounts . . ."

In their written contentions, the appellants argue that "mere suspicion and inference . . . simply is not good enough for a case like the present, in which the plaintiff is seeking to lift the latch on the banker's door." In the hearing before us, Advocate Steenson, for the appellants, submitted that there must be at least *prima facie* evidence that the defendant has been mixed up in the wrongdoing.

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42 The appellants' challenge to the Royal Court's approach raises the general question—in this type of application, to what standard must the court be satisfied that a defendant has become mixed up in alleged wrongdoing, so that it owes the plaintiff a duty of disclosure? Is it sufficient if the plaintiff persuades the court that it is, for example, just possible that the defendant has become mixed up in the wrongdoing, or, looking towards the other end of the range, does he have to make out a seriously arguable case that it has been involved? For convenience, we shall refer to the general question as "the threshold issue."

43 Counsel were unable to point us to any authority in which the threshold issue has been addressed directly. The cases to which we have referred so far in this judgment give little guidance on the standard to which a court has to be satisfied that an innocent information holder has been involved in wrongdoing, so as to give rise to a duty to make disclosure. In *Norwich Pharmacal* (12), it seems that there was clear and unchallenged evidence of wrongdoing and of the innocent defendants' involvement in that wrongdoing. What their Lordships had to say about these aspects of the case, therefore, has to be read with that in mind. Lord Reid said ([1974] A.C. at 174): "But without certain action on their part the infringements could never have been committed. Does this involvement in the matter make a difference?"

44 Lord Morris of Borth-y-Gest looked at the requirement of involvement more generally and said (*ibid.*, at 178):

> "At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information."

Of the defendants in *Norwich Pharmacal*, Lord Morris said (*ibid.*, at 181):

> ". . . [T]hey are not mere outsiders or volunteers or, so to speak, mere bystanders. They become obliged to have active concern with, to acquire positive knowledge of, and to exercise certain powers in respect of, the affairs of traders and the movement of goods."

45 Viscount Dilhorne considered the defendants' position and concluded (*ibid.*, at 188): "I do not see how it can be said that they were not involved in the importation of this chemical." Lord Cross of Chelsea gave general guidance about what the court should do in future when deciding whether or not to make a disclosure order, saying (*ibid.*, at 199):

> "In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer

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> and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant."

Finally, Lord Kilbrandon suggested (*ibid.*, at 206) that ". . . what may be a wider power to order discovery . . ." ought to be limited in the exercise of judicial discretion to ". . . any case in which the defendant has been 'mixed up with the transaction' . . ."

46 The *Bankers Trust* case (4) concerned a fraud, allegedly perpetrated by two named individuals who, it was said, presented forged cheques and received $500,000 each. Lord Denning describes them as "rogues," explaining ([1980] 1 W.L.R. at 1279): "I call them 'rogues' although it has not been proved yet: but the prima

facie evidence against them is strong." His Lordship remarked (*ibid.*, at 1282) that it is a "strong thing" to order a bank to disclose the state of its customer's account, as was being sought in that case, and continued: "It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance, when the customer has got the money by fraud—or other wrongdoing—and paid it into his account at the bank." Whatever "a good ground for thinking" may mean, it seems to us to indicate a lower threshold than a requirement that there be *prima facie* evidence that the money in the bank is the plaintiff's money.

47 In the absence of clear assistance from the authorities in which Lord Reid's statement of principle has been applied, we must decide for ourselves the standard to which the Royal Court should be satisfied that an innocent third party has become mixed up in alleged wrongdoing, so that he owes the person wronged a duty of disclosure. Even where, as here, the plaintiff can adduce *prima facie* evidence of wrongdoing, it may be very difficult for him to bring *prima facie* evidence that an innocent third party, such as a bank, has been unwittingly mixed up in the wrongdoing. In some cases, it will be impossible. It is to be expected that the wrongdoer will have taken steps to conceal the fact that the third party has facilitated the wrongdoing. The innocent bank, by definition, will not have known. Having regard to these considerations, should the threshold in respect of involvement be set lower than a requirement that *prima facie* evidence be adduced?

48 In our view, in attempting to answer that question, it is helpful to look at the position of the third party who is convened as the defendant in an action for disclosure of this kind. He is brought to court because the person wronged believes that he may have information about the wrongdoer. If it is confidential information, the duty of confidence is likely to be owed, directly or indirectly, to the wrongdoer. It is likely that the third party has become mixed up because the wrongdoer, directly or

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indirectly, has chosen to involve him in order to facilitate the wrongdoing. His innocence is acknowledged by fixing responsibility for his costs on the person wronged. Disclosure will only be ordered if there is no other source of information that will assist the person wronged. It does not seem to us unjust that a duty to disclose should arise where the court is satisfied that there is a reasonable suspicion that the third party has been mixed up in the wrongdoing.

49 Some support for the view that something less than *prima facie* evidence will suffice to entitle the court to order disclosure can be gleaned from a number of English cases. In *Mediterranea Raffineria Siciliana Petroli S.p.A.* v. *Mabanaft G.m.b.H.* (11), Mocatta, J. granted an injunction restraining the disposal of the proceeds of sale of a cargo of oil, delivery of which was alleged to have been obtained without the production of bills of lading. The court also made an order requiring directors and an employee of the defendant company to make full disclosure of certain specified facts on affidavit, and directed that one of them should file an affidavit of documents. The order was upheld by the Court of Appeal. The case was decided some five years after *Norwich Pharmacal* (12). Lord Denning, M.R. presided in the Court of Appeal, as he had done in *Norwich Pharmacal*, and one of the other Court of Appeal judges was Templeman, L.J., who, as Sydney Templeman, Q.C., represented the defendants in *Norwich Pharmacal.* No mention is made of *Norwich Pharmacal* in the judgments and Templeman, L.J. notes that "orders of this sort (*i.e.* the one at issue in the case) were made long before the recent orders for discovery." It is clear, therefore, that the court was not considering Lord Reid's statement of principle. Nonetheless, it is of interest that the Court of Appeal felt able to uphold the order on the factual basis that—

> ". . . the plaintiffs' case is that there is a trust fund of $3,500,000. This has disappeared, and the gentlemen against whom orders were sought *may* be able to give information as to where it is and who is in charge of it." [Emphasis supplied.]

50 The rationale for upholding what was described as "a strong order" was that a court of equity—

> ". . . has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain."

In a case of the type before us, where the court is being asked to exercise its powers to assist the victim of a fraud to recover what has been taken from him, or its equivalent in damages, there is, in our opinion, no good reason why it should require a more exacting factual basis on which to order disclosure than does an English court exercising its equitable jurisdiction to protect and preserve a trust fund.

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51 In *Norwich Pharmacal* (12), Lord Kilbrandon conducted a review of procedures in other jurisdictions, in order to discover what general principles were applied there in the determination of applications for discovery from third parties. Borrowing from South African jurisprudence, his Lordship said ([1974] A.C. at 205):

> "In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants *bona fide believe* to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to

any special right of exception which the respondents may qualify in respect of their position as a department of state." [Emphasis supplied.]

52 Finally, in *Carlton Film Distributors Ltd.* v. *VCI PLC* (5), the plaintiffs sought discovery to enable them to determine whether or not they had been the victims of wrongdoing. What they lacked, and what they sought, was *prima facie* evidence of such wrongdoing. Their discovery action was based on what Jacob, J. described ([2003] F.S.R. 47, at para. 8) as "reasonable grounds for supposing" that an actionable wrong had been committed against them. They contended that they were unable to bring proceedings without the information sought. The judge agreed and granted the order.

53 Both Lord Kilbrandon and Jacob, J. clearly thought that something less than *prima facie* evidence of wrongdoing was sufficient to entitle the court to order disclosure. We can see no reason to require a higher threshold in respect of the question whether or not the defendant is a person who has become innocently mixed up in the wrongdoing.

54 In this case, the Royal Court was clearly satisfied that there is a reasonable suspicion that the banks were innocently mixed up in Mr. Maluf's alleged wrongdoing. On that basis, in our judgment, it was entitled to hold that the banks have a duty to make disclosure in order to assist the respondents, and that it had the power to order such disclosure. It made the order on the view that it was necessary in order to enable the Municipality to locate and preserve traceable funds and to decide whether it has grounds to bring actions against the companies or others in Jersey or elsewhere to recover the funds, or their equivalent in damages. Adopting the test laid down in *Arab Monetary Fund* (2), the Royal Court concluded that there is a real prospect that the information from the banks will assist in that process. That finding is not challenged. Consequently, we reject the appellants' first ground of appeal.

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The discretion ground

55 In the Royal Court, the appellants argued that if it had the power to grant the disclosure sought it should decline to do so in the exercise of its discretion. The Royal Court exercised its discretion in favour of ordering disclosure. The appellants have not engaged in the process that would be necessary to persuade us that the Royal Court erred in the exercise of its discretion. They do not contend, for example, that no reasonable tribunal in the Royal Court's position would have exercised its discretion in the way that the Royal Court did. It is not suggested on behalf of the appellants that the Royal Court took into account irrelevant considerations or failed to take account of relevant and material considerations which ought to have been taken into account. In the absence of anything that would entitle us to interfere with the exercise of its discretion by the Royal Court, we reject the appellants' second ground of appeal.

The proper party ground

56 We turn, finally, to the proper party ground. The Royal Court said this (2006 JLR 478, at para. 8):

> "We should interpose at this stage to say that it occurred to the court on reading the papers that whilst the Municipality, as the victim of the alleged frauds, would clearly have a right to bring civil proceedings for the recovery of the proceeds, the same cannot be said for the Federal Republic. However, in his second affidavit, Mr. Witts has given evidence that under the law of Brazil the Federal Republic must be party to any proceedings brought outside Brazil by the Municipality. The companies have not sought to challenge that evidence or to take the point in any way and accordingly we say nothing further of it."

57 Referring to that passage, the appellants now say that the "Deputy Bailiff erred in law when he held that whether or not the Federal Republic of Brazil has sufficient interest to bring these proceedings in Jersey is a question of the law of Brazil and not of the law of Jersey." We can find no such determination in the Royal Court's judgment. The Royal Court's observation was directed to civil proceedings "for recovery of the proceeds," not to these proceedings for discovery. The court was not asked to determine the question whether or not the Federal Republic has sufficient interest to bring these proceedings and it did not do so. The Royal Court fell into no error. The appellants' proper party ground is not properly a ground of appeal—it is a new point and it comes too late. Accordingly, we reject the appellants' third ground of appeal.

Disposal

58 It follows from what we have said above that the appeal is dismissed.

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Citation of authority

59 We add some words to express concerns that we have about the form, as distinct from the substance, of the parties' submissions in this case, both at first instance and on appeal. A number of English authorities were produced and relied on by the parties. The citations include reports in the *All England Law Reports* of cases which are reported in the official *Law Reports.* The official reports, published by the Incorporated Council of Law Reporting for England and Wales, are the most authoritative of all series. They contain a summary of the arguments and they are sent to the judges and counsel concerned for approval prior to publication.

Practitioners should note that, where a case has been reported in the official *Law Reports*, the Royal Court and the Court of Appeal will expect it to be cited from that source. Other series of reports should be used only when a case is not reported in the official *Law Reports.*

Appeal dismissed.