Neutral Citation Number: [2016] EWHC 3578 (Ch)

Case No: HC-2016-001853

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building
7 The Rolls Buildings,
London, EC4A 1NL

Date: 24/11/2016

Before:

THE HONOURABLE MR. JUSTICE BARLING

- -

Between:

ZANTRA LIMITED	**Claimant**
- and -	
BASF PLC	**Defendant**

- -
- -

Mr. Colin West appeared for the **Claimant.**
Mr. Aidan Robertson QC appeared for the **Defendant.**

JUDGMENT

(Approved)

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MR. JUSTICE BARLING:

1. These are Part 8 proceedings in which the relief sought by the claimant, Zantra Limited, represented by Mr. Colin West of counsel, is a *Norwich Pharmacal* order.[1] The proceedings, and that relief in particular, are opposed by the defendant, BASF plc, represented by Mr. Aidan Robertson QC.

2. The background to the proceedings can be relatively briefly stated. The defendant is a manufacturer of crop protection products. The claimant is a distributor of similar products, and also provides advice to farmers on the use of such products with a view to maximising their harvests.

3. It is common ground that there are five so-called national distributors of these products in the United Kingdom. They are, first of all, Agri, which is the trading name of Masstock Arable (UK) Limited and United Agri Products Limited; second, Agrovista UK Limited; third, Frontier Agriculture Limited; fourth, HL Hutchinson Limited; and fifth, Pro Cam Agriculture Limited. For the purposes of the present proceedings it also appears to be common ground that those national distributors account for in the order of 80% to 90% of the market for distribution of those products in the UK, with Agri having the largest share at 30-40%, Frontier having the smallest at 5-10%, and the others being somewhere in between. These figures date from 2011, but for present purposes it is not being disputed that they remain roughly correct. In addition to the defendant there are other large manufacturers of these products, including well-known names such as, eg, Bayer, Syngenta, and DuPont.

[1] *Norwich Pharmacal Co v. CEC* [1974] AC 133.

4. Zantra has been in the UK market for some time, but has not yet broken into the national distribution of these goods on a UK-wide basis. The evidence before me is that in order to do so it is necessary to be appointed as a distributor of one or more of the major agri-chemical manufacturers.

5. Before me are a number of witness statements setting out some of this background. On behalf of the claimant, I have two witness statements from Mr. Murray Mackay who is the managing director and a majority shareholder of that company. On behalf of the defendant, I have a witness statement of Mr. Michael Wagner, who is the crop protection business director with responsibility for the United Kingdom and other regions.

6. The evidence of Mr. Murray Mackay is to the effect that, without a direct distribution arrangement with a large manufacturer, a company cannot really establish itself as a national distributor, because in those circumstances it must fall back on whatever supplies it can obtain indirectly sourced from other distributors or through parallel imports, which is a hindrance to competition on the market within the United Kingdom. That was the position that the claimant had had been in until late last year.

7. At some point in 2015 the claimant was in serious discussions with the defendant about the entry of the claimant into a direct distribution agreement with the defendant. These negotiations were fairly protracted, but it is sufficient for present purposes to say that in July 2015 the defendant agreed to enter into such a distribution arrangement with the claimant, commencing in January this year. On 26th November 2015 the defendant made an announcement to the market in terms which indicated that the defendant

would be opening an account with the claimant for the sale of crop protection products from 1st January 2016. The claimant was described as a significant supplier of crop protection products in the UK, and the announcement stated that the defendant had decided to establish a direct account to work with the claimant in further developing value for farmers with a stewardship and sustainable development of a range of BASF crop protection products. This was the culmination of several months of meetings and negotiations, and was clearly a matter of considerable importance to the claimant.

8. However, within a matter of days of that public announcement there was a startling development. In a telephone call on 11th December 2015, Mr Wagner informed Mr. Murray Mackay that the defendant was not after all going to appoint his company as a distributor of its products. A note of the telephone call is exhibited to the witness statement of Mr. Wagner. The note contained, amongst other material, the following:

> "MW explained to MM [that is Mr. Wagner explained to Mr. Murray Mackay] that BASF have made the commercial decision not to deliver to Zantra in 2016. MW apologised and explained that he was aware of the impact this might have on MM's business but had no choice due to the commercial impact it would have on BASF ...
>
> "MM said that he was surprised BASF did not anticipate that that would have been the market's reaction. He had not known of any company that had succumbed to pressure and he was shocked that we had taken that decision. MW said that he had expected such a reaction from the other distributors, but the magnitude of reaction was beyond anything he had expected. MM said that it was clear that the other distributors had come together to unite against Zantra. He said that he would prefer BASF save any communication to the market until after the face-to-face meeting. MW said that he would prefer to communicate in writing to current distributors today and read out the suggested wording to MM. MM said that this would cause great harm to his brand and business, and he was shocked

> and horrified how we had gone about it, i.e. that we had pulled out within two weeks. He wanted guidance as to how explain it to his team and to the market. MW said that we could not offer any guidance and apologised again ...
>
> "It was left that we would think about when to communicate the announcement to the market and that we would arrange a face-to-face meeting for Tuesday."

9. The evidence about that telephone call from Mr. Murray Mackay is very largely the same as that note, except that Mr. Murray Mackay's recollection is that Mr. Wagner had said that the defendant had decided to terminate Zantra's appointment as a direct distributor because "All of the national distributors had made it clear to the defendant that there would be adverse commercial consequences for the defendant" and, in particular, significant withdrawal of commercial support for the defendant's products, if the defendant opened an account with the claimant. It is not in dispute that the telephone call took place in the presence of, in addition to the two principals, Mr. Jonathan Tan, head of sales UK at the defendant's company, and two in-house lawyers of the defendant.

10. Mr. West, in his submissions, relies upon the fact that the defendant's note of the telephone conversation does not record the defendant’s representatives as in any way contradicting Mr. Mackay's observation in the call that it was clear that the other distributors had come together to unite against the claimant.

11. There was, on the same day, another less formal telephone call between Mr. Murray Mackay and Mr. Wagner. Mr. Murray Mackay's evidence is that Mr. Wagner again emphasised that the defendant's decision to rescind the appointment of Zantra as a direct distributor was due to considerable commercial pressure from the national distributors.

12. A meeting took place on 15th December 2015, attended again by lawyers, including this time the claimant's lawyers. There are before me two attendance notes of the meeting, one produced by the claimant and one by the defendant. These records are largely consistent, but there are certain differences. The note prepared by the defendant records that the decision to revoke the claimant's appointment had been made because "The reaction from the market had been far in excess of what had been expected."

13. I will cite one or two passage from the defendant's note. I should explain that "JT" in that note is a reference to a Mr. Jonathan Tan:

> "JT explained to Zantra that the decision not to supply them had been made just before the telephone call between BASF and Zantra on Friday 12th December 2015. BASF had started on the path to setting up an account with Zantra, but had reviewed the commercial impact of the decision and decided not to proceed with supplying them in 2016. MM questioned whether the response from the national distributors had been so substantial that the value of the business BASF would lose as a result of the distributor's reaction overrode the value the business that Zantra could produce for BASF. JT explained that the decision had been made in the best business interests of BASF. The reaction from the market had been far in excess of what had been expected ...
>
> "MM explained that Zantra had tried to be open in the market and professional. Zantra would like to know what the others are saying about them and for BASF to share the reasons why BASF have made a decision not to supply them. JT explained that the reaction had been variable across the market. MM asked if there was any way the pressure and the market reaction could be overcome. JT could not say but could not see a solution at this time."

14. I also refer to comment by Mr. Charles Widdington, who was a representative of the claimant:

> "CW said that it was clear that BASF had come under significant pressure from their distributors, which was a breach of competition law. We would like BASF to delay the

> announcement and think about ways to supply Zantra and not upset the other distributors at the same time."

Then:

> "MM agreed that the communication would be very detrimental to Zantra as it would reflect very badly on them and would prevent them from attracting other large manufacturers. MM believes that it is very clear that the reason behind BASF's decision is that BASF has succumbed to market pressure and this was clearly unacceptable behaviour from their competitors as they are trying to stop a new entrant from entering into the crop protection market. MM asked BASF to reconsider their decision not to supply Zantra and to not communicate their decision to the market as the last thing he wants is to be in conflict with BASF."

15. It was confirmed at the meeting that BASF had in fact informed certain parties of its decision to cancel the arrangement between the claimant and the defendant. The claimant's assumption is that that was a reference to representatives of certain national distributors.

16. That is the salient background. The claimant also relies upon what it submits is a very obvious change of approach by the defendant, as encapsulated in a letter dated 22nd January 2016 from Gordons, who are the defendant's solicitors. Dealing with the events of December 2015, the writer of the letter says:

> "The events which took place following the announcement are summarised below.
>
> (i) After the announcement was made there was discussions between BASF and some of its distributors.
>
> (ii) It became clear to BASF that the appointment of Zantra as the distributor would cause significant unrest amongst its distributors and that was going to result in a significant reduction in the orders received from them.
>
> (iii) None of the distributors asked BASF not to appoint Zantra as a distributor.

(iv) One of distributors mentioned a specific issue which it had with Zantra's appointment. It had been involved in a separate legal dispute with Zantra. The distributor claimed that this dispute had highlighted concerns regarding the way in which Zantra did business.

"Although BASF anticipated there would be some unrest amongst its distributors, it had not anticipated that it would cause as much disruption as it did. This is predominantly because it was not aware that there had been a legal dispute between Zantra and the one of its distributors.

In view of the potential commercial impact which the unrest may have caused, BASF decided not to appoint Zantra as a distributor for 2016. This was communicated to Zantra in the call on 11th December and followed up in the meeting of 15th December. Aside from the facts set out above no other comments were made to Zantra regarding the reason why BASF had decided to change its mind."

17. The claimant points to the fact that there is nothing in the notes of the telephone conversations or in either party's record of the meeting which refers to a legal dispute with Zantra. The claimant states that that legal dispute was not a dispute between Zantra and a national distributor, but arose because one of the national distributors, Frontier, had taken over a distributor called Hoffman's. An agronomist adviser at Hoffman's had then gone to work for the claimant. That led to the legal dispute between Frontier and the individual in question, which was in due course settled on the basis of undertakings given by the individual to Frontier.

18. The claimant now wishes to bring a claim for breach of competition law against those national distributors who were involved in applying pressure to the defendant in order to cause the defendant to un-appoint the claimant as a national distributor. The problem facing the claimant is that it does not know who those national distributors were, with one possible exception. The possible exception is Frontier. However, although there may be a strong

inference, I am not sure it is accepted that Frontier was one of those who put pressure on BASF. Certainly, the claimant is not in a position to know which, if any, of the other national distributors were involved in approaches to the defendant.

19. The claimant accepts that if it is to make headway in a claim against the national distributors, it will have to establish that there was an agreement or concerted practice between those who applied pressure to the defendant, such as would amount to an infringement of the prohibition in Chapter 1 of the Competition Act 1998 and/or Article 101 of the TFEU. This is the only basis on which a potential claim is now being put in the context of this *Norwich Pharmacal* application. Therefore, the claimant submits that the only effective means of obtaining knowledge of the identities of those concerned, and of the precise nature of the communications made by them to the defendant, is by means of the order now sought.

20. By the proposed order the claimant is seeking disclosure by the defendant of all documents recording its discussions with the national distributors within a relatively short timeframe, and also a witness statement from the defendant setting out the content of those discussions. That information would provide the identities of the companies concerned. As I have indicated, the application is opposed by the defendant. One of the main grounds of opposition is that the evidence relied upon by the claimant does not establish a sufficiently arguable case for the purposes of this jurisdiction.

21. The criteria for an order of this kind are now well established. Counsel have referred me to a number of authorities, but the principles are sufficiently set

out in *Mitsui & Co Limited v Nexen Petroleum UK Limited* [2005] EWHC 625 (Ch) where, at paragraph 21, Lightman J. summarised them as follows:

> "The three conditions to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief are:
>
> i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
>
> ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
>
> iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."

22. There are certain other refinements in the case law, but those are the essential criteria.

23. In relation to the first criterion, namely, whether there is an arguable wrong, what is relied upon here is a potential breach of the competition rules, and in particular an allegation of a concerted practice between two or more of the national distributors to apply pressure to the defendant to un-appoint the claimant as a distributor.

24. By way of general observation, it should be said that matters of that kind are notoriously difficult to prove. First, "concerted action" is a somewhat elusive concept, as the case law demonstrates. It does not necessarily require an overt meeting or agreement, and in certain circumstances can exist even in the absence of a clear agreement or discussions. There is a rather blurred line between unlawful concerted action, on the one hand, and unilateral action by each of a number of market players which happens to coincide, on the other hand. Second, matters of this kind are difficult to prove because, by their very nature, breaches of the competition rules are often carried out covertly, with

the result that documents and other records are difficult to come by. So a potential claimant in such a case is often in a very difficult situation.

25. The position here is perhaps a little clearer than in many other such cases, in that in its telephone conversations, and at the meeting with the claimant, the defendant has frankly acknowledged what it is has done, and also that it has done it because of commercial pressure. That pressure was described in very graphic terms in the telephone conversation on 11th December 2015, when Mr. Wagner said that a reaction from the other distributors was anticipated, but the magnitude of it was "beyond anything he ever expected".

26. As I have already noted, Mr West places reliance upon the fact that, in the first telephone conversation on 11 December 2015, Mr. Murray Mackay's suggestion that there had clearly been a coming together of the national distributors to unite against the claimant had not, even in the defendant's own record of that conversation, been refuted as inaccurate. However, Mr. Robertson submits that the evidence of a breach of competition rules by the national distributors is flimsy.

27. The question for me is whether there is a sufficiently arguable case here to satisfy the first criterion for making an order of this kind. In my judgment there clearly is.

28. On any view, even in later correspondence, the defendant has acknowledged that the "majority of the distributors" had applied commercial pressure to the defendant to persuade it to un-appoint the claimant. In the very few days which elapsed between the announcement of the appointment of the claimant in November 2015 and the defendant's decision to reverse the appointment,

apparently taken shortly before 11th December 2015, there had admittedly been a huge reaction on the part of several national distributors. That reaction was sufficient to persuade the defendant to do a *volte face*, and break its recent commitment to the claimant.

29. Further, Mr. Wagner's evidence about this is curious. He says in his witness statement, at paragraph 14: "I do not know how Murray has gained the impression that the national distributors (or indeed any BASF distributors) have acted in concert or that there has been any threat of a collective boycott." On its face, that is a somewhat disingenuous statement; for in the light of the undisputed circumstances, it is perfectly clear how Mr. Murray Mackay could have got that impression.

30. The same applies to the suggestion, later in Mr Wagner's witness statement, at paragraph 16, that it would not be reasonable for the claimant to draw any conclusion from the discussions that he had had with the claimant on the telephone or at the meeting. Given, in particular, the absence of any immediate denial or correction by the defendant's representatives of the express suggestion by Mr. Murray Mackay, in the initial telephone conversation on 11 December, that the distributors had come together to act against the claimant, there do appear to be reasonable grounds upon which one could infer that there had been some collusion between the distributors, or at least that the defendant acknowledged that there could well have been some collusion.

31. These factors, and the evidence generally, including the magnitude and immediate effectiveness of the national distributors' reaction to the claimant's appointment, are in my view a perfectly adequate basis on which to find, as I

do, that the first criterion of this jurisdiction is satisfied. Of course, that is not the same as a finding as to whether collusive behaviour has actually taken place.

32. I therefore move on to consider the other criteria.

33. Second, there must be a need for an order of this kind to enable action to be brought against the ultimate wrongdoer. Clearly, there is such a need in the present case. Unless a *Norwich Pharmacal* order is made requiring provision of the information that is described in the relief sought, it is difficult to see how the claimant could make any progress in a claim which, as I have already found, is arguable.

34. Mr. Robertson did suggest in his skeleton argument that there might be other bases upon which an application could be brought for disclosure. However, I believe it is fair to say that he has not pressed this point to any great extent, except in relation to circumstances where BASF itself became a defendant to proceedings. That is not how the claimant currently wishes, or feels it necessary, to proceed.

35. At this stage I ought to deal with a particular argument which Mr. Robertson made, and which he submits goes to the root of the application. The submission, as I understand it, is that the claimant's claim is fundamentally misconceived because no allegation of an unlawful act, whether an abuse of a dominant position or participation in an unlawful agreement, is made against the defendant itself. Mr. Robertson submits that if the defendant is innocent of any wrongdoing, then it cannot avail the claimant to pursue this claim as there would be a break in the chain of causation. This is because on that basis the

claimant would have suffered loss by reason of an act which was lawful on the part of the defendant, namely to the un-appoint the claimant as a distributor.

36. In my view that is an untenable argument. If it is postulated that two or more of the national distributors got together in what would effectively be a cartel-type arrangement in order to threaten the defendant with adverse commercial consequences unless it un-appointed the claimant, and that damage was suffered by the claimant as a result of the defendant giving in to the pressure, then the fact that the defendant's will was overborne and that it was to be considered innocent of wrongdoing itself, would not in my view break the chain of causation. Certainly the argument is not sufficiently strong for it to amount to a bar to the order sought.

37. Mr. Robertson then submitted, in the alternative, that if the defendant's will was overborne by pressure from the distributors, that would not render the defendant innocent. It would be guilty of being a party, albeit a reluctant party, to an unlawful agreement with the national distributors. He referred in that context to the decision of the European Commission in *Fisher Price* dated 23rd February 1988. That was a decision in infringement proceedings under what was then Article 85 of the EEC Treaty. A supplier had pressurised its distributor not to purchase goods which were parallel imports, and the distributor had agreed to stop buying those imports as a result of that commercial pressure. The Commission concluded that the distributor was still a party to an unlawful agreement within the meaning of Article 85, notwithstanding that it was reluctant and that it had only consented under strong pressure and even against its own economic interests.

38. Mr. Robertson submitted that if the defendant is in fact liable for a tort, then *Norwich Pharmacal* is not available. In support of this argument he referred to the judgment of His Honour Judge Pelling QC, sitting as a judge of the High Court, in *Hilton v D IV LLP* [2015] EWHC 2 (Ch). There the learned judge gave guidance on a number of the factors which are likely to be relevant where an order of this kind is sought, and, having referred to the speech of Lord Reid in the *Norwich Pharmacal* case itself, said this, at paragraph 58 of the judgment:

> "The origin of the jurisdiction is the statement of principle contained in the speech of Lord Reid in Norwich Pharmacal Co v. CEC [1974] AC 133 at 175. However the key qualification in relation to the jurisdiction was set out by Lord Reid at 174 in these terms: "*It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession*". The reason why the respondent in those proceedings was treated differently was because "*... without certain action on their part the infringements could never have been committed*". It was these qualifications that led Lord Reid to formulate the principle that the claimants seek to rely on in this case in these terms: " *... 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 comes under a duty to assist the person who has been wronged by giving him full information ...*" However, as Lord Reid said in Norwich Pharmacal, "*... information cannot be obtained by discovery from a person who will in due course be compellable to give that information ... on a subpoena duces tecum...*". Hence the remedy, which is an exceptional procedural device made available to avoid injustice, is available only against those who won't, or are unlikely to, be liable for the wrong but have nevertheless become mixed up in its commission. Outside that limited class the remedy is not available."

39. It seems to me that Mr Robertson's argument is based on a misreading of the necessary criteria for a *Norwich Pharmacal* order. The fact that the respondent to an application of this kind is a tortfeasor or arguably a tortfeasor is not a bar to use of this jurisdiction. The contrary is made clear in the *Norwich Pharmacal* case itself, in the speech of Lord Reid at page 174 (e) to (f). The point being made by Judge Pelling at the end of the passage cited above is that you do not *need* to be a tortfeasor, or be arguably a tortfeasor, in order to have this jurisdiction exercised against you. It is sufficient if you are "mixed up in" the wrong alleged against others, or have facilitated that wrong. Therefore,

that passage does not, in my judgment, support the point for which Mr. Robertson sought to rely upon it.

40. Nor do I consider that the *Fisher* decision of the Commission is of assistance in the present case. What is sought to be alleged here is an agreement or concerted practice between the national distributors to apply commercial pressure to their supplier, the defendant. That is the tort which the claimant wishes to investigate. Whether or not the defendant, in succumbing to that pressure, is also to be taken to be party to an agreement falling within the scope of the competition rules, is nothing to the point. In my view that would be a different, albeit related, agreement, and would be a separate tort from the one which the claimant is seeking to establish here.

41. For these reasons, I do not accept the defendant's argument that there is a fundamental misconception by the claimant.

42. As far as the third criterion for the exercise of this jurisdiction is concerned, namely, that the person against whom the order is sought must be "mixed up in" or have facilitated the wrongdoing, that is clearly satisfied here. The defendant admitted that it bowed to commercial pressure. Therefore, if that pressure was applied as a result of unlawful concerted action by two or more of the national distributors, then the defendant was undoubtedly "mixed up in" or facilitated that wrongdoing, whether innocently or otherwise.

43. Coming back to the helpful list of factors to which Judge Pelling referred in *Hilton*, these included the following:

"i) The strength of the possible cause of action identified by the applicant for the order;

ii) The strong public interest in allowing an applicant to vindicate his legal rights;

iii) Whether making an order will deter similar wrong doing in the future;

iv) Whether information could be obtained from another source;

v) Whether the respondent was aware or ought to have known that he was facilitating arguable wrong doing; and

vi) The degree to which the material sought is confidential."

44. The strength of the possible of cause of action I have already touched on. In my view there is sufficient material, even in the facts which have been accepted by the defendant or which emanate from the defendant, to establish that there is an arguable cause of action here.

45. Judge Pelling next referred to the strong public interest in allowing an applicant to vindicate his legal rights. That is a point particularly relied upon by Mr. West in the present case. Where anticompetitive behaviour is alleged or strongly suspected, then if such behaviour goes unsanctioned it may well (and often does) operate against the public interest by distorting the normal competition which should take place in the market.

46. As to whether an order in this case would deter similar wrongdoing in the future, if there has been unlawful concerted action then an order which enables the wrongdoers to be identified and pursued is likely to have, or contribute to, a deterrent effect.

47. As to whether the information in question could be obtained from another source, I have already indicated that an order in the present case is necessary. It seems to me that there really is no other appropriate source. The identities of those distributors with whom the defendant had relevant conversations, and

the content of those conversations, are matters particularly, if not exclusively, within the defendant's knowledge.

48. Another factor is whether the respondent to an application of this kind was aware or ought to have known that he was facilitating arguable wrongdoing. Although relevant, that is not a prerequisite for the exercise of the jurisdiction. I make no finding, except to say that the defendant ought probably to have been aware that its actions were in the circumstances likely to give rise to strong suspicion on the part of the claimant that the latter had been the victim of anticompetitive conduct.

49. The degree to which the material sought is confidential can be a factor, but it is not a matter of great significance in this case. As Mr. West has already stated, there is no objection to the material sought being supplied within a confidentiality ring. Also, the normal facility of redaction of documents can be employed where appropriate.

50. I am satisfied that the order sought is proportionate, having regard in particular to the difficulties associated with obtaining information of this kind about the conduct of competitors which, by its nature, is not likely to be readily available, and having regard to the seriousness of the potential cause of action. The order would not constitute an inappropriate fishing exercise: thanks to the candour of the defendant in its initial explanations to the claimant, it is clear that pressure was actually applied by more than one national distributor, and that the decision complained of was taken by the defendant as a result of that pressure.

51. For these reasons, all the criteria for the grant of an order under the *Norwich Pharmacal* jurisdiction are satisfied. This, of course, is an equitable jurisdiction, and there is a discretion as to whether to grant the order. Having regard to all the circumstances, including the factors to which I have referred, I consider that I should exercise the jurisdiction here. Indeed, in my view this is a classic situation in which an order of this kind is likely to be appropriate.

52. I will hear counsel if they wish to make any points on the specific content of the order, which was touched on only briefly during the hearing today.
