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THIRD PARTY DISCLOSURE OF A DEBTOR'S ASSETS: WHAT ARE THE LIMITS?

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This article discusses the nature of the jurisdiction of the Royal Court of Jersey to grant injunctions for the disclosure by a third party of the assets of a judgment debtor: i.e. other than in respect of a proprietary claim by the creditor. It suggests that the juridical source of the order derives from the broad inherent "equitable" auxiliary jurisdiction and may be refined by reference to Norwich Pharmacal principles which come from the same source.

Introduction

1 The Royal Court of Jersey has long exercised jurisdiction over parties who are not defendants and against whom no substantive relief is sought by the claimant. Such a party is known as and is included in proceedings as a "party cited" so as to be subject to a court order. Typically a defendant's Jersey bank will be a party cited so that it is, along with the defendant, subjected to a freezing injunction in respect of assets of the defendant in the hands of that party cited. This may be before or after judgment is taken. The court usually also makes a disclosure order against the party cited requiring it to identify to the plaintiff what assets have, in fact, been frozen. Sometimes the defendant is beyond the court's powers and the party cited bank reveals that it no longer holds assets for the defendant. In such situations the court is sometimes asked to order the bank to disclose where it sent the money that is no longer in the account.

2 The question to be addressed in this paper is, on what basis in law is a bank obliged to disclose that information given its duty of confidence to its customer, the defendant? Or to ask a slightly different question; in what circumstances should the court order it to do so?

3 One might be assisted in answering these questions by posing the following hypothetical case which, for simplicity, has no freezing order as part of it. A creditor with a judgment of the English High Court (not in regard to a proprietary claim) has found a copy of a recent bank statement of the judgment debtor's account with a Jersey bank. The debtor has disappeared and the creditor has no other information about the debtor's assets. The statement shows that the

account is now empty, but that the debtor had a large sum with the Jersey bank which was paid out one month before to a foreign bank account which cannot be identified from the statement. What power does the Royal Court have to grant a free-standing application for a disclosure order against the bank? Can such disclosure order only be granted in support of a substantive legal right to that information from the bank? If so, from what branch of the law does that right derive?

The jurisprudential basis to grant a disclosure order against a third party

4 A starting point for the analysis is the recent case of *Jomair Leasing Ltd v Hourigan*.[1] In that case the Royal Court granted an unopposed application for an order that the judgment debtor's bank, Abbey National International Ltd, disclose—

> ". . . all bank statements in respect of the three accounts . . . together with full details and documents in relation to such transfers into or out of the accounts as may be specified by the plaintiffs' advocates following inspection of the bank statements."

5 The background was that the plaintiffs had obtained judgment against the defendant in the State of Utah in the United States. The Jersey proceeding sought judgment pursuant to the Utah judgment. The defendant did not enter an appearance in Jersey and judgment in default was given against him. Thereafter the plaintiffs sought *ex parte* relief by way of a freezing injunction against the defendant and the bank as party cited, together with disclosure orders against both of them in relation to the assets of the defendant. The Deputy Bailiff granted the *ex parte* freezing order and disclosure order against the defendant, but refused to grant the disclosure order against the party cited on an *ex parte* basis. Because it was a judicial decision made on an *ex parte* application in chambers there are no published reasons for the decision, which is entirely normal. The judgment in the subsequent hearing before the Royal Court (presided over by a different judge; the Bailiff) therefore deals with the application for the disclosure order against the party cited. Counsel for the party cited did not appear at the hearing and the party cited rested on the wisdom of the court. The defendant did not appear and was not represented.

6 Paragraphs 8 and 9 of the judgment are in the following terms—

> "8. This court has in a number of cases made it clear that there is jurisdiction to grant an order for disclosure in order to aid

1 [2011]JRC042.

enforcement of a judgment. See *Goldtron Ltd v Most Investment Ltd* 2002 JLR 424 at paras 25–28; *Apricus Investments v CIS Emerging Growth Ltd* [2003] JLR *N* 40,[2] [2003]JRC151 at paras 16–20; and *Africa Edge SARL v lncat Equipment Rental Ltd* 2008 JLR *N* 41, [2008]JRC175 at paras 8–10.

9 All of these cases approved the *dicta* of Coleman, J in *Gridrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos LDA* [1994] 1 WLR 299, at 310, as follows—

> 'It is to be observed, however, that both in *Ashtiani v Kashi* and in *Derby & Co Ltd v Weldon (Nos 3 & 4)* the courts were concerned with pre-judgment orders which included *Mareva* injunctions. The orders for disclosure were therefore orders ancillary to those injunctions. There was no question of there being any other order in support of which a disclosure order could be justified. Where, by contrast, one has the position that a judgment has been already obtained or an award made and where a *Mareva* injunction in aid of execution is justified, *the jurisdiction to make a disclosure order arises* both as a power ancillary to and in support of the injunction and *independently of the injunction as a power in support of the execution of the judgment or award* . . .'" [Author's emphasis.]

7 In the recent case of *Leeds United Ltd v Phone-In Trading Post Ltd (t/a Admatch)*,[3] the court made disclosure orders against the defendant as the judgment debtor in order to establish the financial position of the debtor (which claimed to be impecunious) and what had happened to monies which it accepted it had previously. At para 16 of the judgment, the court, having referred to the orders made in *Jomair* and the cases there mentioned, held that—"The source of the power is undoubtedly the inherent jurisdiction of the court to ensure that its orders can be enforced so that plaintiffs are not left holding empty judgments". This much is clear cut in regard to orders as against a debtor, but how far does the rule assist in regard to orders against third parties? To expose that issue it is useful to explore the reasoning behind the decision in *Gridrxsime*.

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2 In Apricus, the court upheld disclosure orders which appeared to have been made against both the defendants and a third party trustee in aid of execution of an unsatisfied arbitral award. The information sought included information as to what assets of the defendant and a Cypriot company in which it had invested were held by the trustee. There is no discussion in the judgment as to the juridical basis upon which the orders were made against the trustee.

3 [2011]JRC159.

8 *Gridrxsime Shipping Co Ltd v Tantomar-Transportes Maritimos LDA*,[4] a judgment of first instance in the English High Court, was a case where the disclosure order sought was against the judgment debtor and not against a third party. In that case, the plaintiffs had the benefit of an arbitration award which had not yet been converted into a High Court judgment under s 26 of the Arbitration Act 1950. If there had been an English judgment, the plaintiff could have obtained an order pursuant to what was then Order 48 of the Rules of the Supreme Court and which is now embodied in Part 71 of the English Civil Procedure Rules ("CPR"). Under those rules a judgment creditor may apply for an order requiring a judgment debtor or, if a judgment debtor is a company or other corporation, an officer of that body to attend court to provide information about the judgment debtor's means or any other matter about which information is needed to enforce a judgment or order.[5] The *Gridrxsime* case arose because there was no judgment debt, only an arbitration award, so the court had to examine what other power it had to grant orders for the disclosure of assets against a defendant for the purpose of facilitating the enforcement of judgments and also arbitration awards which were convertible in to judgments.

9 In *Gridrxsime*, Coleman, J. followed *Machine Watson & Co Ltd v International Tin Council (No 2)*[6] where the Court of Appeal also had to consider how to deal with a case where the judgment debtor was not amenable to RSC O 48. In that case, the debtor was an unincorporated association to which O 48 did not apply. The Court of Appeal held that the court's power to grant an injunction requiring discovery was derived from s 37(1) of the Supreme Court Act 1981 which provides that "the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so". In his judgment at 305B, Kerr, LJ held that—

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4 [1994] 1 WLR 299.

5 It seems odd that Jersey has never adopted rules of court analogous to the English Civil Procedure Rules Part 71 which allow for the questioning of a debtor to be carried out by the judgment creditor or someone acting on the judgment creditor's behalf or a High Court enforcement officer. There is clearly a case for following the English model. A judgment creditor should be able to apply to the Royal Court (in the form of the Judicial Greffier; the Jersey equivalent for these purposes of an English High Court Master) ex parte for an order that a judgment debtor attend before an officer of the Viscount (the court's executive officer) to be examined as to his assets. Had it been in place this procedure might, for example, have avoided the need for a full Royal Court contested hearing in the case of Leeds United Ltd v Phone-In Trading Post Limited (t/a Admatch) [2011]JRC159.

6 [1989] Ch 286.

> "This jurisprudence was then considered at considerable length by this court in *AJ Bekhor & Co Ltd v Bilton*. All three members were agreed that orders in aid of a *Mareva* injunction should be made to ensure that this was effective in the face of the defendant's non-compliance and evasiveness. A majority (Ackner and Stephenson, LJJ) concluded that the ancillary order should be that the defendant should attend for cross-examination, whereas Griffiths, LJ declined to interfere with the order of the judge at first instance that the defendant should give full discovery concerning his assets. As regards the source of the jurisdiction, a differently constituted majority (Ackner and Griffiths, LJJ) considered that the power to make these orders derived from what is now section 37(1), whereas Stephenson, LJ regarded it as part of the inherent jurisdiction of the court."

10 To expand on that last point, in *AJ Bekhor & Co Ltd v Bilton*[7] Stephenson, LJ held that—

> "In my judgment a judge has the duty to prevent his court being misused as far as the law allows, but the means by which he can perform that duty are limited by the authority of Parliament, of the rules of his court and of decided cases. Those means do, however, include what is reasonably necessary to performing effectively a judge's duties and exercising his powers. In doing what appears to him just or convenient he cannot overstep their lawfully authorised limits, but he can do what makes their performance and exercise effective. *He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy*, even though not previously made or expressly authorised. This implied jurisdiction, inherent because implicit in powers already recognised and exercised, and so different from any general or residual inherent jurisdiction, is hard to define and is to be assumed with caution. But to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts." (Author's emphasis)

11 The law of Jersey as to the inherent jurisdiction of the Royal Court in the procedural context was described in *Mayo Assocs SA v Cantrade Private Bank Switzerland (C.I.) Ltd*.[8] This aspect of the *Mayo* litigation was an application by a defendant to seek the court's

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7 [1981] 2 All ER 565, (CA) at 954A.

8 1998 JLR 173.

intervention to regulate the way in which its settlement offer should be put by a plaintiff to the many investors in the plaintiff. The court refused to get involved because it held that the defendant had no legal right or *locus standi* to intervene between the plaintiff and the investors. The Court of Appeal, at 189, held as follows—

> "In its skeleton argument, *Cantrade* sought to support the Royal Court's order on the basis that it fell within the scope of a passage in *Halsbury's Laws of England*, 4th ed., para. 14, at 23, which this court cited with approval in *Finance & Econ Cttee v Bastion Offshore Trust Co Ltd* (7) (1994 JLR at 382) and which defines inherent jurisdiction as being—
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> > '. . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.'
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> While we accept the validity of this description it must be understood, and therefore confined, within the context of the principles and authorities to which we refer in this judgment.
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> But if necessity is the touchstone, the question still remains as to the legitimate area of exercise of the inherent jurisdiction. In our judgment, this question falls to be answered in a civil case by reference to the function of the court in civil proceedings. That function has been succinctly expressed by Lord Diplock in *Gouriet v Union of Post Office Workers* (8) [1978] A.C. at 501 as follows:
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> > 'The only kind of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against that other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed.'
>
> Thus necessity is to be judged in the light of the objectives the parties have sought to achieve through invocation of the court's function."

12 Thus the law of Jersey appears to require a pre-existing "legal right" by reference to which the inherent jurisdiction can be invoked to support its application.

13 The English case law seems to show a wide view of what type of "legal right" is required before the court is able to step in. Such cases are referable to the English court's inherent "auxiliary" jurisdiction in equity as developed over centuries by the Court of Chancery in England. By that auxiliary jurisdiction claimants were aided in the enforcements of their legal rights being pursued in the common law court by a suitable order from the Chancery Court. This auxiliary jurisdiction in equity is a manifestation of the equitable maxim that "Equity will not suffer a wrong to be without a remedy".[9] Prior to the Supreme Court of Judicature Act 1873, in England these equitable remedies were granted by the Chancery Court in aid of proceedings brought in the Common law courts. That statute had the effect of fusing those courts into one High Court and s 25(8) gave the High Court the statutory power to issue injunctions that had long existed in the Chancery Court. This was the precursor to what is now s 37 (1) of the Supreme Court Act 1981. Jersey, unlike Guernsey,[10] has no such statutory power.

14 The wide view of this equitable jurisdiction in modern form was considerably advanced by Lord Nicholls in his minority judgment in the Privy Council decision in *Mercedes Benz v Leiduck*.[11] His judgment has found wide international acceptance as representing the view of the wide inherent equitable auxiliary jurisdiction. It is worth reviewing the key part of that judgment from p 310 in the context of the type of order made in the *Jomair* case.

> "Given that *Mareva* relief is of an interim character, it may seem strange that there can be proceedings claiming this relief and nothing more. What is clear is that in the case of an anticipated foreign judgment, where the judgment is being sought in other proceedings, nothing further can be claimed in the *Mareva* proceedings. When the foreign judgment is obtained, the common law regards the defendant as under an obligation to pay, which the English court will enforce: see the classic expositions of Parke, B in *Williams v Jones* (1845) 13 M & W 628, 633, and Blackburn, J in *Schibsby v Westenholz* (1870) LR 6 QB 155, 159, affirmed by Lord Bridge of Harwich in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484. But, in the nature of things, until the judgment is forthcoming the plaintiff cannot seek to enforce it. Until then he has only a prospective right of enforcement, to which the *Mareva* relief is ancillary.

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9 See Snell's Equity (13th ed), para 3–04, at 28.

10 Section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987.

11 [1996] AC 284.

The substantive relief sought by a writ or other originating process needs to be founded on a cause of action. So the question which arises, and which must be faced squarely, is whether a writ seeking only a *Mareva* injunction in respect of an anticipated foreign judgment falls foul of this requirement.

To a large extent any discussion of this question is doomed to be circular. A cause of action is no more than a lawyers' label for a type of facts which will attract a remedy from the court. If the court will give a remedy, *ex hypothesi* there is a cause of action. However, the discussion still has usefulness because it causes one to look at the matter from a different angle.

Two preliminary points are to be noted. First, practising lawyers tend to think in terms of the established categories of causes of action, such as those in contract or tort or trust or arising under statute. They do not always appreciate that the range of causes of action already extends very widely, into areas where identification of the underlying 'right' may be elusive. For instance, a writ may properly be issued containing nothing materially more than a claim for an injunction to restrain a defendant from continuing proceedings abroad on the ground that this would be unconscionable: see *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81, 95; [1984] QB 142, 147. In such a case, the underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable. This formulation exemplifies the circular nature of the discussion. Second, originating process is not always concerned with the determination of an underlying dispute between the parties. For instance, a plaintiff may bring an action for discovery against a person, in respect of whom he has otherwise no cause of action, in aid of other proceedings not yet commenced: see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. In such a case the only relief sought is of an interim character in the sense that it is in aid of other proceedings.

A right to obtain an interlocutory injunction in aid of the substantive relief sought in an action is not normally regarded as a cause of action. This is because ordinarily proceedings bring a substantive dispute before the court. Attention is therefore focused on the cause of action involved in the substantive dispute the court is being asked to resolve. The claim to interim protective relief is ancillary to the underlying cause of action, and in that respect it has no independent existence of its own.

That is the normal position. But where the substantive dispute is being tried by a foreign court, the matter stands differently. It is

> difficult to see any reason in principle why, in this type of case, where the defendant is within the territorial jurisdiction of the court, the court should decline to give such interim relief as might have been given had the court been determining the substantive dispute. It would be odd if the court should adopt the attitude of drawing back and declining to give any relief, whatever the circumstances, unless the court were seized of the whole dispute. That would be a pointlessly negative attitude, lacking a sensible basis. That is not the law. On the contrary, the *Channel Tunnel* decision [1993] AC 334 has shown the way ahead. As appears from the observations in that decision referred to above, a writ may be issued claiming only interim relief ancillary to a final order being sought from some other court or arbitral body. So be it. If the consequence is that in such a case, where the court is seized only of a claim for interim relief, that claim must bear the burden of being labelled a cause of action if intervention by the court is to be justified, let that be so. The law continues to adapt and develop."

15 The minority view of Lord Nicholls as to the power of the court to grant free standing injunctions was the foundation for the judgment of the Jersey Court of Appeal in *Solvalub v Match Investments Ltd*.[12] where the court upheld an order granting leave to serve a "free standing" freezing injunction in support of foreign proceedings out of the jurisdiction. The approach of Lord Nicholls has found support most recently in the Cayman Islands in the case of *Gillies Smith v Smith* on 12 May 2011 in which judgment the court reviewed the cases on free standing injunctions in Jersey (including *Solvalub*), the BVI and the Isle of Man.

16 Even before *Mercedes Benz v Leiduck* there were cases where the auxiliary jurisdiction to grant injunctions was used creatively as the following headnote for the case of *In re Oriental Credit Ltd*[13] reveals—

> "The applicant, a director and shareholder in a company, left the jurisdiction shortly before it went into liquidation in October 1986. Attempts by the liquidators to communicate with him evoked no response and on 26 June 1987 the registrar made an order pursuant to section 561 of the Companies Act 1985 for his private examination to take place in July. On the same day, in anticipation of the applicant's return to the jurisdiction the following week for a very short time, the liquidators obtained an

12 1996 JLR 361.

13 [1988] Ch 204.

> order restraining him from leaving the jurisdiction until the completion of the examination in accordance with the registrar's order.
>
> On the applicant seeking the discharge of the injunction on the ground that the court had no jurisdiction to make it:—
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> Held, refusing the application, that, although the applicant had a public duty to obey the order made under section 561 of the Companies Act 1985 to attend for examination and he could be arrested if he failed to do so, the order to attend created neither a cause of action nor any legal or equitable right in the liquidators; that, notwithstanding that the liquidators had no enforceable right to be protected by an injunction, the court had a wide power under section 37 of the Supreme Court Act 1981 to ensure that its orders were complied with and, therefore, the court had acted within its jurisdiction in issuing the injunction in aid of and ancillary to the order of the registrar requiring the attendance of the applicant for examination (post, pp. 207F–208D)."

17 Guernsey has followed the principles that were applied in *Solvalub* in the context of disclosure orders against third parties. Southwell, JA took the matter further in his judgment in the Guernsey Court of Appeal case of *Seed International Ltd v Tracey*.[14] That was a pre-judgment situation. In the face of the objections of the customer defendant (but with no objections from the bank) the court upheld orders against the bank to produce copies of all documents and records relating to any account held by its customer and full details of payments in and out of those bank accounts. As in *Jomair*, there was no claim by the plaintiff to title to the money in those accounts.

18 The Guernsey Court of Appeal justified the order on the basis that the court said that it was exercising a jurisdiction similar to that relied upon by Goff, J in *A v C*[15] which was for "the prevention of abuse"; the abuse in both cases being "the ability of the defendant to move his assets from country to country so as to avoid the risk of having to satisfy any judgment that might be entered against him".

19 In *Seed*, the Royal Court of Guernsey, as well as the Court of Appeal also relied upon the English case of *Republic of Haiti v Duvalier*[16] where disclosure orders were made not only against the alleged wrongdoer, as former ruler of the country, but also against his lawyers. The background to that case was that the defendant ruler had

14 55/2003 (18 December 2003, Civil Appeal 341).

15 [1981] 1 QB 956.

16 [1990] 1 QB 202.

made clear his intention to move his assets around the world as necessary to avoid what he regarded as the false claims of the new rulers of Haiti.

20 Neither of the judgments in *Seed* or *Duvalier* contains much analysis of the separate position of the third parties. This is not surprising where, as in the *Seed* case, counsel for the wrongdoer defendant and bank customer put the argument as to why the bank should not breach its duty of confidence to him. At para 43 of the judgment in *Seed* the court said—

> "Miss Ozanne [for the customer, Seed] also sought to argue the case on the footing that what this court is concerned with is the confidentiality of RBS (International) vis-a-vis its customer, Seed, so that the court should pay primary attention to the rights of the bank as an outside party not involved in the substantive matters in issue in the action. This point is in our judgment not well-founded. RBS (International) have taken no part in these proceedings, and are content both that Seed should argue its own case, and to abide by such order as the Guernsey courts may make. The real issue between the parties is whether disclosure of assets of the defendants should be ordered."

21 What seems clear from *Seed* is that the jurisdiction that was being relied upon by the court to order disclosure against the bank is an auxiliary equitable jurisdiction to ensure that no wrong is left without a remedy drawn from the English model.

Are there limits to exercise of the jurisdiction?

22 But should there be defined limits for the making of such orders? Do such limits exist elsewhere? It was common ground and expressly stated by the court that the order in *Seed* was not made by reference to the well developed rules of law for free standing orders for the disclosure of information that have come to be known as *Norwich Pharmacal* orders.[17] *Norwich Pharmacal* orders derive from the same equitable auxiliary jurisdiction of the English Chancery Court as justifies disclosure orders against a judgment debtor. The English jurisprudence on *Norwich Pharmacal* orders has been largely followed in both Jersey and Guernsey.[18] It is therefore useful here only to summarise the basis for the rule and the principles that drive it before looking at one aspect of those principles.

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17 See para 32 of the judgment.

18 For a good discussion of Jersey Norwich Pharmacal law see the Civil Procedure Study Guide published by the Institute of Law on the website at www.lawinstitute.ac.je.

23 The essential concept behind a *Norwich Pharmacal* order is the idea of the "missing link" in terms of information which a person (A) holds and which another person (B) needs in order for B to be able to advance his legal rights. Because, in the nature of things, many people hold information which others think will be useful to assist them in the enforcement of their rights, the courts have established threshold tests to prevent innocent "bystanders" being compelled to provide information. Thus, in broad terms, the common law jurisdictions, including Jersey and Guernsey, have established the following threshold tests before the court will consider in its discretion whether to make the disclosure order and, if so, in what form. Those tests are broadly—

(a) that there are at least reasonable grounds for supposing that an actionable wrong has been committed against the applicant;

(b) there is a real prospect that the third party holds information without which the claimant will not be able to act to advance his rights;

(c) that there are at least reasonable grounds for supposing, or a reasonable suspicion, that the third party has been mixed up in the wrongdoing so as to facilitate the wrongdoing; and

(d) that there is no other straightforward and available means of obtaining the information other than by the order sought.

24 It is in regard to the third aspect of being "mixed up" in wrongdoing that the discussion below will centre because it is the critical gateway preventing the interrogation of anyone who happens to hold useful information.

25 Before we look more closely at the test for being "mixed up" in wrongdoing it is instructive to look at an example of the *Norwich Pharmacal* order as an aid to the enforcement of judgments. It is also interesting to see that the case we will consider was decided in 1994; *i.e.* before *Mercedes Benz v Leiduck*. In *Mercantile Group (Europe) AG v Aiyela*,[19] the plaintiff had obtained against the first defendant both judgment and, in aid of enforcement, a *Mareva* injunction and an order for the disclosure of his assets. The plaintiff also obtained an order against the first defendant's wife (the fourth defendant) requiring her to disclose detailed information relating to her own and her husband's financial affairs and the assets held by them both, and a *Mareva* injunction restraining her from dealing with specified accounts and mandates held by her. She applied to set aside the orders for want

19 [1994] QB 366.

of jurisdiction, on the ground that she was a third party against whom no cause of action lay. She did however accept, for the purposes of her application, that relevant sums were arguably held by her on trust for the first defendant to defeat execution of the judgment, against him. At p 371 of the judgment, the argument is recorded as having been put by counsel for the fourth defendant as follows—

> "The disclosure orders were also made without jurisdiction. The court's jurisdiction to order discovery against a third party is an exception to the general principle and is restricted to cases where the plaintiff seeks the identity of a wrongdoer in order to begin proceedings: see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; *Bankers Trust Co v Shapira* [1980] 1 WLR 1274; *Dubai Bank Ltd v Galadari* (unreported), 6 October 1992 Court of Appeal (Civil Division) Transcript No 892 of 1992; and *Post v Toledo, Cincinnati and St Louis Railroad Co*. (1887) 11 NE Rep 540. That limited jurisdiction has not been enlarged by section 37(1) of the Supreme Court Act 1981 so as to facilitate or extend the enforcement and supervision of the court's injunction jurisdiction. In any event, the disclosure orders were made without jurisdiction because a third party cannot be examined for the purpose of execution: see *Hood Barrs v Heriot, ex parte Blyth*. A judgment creditor cannot obtain an order for discovery of assets against a third party unless that party falls within the category of persons who may be examined: see RSC, Ord. 48 and *The Siskina* (1896) 2 QB 338."

26 In response, and at p 374 of the judgment, Hoffmann, LJ had the following to say—

> "The disclosure order
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> There is no dispute that the court was entitled to grant a post-judgment *Mareva* against Mr Aiyela. The question is whether, ancillary to that order, it can order discovery from a person against whom there is no substantive cause of action. The power to order disclosure is derived from section 37(1) of the Supreme Court Act 1981. The exercise of this power against third parties was discussed by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The effect of this decision, as expounded in later cases, is that jurisdiction to order disclosure against a third party exists when two conditions are satisfied. First, the third party must have become mixed up in the transaction concerning which discovery is required. Secondly, the order for discovery must not offend against the 'mere witness' rule, which prevents a party from obtaining discovery against a person who 'will in due course be compellable to give that

> information either by oral testimony as a witness or on a subpoena duces tecum'; see [1974] AC 133, 174, per Lord Reid."

And then later—

> "In the case of discovery against a third party in aid of a post-judgment *Mareva*, the mere witness rule can have no relevance. The trial, if any, will already have taken place. It follows that all that is necessary to found jurisdiction is that the third party should have become mixed up in the transaction concerning which discovery is required and, of course, that the court should consider it 'just and convenient' to make an order. The court will naturally exercise with care a jurisdiction which invades the privacy of an innocent third party. But this is a matter to be taken into account in the exercise of the discretion. It does not go to the existence of the jurisdiction.
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> Mr Mann said on behalf of Mrs Aiyela that RSC, Ord 48, r 1, which provides for examination of the judgment debtor, represented the limits of the information to which a judgment creditor is entitled in aid of execution. I do not agree. It would be very strange if before judgment the plaintiff could, as in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, obtain information from third parties about the whereabouts of the debtor's assets, but was limited after judgment to examining the debtor under RSC, Ord 48, r 1. I do not think that the submission gains support from the decision of this court in *Dubai Bank Ltd v Galadari* (unreported), 6 October 1992; Court of Appeal (Civil Division) Transcript No 892 of 1992, which concerned an attempt to impose upon a party an obligation to use best endeavours to give discovery of documents which were not within his control. The court said that there was no jurisdiction to widen the scope of discovery in this way. But the disclosure order against Mrs Aiyela does not require her to disclose any information which is not within her own knowledge or any documents not within her own control.
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> In this case there was prima facie evidence that Mrs Aiyela had become mixed up in the arrangements made by her husband to defeat execution of the judgment while continuing to live in luxury. It follows that there was jurisdiction to make a disclosure order against her."

27 Thus the English Court of Appeal in *Mercantile Group v Aiyela*, whilst recognising the court's power to grant a disclosure order, did so only by reference to the principles and threshold tests in *Norwich Pharmacal Co v Customs & Excise Commrs*. It had the concession from the information holder that she was mixed up in wrongdoing, so it did not need to consider whether it could make such an order

without her having "enabled" or "facilitated" the wrong to be committed. It is interesting to consider how, 17 years later, the court should now consider its powers in light of the wide views of the power to make equitable auxiliary orders and whether *Norwich Pharmacal* principles should still be invoked to provide protection for a third party who, we can assume, like the bank in *Jomair*, did not "enable" the wrong to be committed. [20]

28 Let us then look more closely at the test as to what needs to be shown for a party to have been "mixed up" in wrongdoing. This will help us consider what limits there should be in terms of any required degree of connection or relationship that the holder of the information has to the debtor.

29 The Jersey Court of Appeal in *Macdoel Investments v Federal Republic of Brazil*[21] reviewed what being "mixed up" in wrongdoing meant and referred to the tests from the *Norwich Pharmacal* as follows—

> "In *Norwich Pharmacal* . . . Lord Reid said, 'But without certain action on their part the infringements could never have been committed; does this involvement in the matter make a difference?' (pages 174E to F) Lord Morris of Borth-y-Gest looked at the requirement of involvement more generally, and said, 'At the very least the person possessing the information must have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information' (pages 178H to 179A). Of the defendants in *Norwich Pharmacal*, Lord Morris said,
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> > '. . . they are not mere outsiders or volunteers or, so to speak, mere bystanders. They became 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.' (page 181C)
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> Viscount Dilhorne considered the defendants' position (at page 188B to C), and concluded: 'I do not see how it can be said that

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20 In Steven Gee QC's book on English law Commercial Injunctions (5th ed) at para 22.049, he suggests that prejudgment disclosure orders can be made in cases not involving a proprietary claim against third parties under the Norwich Pharmacal jurisdiction in the same way as they can post judgment where the third party has become mixed up in an attempt by a defendant to make himself judgment proof. Steven Gee considers that such action on the part of the wrongdoer is a sufficient predicate wrong for the purposes of the Norwich Pharmacal principle in that it could give rise to claims to challenge dispositions as a fraud on creditors under s 423 of the Insolvency Act 1986.

21 [2007]JCA069 at para 42.

> 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—
>
> > '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 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.' (page 199F to G)
>
> Finally, Lord Kilbrandon suggested that 'that 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'." (pages 205A to 206B)

30 In an *obiter* remark at para 25 of the judgment at first instance in *Macdoel*,[22] in Jersey, Birt, DB suggested that "being mixed up so as to facilitate a wrongdoing" may not be a necessary ingredient where one is making a proprietary claim applying the ancient equitable jurisdiction of the court to preserve a trust fund. He said that he thought that that jurisdiction had been subsumed into the wider *Norwich Pharmacal* jurisdiction. He also said that he found it difficult to think of an example in a proprietary case where the defendant would not also have been mixed up.

31 On the same aspect and in *Systems Design Ltd v President of the State of Equatorial Guinea*,[23] at para 62(ii) of the judgment, the Guernsey Court of Appeal held that—

> "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)."

32 The use of the phase being involved "in the widest sense" might suggest that the third party need not have caused the wrongdoing before they are to be described as having been mixed up in

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22 Para 42.

23 Guernsey unreported, 5 April 2005.

wrongdoing. This was the conclusion of the English court of *R (Mohamed) v Secy of State*.[24] In that case, the claimant was arrested in Pakistan as a suspected terrorist and held incommunicado at various undisclosed locations until he was moved to Guantanamo Bay, Cuba, where US military prosecutors charged him with terrorist offences. The prosecution case against the claimant was based on confessions which, he claimed, had been induced by torture to which he had been subjected while he was held incommunicado and which the UK security services had facilitated. Pursuant to the *Norwich Pharmacal* jurisdiction, the claimant's lawyers asked the Secretary of State for Foreign and Commonwealth Affairs to disclose to him information known to the UK Government which might support his defence that the confessions were inadmissible as evidence in that they had been obtained by torture. The judgment of Thomas, LJ had to consider whether the UK government was involved in the wrongdoing being the torture.

33 Thomas, LJ set out the relevant legal principles as follows—

> "70 In the closing submissions made on behalf of the Foreign Secretary, it was accepted that it was not necessary for BM to establish that the actions of the Foreign Secretary were causative of the wrongdoing. We consider that that acceptance was plainly correct for the reasons we shall set out. It is sufficient that the SyS or SIS became involved in the wrongdoing (even if innocently) by facilitating that wrongdoing. Our reasons are as follows.
>
> (a) In *Norwich Pharmacal* [1974] AC 133 itself the distinction that was drawn was between the mere bystander or witness to wrongdoing whom all the Law Lords were clear could not be placed under an obligation to provide information and those who were involved or who participated in wrongdoing in such a way as to place them under an obligation. We have already referred to the test of Lord Reid-being mixed up so as to facilitate (page 175b–c); Lord Morris of Borth-y-Gest referred to someone becoming 'actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information' (page 178h); Viscount Dilhorne spoke of a person being involved in the transaction or involvement or participation in the wrongdoing (page 188a–c); Lord Cross of Chelsea spoke of unwitting facilitation arising through a relationship of the person against whom relief was sought and the person alleged to have committed the wrong (page 197b–g); Lord

24 [2009] 1 WLR 2579.

Kilbrandon spoke of the right to relief of the person seeking disclosure depending on the relationship of the wrongdoer to those against whom relief was sought (pages 203d–204d). None of the speeches speak of causation; it is clear that facilitation is not the same as causation.

(b) In *Ashworth Hospital Authority v MGN Ltd*, [2002] 1 WLR 2033 para 30 Lord Woolf, CJ referred to the speeches in *Norwich Pharmacal* in these terms:

> 'They make it clear that what is required is involvement or participation in the wrongdoing and that, if there is the necessary involvement, it does not matter that the person from whom discovery is sought was innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish.'

He added, at paragraph 35—

> 'Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.'

Lord Slynn of Hadley, whose speech was the only other speech to refer to this element, spoke only of 'participation' and 'involvement' in the wrongdoing. Again there is nothing that requires the involvement be causative of the wrongdoing.

(c) We were referred to other decisions and observations including *Axa Equity and Law Life Assurance Society plc v National Westminster Bank plc* [1998] CLC 1177 (where Morritt LJ spoke of involvement in terms of 'causing or facilitating'), the observations of Sedley LJ in *Interbrew SA v Financial Times Ltd* [2002] 2 Lloyd's Rep 229 (where he spoke of facilitation), and *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB). In the last case King J said, at para 12: 'The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered.'

> (d) We are not sure that it was necessary to go so far as King J went in that case. That is because as Sir Anthony Clarke MR said in *Koo Golden East Mongolia v Bank of Nova Scotia* [2008] QB 717, para 37 it is necessary to consider all the circumstances in the light of the fact that Norwich Pharmacal relief is a flexible remedy.
>
> 71 It seems to us, therefore, that we ought to approach this issue not by asking the question. 'Did the actions by or on behalf of the UK Government cause the alleged wrongdoing?' (as they plainly did not do so) but by asking the question, 'Did the UK Government through the SyS or SIS and its agents become involved in or participate in the alleged wrongdoing through facilitating it?' The issue can be further analysed by examining the relationship of the SyS and the SIS in connection with BM to the US authorities who are alleged to be the wrongdoers."

Conclusion

34 In the text *Commercial Fraud in Civil Practice*[25] the author, barrister Paul McGrath, examines a range of English cases on facilitating and argues for relaxation in the requirement. He says, at para 22.84, that

> ". . . whilst it must be recognised that the authorities generally support this restriction [that the person (X) holding the information must have facilitated the wrongdoing] the preferable position is that the manner in which X obtained the necessary information should be irrelevant to the need to obtain disclosure from X."

In this author's view, it may not be necessary to go as far as abolishing the general requirement of being mixed up in order to protect a mere bystander but merely to reframe the aspects of the relationship between the wrongdoer and X to allow for a more flexible "sufficient connection" test. Thus, coming back to the facts of *Jomair* and the example at para 2 above, if the inherent jurisdiction in this sphere of the law is to be confined by reference to *Norwich Pharmacal* principles, the answer to the question posed at para 2 above (and the conclusions after arguments in *Jomair* might have been) as follows—

(a) the power to make such an order is part of the inherent armoury of the court to prevent a wrong being perpetrated even if it is in support of steps being taken abroad, in the same way that in *Solvalub* it was held that assets in Jersey can be frozen pre-judgment in aid of the

25 Oxford University Press (2008), at paras 22.69–22.88.

rights of a plaintiff in a foreign court proceeding. There is the same imperative for disclosure to be given to assist in the enforcement of foreign judgments which would be enforceable in Jersey;

(b) the non-payment of a foreign judgment debt which could be enforced in Jersey is a sufficient wrong giving rise to rights which the court will enforce;

(c) it is not a requirement that the third party holder of the information has enabled or facilitated the non-payment of the judgment debt. What is required as a threshold requirement is that the holder of the information has a sufficient connection with a wrong committed or sought to be avoided;

(d) whether the connection is sufficient depends upon all the facts which include whether the holder of the information derived the information sought from the debtor in acting as agent of the debtor or in some arrangement with him;

(e) such a connection may well, if the other threshold tests applicable to *Norwich Pharmacal* orders (described above) are satisfied, give rise to a duty to assist the plaintiff by giving him information to enable him to identify and locate the defendant's assets;

(f) once the threshold tests are satisfied, then the court has a discretion whether to make such an order;

(g) key elements in the exercise of that discretion will be (i) whether the holder of the information is under a duty to keep the information confidential; (ii) to whom that duty is owed and (iii) what the consequences of disclosure might be for the holder of the information;

(h) in a case where the duty is owed by a bank to the defaulting debtor it will likely be that these tests will be resolved in favour of the plaintiff;

(i) an alternative view on the right facts could be (if there is evidence that the debtor used the account to avoid his obligations) that the bank facilitated the wrongdoing by providing a bank account.[26]

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26 In that vein, see the recent judgment of the Eastern Caribbean Supreme Court of Appeal in JSC BTA Bank v Fidelity Corp Servs Ltd, 12 January 2011, where the court endorsed the threshold test of the need for the holder of the information to have been "involved" in the wrongdoing so that mere onlookers could not be compelled to give disclosure. The court held that, by virtue of their role in providing registered agent services for companies that were said to have been created for the purpose of defrauding the plaintiff, the defendant thereby facilitated, albeit innocently, the commission of the fraud.

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