TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/035

BETWEEN:

JSC BTA BANK

Appellant

and

[1] FIDELITY CORPORATE SERVICES LIMITED
[2] COMMONWEALTH TRUST LIMITED
[3] AMS TRUSTEES LIMITED
[4] TRIDENT TRUST CO (BVI) LIMITED
[5] COVERDALE TRUST SERVICES LIMITED
[6] MORGAN & MORGAN TRUST CORPORATION LTD
[7] MOSSACK FONSECA & CO (BVI) LIMITED

Respondents

Before:

The Hon. Mde. Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Ian Donaldson Mitchell, CBE, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Philip Marshall, QC, Mr. Mark J. Forte
and Ms. Tameka Davis with him for the appellant
Mr. Paul Webster, QC, Ms. Nadine Whyte with him for the 5th respondent
Mr. John Carrington, Mr. Patrick Thompson with him for the 6th respondent

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2011: January 12;
February 21.

Civil Appeal – Commercial Law – disclosure of information – whether the disclosure sought is a necessary and proportionate response in all circumstances – inherent jurisdiction of the court – Norwich Pharmacal – equitable jurisdiction of the court to preserve a potential trust fund – whether an innocent party can be said to have facilitated the wrongdoing to the extent an order for discovery maybe made against him – elements of jurisdiction – necessity – the exercise of discretion – requirement of involvement or participation – whether it has to be satisfied that the

party is more than a bystander or witness – rights of third parties – application to adduce further evidence – costs

In 2009 the Government of Kazakhstan took action against one of the largest banks in Kazakhstan for the Regulation and Supervision of Financial Organisations which concluded that the Bank had negative equity and therefore was insolvent. The Bank has been restructuring debt of over US$11 billion under the supervision of the Almaty Financial Court. Any recoveries made by the Bank and other proceedings will partly go to meet the claims of creditors.

Ablyazov through nominee companies owned the majority of the shares in and controlled the Bank and was also the Chairman of the Board of Directors. He and Khaksylyk (his close associate) have since been dismissed and have both fled to the United Kingdom. Various criminal prosecutions have been filed against the two and others in Kazakhstan. Civil proceedings have been ensued in the Commercial Court in the United Kingdom and the Bank has obtained freezing relief against them as well. The proceedings in the Territory of the Virgin Islands have been brought in support of one the United Kingdom proceedings which concerns misappropriation of over US$1 billion which was extracted from the Bank in late 2008 under bogus loans allegedly created for fictitious transactions.

The Bank claims that this was facilitated through the use of various companies incorporated in the Territory of the Virgin Islands and the Seychelles. The Bank further alleges that this scheme was perpetrated by and for the benefit of Mr. Ablyazov using the companies as his vehicles and by Mr. Zharinbetov as his assistant in order to implement the scheme. The Bank made proprietary claims in respect of the sums advanced and claims for compensation against the Bank officers for breach of duty either in relation to the perpetration of the fraud or for failing to disclose and/or for approving what are described as “related party” transactions.

Mr. Ablyazov and Mr. Zharimbetov deny any involvement in the claims alleged against them and state that the companies and documents appeared to have been genuine.

The Bank subsequently filed an application for Norwich Pharmacal and ancillary relief in the form of information and documents in their custody, possession or control against the seven discovery defendants/respondents. They claim that the respondents are likely to be able to provide information to the Bank to assist the process of recovery of the Bank’s assets. They incorporated the companies, maintained them in good standing and allowed them to use bank accounts. The trial judge dismissed the application and held that there was no evidence that the discovery defendants were involved in, or participated in or facilitated those acts, acts of which, for all the evidence showed, they were entirely ignorant. The Bank now appeals the order of the trial judge in which he dismissed the application for disclosure of information and in addition there is an application to adduce further evidence.

Held: granting the application to admit further evidence, allowing the appeal and granting the reliefs sought. Awarding the 5th and 6th respondents their costs in the court below and awarding the 6th respondent costs in this court to be assessed if not agreed.

1. That the relief sought in this case is necessary and proportionate in all circumstances to permit the bank its undoubted right to proceed both in law and in equity against those who set up the companies and those that are presently in possession of the defrauded funds.

   Campaign Against Arms Trade v BAE Systems PLC [2007] EWHC 330 (QB) applied.

2. That the respondents, by virtue of their role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed and maintained facilitated, although innocently, the commission of the fraud and as such were involved in the fraud perpetuated against the bank. This renders the respondent under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the bank as the injured party in discovering the true wrongdoers.

   Norwich Pharmacal Co v Commissioners of Customs & Excise [1974] AC 133, Ashworth Hospital Authority v MGN Ltd [2002] 4 All ER 193, Banker's Trust Co v Shapira [1980] 1 WLR 1274 applied.

3. That the further evidence sought to be introduced by the appellant which comprises the defence of the 2nd defendant in the English Proceedings becomes relevant. It is clear that both individual defendants in the English proceedings have taken the position of lack of any knowledge or control over or having any relationship with these entities and thus it may reasonably be expected that no information will be forthcoming from them as to who are the instructing or controlling minds behind these entities. The respondents by virtue of the services they render coupled with the due diligence duties they are obliged to perform in their capacity as registered agents would be expected to have such information and in all probability information pertaining to banking mandates and resolutions passed by these entities for operating bank accounts in their possession.

4. That all of the respondents are entitled to be paid by the bank their reasonable costs of providing discovery as the court recognises the fact that innocent third parties become embroiled in proceedings through no fault on their part.

JUDGMENT

[1] MITCHELL, J.A. [AG.]: This is an appeal by JSC BTA Bank against an order of Bannister J dated 8th November 2010, in which he dismissed the application of the Bank for disclosure of information (a) pursuant to the inherent jurisdiction of the court applying the principles established in Norwich Pharmacal Co v Commissioners of Customs &

Excise[1]; and (b) pursuant to the equitable jurisdiction of the court to preserve a potential trust fund applying the principles established in Bankers Trust Co v Shapira[2]. In addition to the appeal there is an application to adduce further evidence.

The Background

[2] The Bank is one of the largest banks in Kazakhstan. In 2009 the Government of Kazakhstan took action in the wake of the worldwide financial crisis and the findings of a random inspection report[3] by the Agency of the Republic of Kazakhstan for the Regulation and Supervision of Financial Markets and Financial Organisations which concluded, among other things, that the Bank had negative equity, and thus was insolvent. The Bank has been restructuring debt of over US$11 billion under the supervision of the Almaty Financial Court. Any recoveries made by the Bank in these and other proceedings will partly go to meet the claims of creditors.

[3] Until 2nd February 2009, Mukhtar Ablyazov through nominee companies owned the majority of the shares in and controlled the Bank. He was also the Chairman of the Board of Directors. He has since been dismissed and fled to the United Kingdom (UK). Zhaksylyk Zharimbetov is a close associate of Mr Ablyazov. He was the First Deputy Chairman of the Management Board and also the Chairman of the Credit Committee. He also fled to the UK.

[4] Various criminal prosecutions have been opened against Mr. Ablyazov, Mr. Zharimbetov and others in Kazakhstan. The Bank has also commenced several sets of civil proceedings in the Commercial Court of the Queen's Bench Division of the High Court in the UK and has obtained freezing relief against Mr. Ablyazov and Mr. Zharimbetov in support of its claims.

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[1] [1974] AC 133.
[2] [1980] 1 WLR 1274.
[3] Dated 22nd January 2009.

[5] The present proceedings in the Territory of the Virgin Islands have been brought in aid of one of these sets of UK proceedings. These UK proceedings[4] concern, as alleged by the Bank, a scheme of misappropriation by which over US$1 billion was extracted from the Bank in late 2008 under bogus loans purportedly created for fictitious transactions.

[6] The scheme was effected allegedly through the use of various companies incorporated in the Territory of the Virgin Islands as well as the Seychelles which acted as (a) supposed borrowers and who sought financing from the Bank and (b) as supposed intermediaries for the purported supply of oil drilling and other equipment who were the direct recipients of the Bank's advances. The Bank's case is that the scheme was in fact perpetrated by and for the benefit of Mr. Ablyazov using the companies as his vehicles and by Mr. Zharimbetov as his assistant in order to implement the scheme.

[7] The Bank has made proprietary claims in respect of the sums advanced and claims for compensation against the Bank officers for breach of duty either in relation to the perpetration of the fraud or for failing to disclose and/or for approving what are described as "related party" transactions.

[8] In his defence in the UK proceedings Mr. Ablyazov has denied any involvement in the loans to the borrowers and the other arrangements described above. He also claims that the documents and companies appeared to have been genuine. Mr. Zharimbetov also claims in the UK proceedings that the various arrangements appeared to have been genuine commercial transactions[5]. The evidence in the UK proceedings reveals that no equipment whatsoever has been received by the borrowers, the money loaned by the Bank was advanced almost immediately by the intermediaries to various off-shore companies without the provision of security and in circumstances in which it was commonly understood that the loans would not be in fact repayable such that the value of these loans as receivables is said to be nil. It is said that the artificial arrangements were a

[4] JSC BTA Bank v Ablyazov and others.

[5] In his defence served in the UK proceedings on 5th December 2010 and which is the subject matter of an application before this court to admit additional evidence.

device apparently intended to conceal the making of advances to persons who could not otherwise receive loans under regulations governing the Bank's lending.

[9] Nine (9) Territory of the Virgin Islands companies ("BVI companies"), of which the respondents are or were registered agents, received funds totalling US$1,031,263.00 or a portion thereof alleged to have been misappropriated from the Bank. The Bank claims that the respondents are likely to be able to provide information to the Bank to assist it to identify the ultimate recipients of the payments or their proceeds and thus assist the process of recovery of the Bank's assets. They incorporated the companies, maintained them in good standing and allowed them to use bank accounts. The funds passed into the accounts of the nine (9) BVI companies at the bank in Latvia. There is no action against the nine (9) BVI companies but the intention is to proceed against the person behind the formation of the companies, which, save for one, are now defunct. Mr. Ablyazov and Mr. Zharimbetov have filed defences to the legal proceedings in the UK. They deny knowledge of the fraud or of the persons behind the nine (9) companies. It is clear they will not be supplying information about the present location of the Bank's funds.

[10] The Bank filed an application for Norwich Pharmacal and ancillary relief in the form of information and documents in their custody, possession or control against the seven discovery defendants/respondents. On 8th November 2010 Bannister J. in a considered decision concluded that while each case must turn on its own facts he could not accept that merely by providing incorporation or registered agent services in the present case any of the discovery defendants became involved in, or participated in or facilitated the wrongdoing complained of. He concluded that there was no evidence that the discovery defendants were involved in, or participated in or facilitated those acts, acts of which, for all the evidence showed, they were entirely ignorant. Only if it could be shown by credible evidence that an incorporation agent, for example, knew or had reason to believe that a company supplied by it to a client had been purchased in order to be used as a vehicle for a particular fraud might it be possible to show that by providing the company the agent was involved in the fraud. He held that the Bank had failed to pass this threshold test and dismissed the application. He also decided that the Bank had to establish necessity as a

prerequisite to the grant of Norwich Pharmacal relief. It is against these decisions that the Bank appeals.

The law

[11] It is a principle of the common law that the court will not permit a litigant to rope into its proceedings an innocent bystander or witness. The citizen is entitled to his privacy and has a right not to be involved in legal proceedings between two disputants without his consent save in answer to a subpoena for him to come as a witness or to produce the documents to the court. There is a plethora of cases from the UK, the Eastern Caribbean and the common law world describing the circumstances in which the court will change its stance and allow me to be joined as a 'discovery defendant' in order to oblige me to disclose what I know concerning a tort action between two other parties.

[12] The starting point is the Norwich Pharmacal case cited above. There the appellants were the owners of a patent for a chemical compound. The patent was being infringed by illicit importations manufactured abroad. In order to obtain the names and addresses of the importers the appellants brought actions against the Commissioners of Customs and Excise alleging infringement of the patent and seeking orders for the disclosure of the relevant information. The Commissioners claimed privilege against production of the relevant documents. The High Court ordered discovery, but the Court of Appeal reversed that decision. Lord Denning held that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged, or who is in the position of a mere witness. It would be intolerant if an innocent person – without any interest in a case – were to be subjected to an action simply to get papers or information out of him. The only permissible course is to issue a subpoena for him to come as a witness or to produce the documents to the court. The appellants appealed to the House of Lords. There it was held that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information.

[13] Lord Reid in the leading judgment in the House of Lords ruled[6]:

> "… 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. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

[14] As Viscount Dilhorn put it in his decision in the same case[7]:

> "Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. … Are the respondents to be regarded as involved in this case? I think the answer is yes. They were not, it is true, involved of their own volition. They were involved in the performance of their statutory duty. The [chemical compound] was in Customs' charge until cleared and the Commissioners could control its movement until cleared. … I cannot see how it can be said that they were not involved in the importation of this chemical. … So for these reasons in my opinion the answer to the first question I formulated, can the respondents be ordered to disclose the names of the importers? is in the affirmative. As to the second question, should they be ordered to do so? I think that the answer is also yes, unless in consequence of their special position the answer to the third question [are the respondents prohibited from disclosing the information?] is in the negative. Subject to the public interest in protecting the confidentiality of information given to Customs, in my opinion it is clearly in the public interest and right for the protection of patent holders, where the validity of the patent is accepted and the infringement of it not disputed, that they should be able to obtain by discovery the names and addresses of the wrongdoers from someone involved but not a party to the wrongdoing."

[15] It was the view of Lord Cross of Chelsea that[8]:

> "… in any case in which there was the least doubt as to whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order. 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

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[6] (ibidem) page 175B.
[7] (ibidem) page 188B.
[8] (ibidem) page 199F.

> 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. The full costs of the respondent of the application and any expense incurred in providing the information should have to be borne by the applicant."

[16] And, as it was put by Lord Kilbrandon[9]:

> "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. It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. The exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been 'mixed up with the transaction', to use Lord Romilly's words, or 'stands in some relation' to the goods, … is that that is the way in which judicial discretion ought to be exercised."

[17] Each of the Lords had a different expression to describe the circumstances in which an innocent party can be said to have facilitated the wrongdoing to the extent that an order for discovery may be made against him. Lord Reid described it as "getting mixed up" in the tortious acts; Viscount Dilhorn as "involved in the transaction"; Lord Cross as being the "relation subsisting between the alleged wrongdoer and the respondent"; and Lord Kilbrandon as "a consequence of the relationship in which they stand", "mixed up with the transaction", and "stand in some relation" to the goods. Whichever phrase is used, it is clear that there need be no necessity for any tortious liability to apply to the discovery defendant. He must simply not be a "mere witness" or a "mere bystander".

[18] There are two threshold requirements for the jurisdiction of the court to come into being. First, there must have been a wrong. It is common ground that a wrong has been

[9] (ibidem) page 205H.

committed against the Bank, and this is not in dispute. Second, the respondent to an application for disclosure must have "become mixed up" in it. That is the basis of the jurisdiction. A further principle to apply, after the threshold requirements have been satisfied, is the one of necessity.

[19] This approach is supported by a large number of cases and textbook writers. One of the more recent cases provided to us is the decision of King J in the UK High Court in Campaign Against Arms Trade v BAE Systems PLC[10]. The applicant was a long established association engaged in research into and campaigning against the international arms trade. The respondent was a well known major arms manufacturer based in the UK. The applicant association sought Norwich Pharmacal relief against the respondent. The applicant was seeking to discover the source of a leak to the respondent of an email sent by one of its members to the applicant's steering committee. The email contained privileged legal advice which the applicant association had received from its solicitors on tactics and costs in relation to the proposed review proceedings which the applicant intended to initiate against the government and in respect of which the respondent was an interested party, with an interest adverse to that of the applicant. By the review proceedings the applicant sought to challenge the decision of the Serious Fraud Office to discontinue its investigation into alleged corruption and bribery on the part of the respondent in the securing of a number of arms supply contracts from the Government of Saudi Arabia. The purpose of the email was to inform the committee of the advice given and to seek instructions to proceed.

[20] Under the heading "The exercise of the discretion: necessity" King J pointed out[11] that even if this requirement that the respondent must be more than a mere bystander is satisfied, this is not the end of the matter. It is only a threshold requirement to the exercise of what is a discretionary jurisdiction. Its satisfaction merely "triggers" the jurisdiction. The fact there is involvement enables the court to consider whether it is appropriate to make the order sought. The jurisdiction is an exceptional one which is only to be exercised by

[10][2007] EWHC 330 (QB).
[11](ibidem) at paragraph 15.

the court when it is satisfied that it is necessary it should be exercised. The disclosure sought has to be a necessary and proportionate response in all the circumstances. This necessity requirement will however vary in its impact according to the circumstances in which the application is being made. Where, for example, (but not the case here) the disclosure sought would involve the disclosure of a journalist's sources of information, the court will have to have regard to the protection that might be given to those sources by any applicable statute which might, for example, require that the disclosure be necessary in the interests of justice or national security or for the prevention of disorder or crime. It is clear therefore that the "necessity" factor comes into play only as a requirement in the exercise of the judicial discretion, after the threshold requirements have been satisfied.

[21] The House of Lords decision in Ashworth Hospital Authority v MGN Ltd[12] was referred to by both parties. The defendant's newspaper had published verbatim extracts of the medical records of a patient[13] at a security hospital administered by the claimant. The source of the information was probably an employee of the claimant. As such, his contract of employment would have contained a confidentiality clause. The source had supplied the information to an intermediary who in turn had supplied it to one of the respondent's journalists. While the journalist did not know the name of the source, he did know the name of the intermediary. Production of the name of the intermediary would likely lead to the name of the source. The publisher contended that it could not be ordered to give disclosure since it was not itself a tortfeasor and in any case the disclosure jurisdiction was limited to cases where such disclosure was required in order to enable the claimant to bring proceedings against the wrongdoer. Alternatively, the publisher contended that the order for disclosure was neither proportionate nor necessary.

[22] Lord Woolf points out[14] in this case that, while the 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 one. It distinguishes that party from a mere onlooker or

[12] [2002] 4 All ER 193, [2002] UKHL 29.
[13] Ian Brady, the notorious Moors Murderer.
[14] (ibidem) at paragraph 35.

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.

[23] Lord Woolf indicates[15] that the requirement for involvement is not the only protection available to the third party. There is the more general protection which derives from the fact that this is a discretionary jurisdiction which enables the court to be astute to avoid a third party who has become involved innocently in wrongdoing by another, from being subjected to a requirement to give disclosure unless this is established to be a necessary and proportionate response in all the circumstances. The need for involvement can therefore be described as a threshold requirement. The fact that there is involvement enables a court to consider whether it is appropriate to make the order which is sought. In exercising its discretion the court will take into account the fact that innocent third parties can be indemnified for their costs while at the same time recognising that this does not mean there is no inconvenience to third parties as a result of becoming embroiled in proceedings through no fault on their part.

[24] In Bankers Trust previously cited, two men presented the plaintiff bank in New York two cheques, each for a half a million dollars purportedly drawn on a bank in Saudi Arabia and made payable to one of the men. The bank paid over the million dollars and on instructions from the two men credited $600,000.00 and later $108,203.00 to accounts of the two men at the London branch of the third defendant bank. The bank in Saudi Arabia later informed the plaintiff bank that the cheques were obvious forgeries. The plaintiff bank reimbursed the bank in Saudi Arabia in the sum of $1,000,000.00 and issued a writ in London in an action to trace and recover the moneys. It asked for injunctions to prevent any dealings with the funds in the defendant bank. They obtained a Mareva injunction and sought an interlocutory order that the defendant bank should disclose and permit the

[15] (ibidem) at paragraph 36.

plaintiff bank to inspect and take copies of all correspondence between the two men and the defendant bank relating to any account in either of the two men's names as well as all cheques, debit vouchers, transfer applications and orders and internal memoranda relating to the accounts. The application for the interlocutory order was refused. They appealed.

[25] It was held in the Court of Appeal allowing the appeal and granting the order sought against the defendant bank that though the court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stage of an action where the plaintiffs sought to trace funds which in equity belonged to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in dissipation of the funds before the action came to trial. In the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property.

[26] There were several other authorities which were presented to us by the parties, and which have been very helpful in arriving at an understanding of the principles involved. These included:

(1) Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188

(2) Totalise plc v The Motley Fool Ltd [2001] EWCA Civ 1897

(3) Aoot Kalmneft v Denton Wilde Sapte [2002] 1 Lloyds Law Reports 417

(4) President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7

(5) Oxus Gold PLC v Maples Finance BVI Ltd [unreported decision of Hariprashad-Charles of 9 November 2006 in claim BVIHCV2006/0213]

(6) Morgan & Morgan Trust Co Ltd v Fiona Trust [unreported Court of Appeal decision from the BVI in Civil Appeal No 3/2006]

(7) MacDoel Investments Ltd v Federal Republic of Brazil [2007] JLR 201

(8) Danone Asia Pte Ltd v SB Chow & Co CPA [unreported decision from Hong Kong dated 5 November 2008]

(9) Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579

(10) Al-Rushaid Petroleum Investment Co v TSJ Engineering Consulting Co Ltd [unreported decision of Hariprashad-Charles of 20 April 2010 in claim BVIHCV(COM) 37/2010]

(11) Hollander – Documentary Evidence (Sweet & Maxwell, 10th ed, 2009)

However, in my view no useful purpose will be served in further analysis of the authorities on the various issues. The principles that apply in an application of this sort are well settled and susceptible to no doubt.

Application of the law to the facts

[27] Applying the law to the facts in this case, I am satisfied that the respondents by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed are said to have been mere vehicles created for the purpose of defrauding the Bank. The respondents, by incorporating and maintaining those vehicles thereby facilitated, albeit innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the Bank as the injured party in discovering the true wrongdoers. An order for discovery against them would permit the Bank to discover not only who had been the person or persons giving the incorporation and bank account instructions, but would provide the necessary protection to the respondents against any charge that might be brought against them that they had been in breach of their duty of confidentiality. Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them

seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced.

Necessity

[28] The necessity for making such an order against an innocent third party, though not a threshold requirement for grounding the exercise of the Norwich Pharmacal jurisdiction is nonetheless a factor which will weigh heavily in the exercise of the discretion to grant such relief. The trial judge considered that it was not necessary to order the respondents to make disclosure because the bank knew the identities of the nine (9) BVI companies by whom it had been wronged, and also knew the identities of the persons who had already been made defendants in the English proceedings, and who were described as the masterminds behind the "Scheme of Appropriation" and that once the primary defendants had been identified (and sued) the existence of possible additional defendants would emerge in the course of the proceedings. In this regard the further evidence sought to be introduced by the appellant which comprises the defence of the second defendant in the English Proceedings becomes relevant. As for the introduction of this evidence on appeal, I am satisfied that the tests as set out in the leading case of Ladd v Marshall[16] have been met. It is now clear that both individual defendants in the English proceedings have taken the position of lack of any knowledge or control over or indeed of having any relationship with these entities of the Territory of the Virgin Islands and thus it may reasonably be expected that no information will be forthcoming from them as to who are or were the instructing or controlling minds behind these entities. The respondents, by virtue of the services they render coupled with the due diligence duties they are obliged to perform in their capacity as Registered Agents would be expected to have such information and in all probability, information pertaining to banking mandates and resolutions passed by these entities for operating bank accounts in their possession. I can see no sound reason for first sending the Bank off to the Latvian Bank when there is little information as to the manner in which bank accounts were set up in Latvia. The information gleaned from the

[16] [1954] 1 W.L.R. 1489.

Registered Agents may very well lead to the need for disclosure relief also being sought in Latvia.

[29] Adopting the thinking of King J. above, I am satisfied that the relief sought in this case is necessary and proportionate in all the circumstances to permit the Bank its undoubted right to proceed both in law and in equity against those who set up the Companies and those that are presently in possession of the defrauded funds.

Conclusion

[30] I would grant the application to admit further evidence. I would allow the appeal and grant the reliefs sought. Based on reasoning of Lord Cross above, the 5th and 6th respondents are entitled to their costs in the court below and the 6th respondent to its costs in this court, to be assessed if not agreed. All of the respondents are entitled to be paid by the Bank their reasonable costs of providing discovery.

Ian Donaldson Mitchell, CBE, QC
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal