



Neutral Citation Number: [2021] EWHC 988 (Ch)

Case No: BL-2020-001419

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS OF ENGLAND & WALES**  
**BUSINESS LIST (ChD)**

7 Rolls Building  
Fetter Lane  
London EC 4A 1NL

Date: 21/04/2021

**Before :**

**MR JUSTICE ADAM JOHNSON**

**Between :**

**(1) JONATHAN DAVID ROWLAND**

**Claimants**

**(2) DAVID JOHN ROWLAND**

**- and -**

**KEVIN GERALD STANFORD**

**Defendant**

**Thomas Grant QC and Andrew McLeod** (instructed by **Forsters LLP**) for the **Claimants**  
**The Defendant** appeared in person (post-hearing submissions in writing by **John McDonnell QC**)

Hearing dates: 23 February 2021

Written submissions: 23, 24 and 26 February 2021; 1 and 8 March 2021

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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MR JUSTICE ADAM JOHNSON

**Mr Justice Adam Johnson:**

**Introduction & Background**

1. This is the hearing of an application for Norwich Pharmacal relief against the Defendant, Mr Stanford.
2. There is a long and complex history, but for present purposes the background may be stated relatively briefly.
3. The Claimants, a father and son, are both businessmen. In 2008, in the wake of the Icelandic banking crisis which led to the collapse of the Kaupthing Group, the Second Claimant made an investment that led to the formation of a private bank in Luxembourg, Banque Havilland SA, to which the non-distressed assets of Kaupthing Bank Luxembourg SA were transferred.
4. The Defendant, Mr Stanford, is also a businessman. He had substantial investments with Kaupthing entities prior to their collapse. For many years he has pursued allegations that improper use was made of his investments by Kaupthing in an effort to manage the crisis affecting the Kaupthing Group as it was developing. He has alleged there was also mismanagement of his assets amounting to fraud by Banque Havilland SA.
5. Mr Stanford was declared bankrupt on the petition of HMRC in February 2019 and his affairs were taken over by a Trustee in Bankruptcy. I was told that his Trustee eventually reached a settlement of pending claims arising out of Mr Stanford's allegations at some point in the Autumn of 2020, but I have not seen a copy of the settlement agreement and neither, as I understand it, has Mr Stanford.
6. For a number of years from about 2008 to 2013, a Mr Michael Wright, a former corporate solicitor, worked for the Claimants and (between about 2010 and 2013) shared an office in Monaco with the First Claimant, Jonathan Rowland. Mr Wright parted company with the Claimants, it seems in unhappy circumstances, in 2013, and subsequently commenced proceedings in the Commercial Court against Jonathan Rowland and his father, which eventually were unsuccessful: see the judgment of Christopher Butcher QC (as he then was) at [2017] EWHC 2478 (Comm), handed down on 9 October 2017.
7. In the course of those proceedings, it was disclosed that Mr Wright had access to an electronic file, referred to as "*the Archive*", containing what Mr Wright claimed was a backup copy of an email account used by Jonathan Rowland for a number of years up to June 2013. Mr Wright later claimed that the laptop storing the Archive had been lost, and he made an Affidavit in the Commercial Court action on 29 July 2016 in which among other things he said: "*I have not shown the Archive to anybody else or provided anybody else with access to it or with copies of documents derived from it.*"
8. After the Commercial Court proceedings had concluded, the Claimants came to suspect that Mr Stanford had access to the Archive. That suspicion arose because of emails he sent in October and November 2017, one of which appeared to refer expressly to documents likely to have been within the Archive. Correspondence followed, initiated by the Claimants' solicitors Forsters, who sent a letter to Mr

Stanford on 12 December 2017, asking for an explanation of where he had obtained the documents he had referred to, and for an undertaking that no further use would be made of them. The letter threatened an application for an injunction if the requested undertaking was not forthcoming.

9. In his response of 20 December 2017, Mr Stanford said that a package of hard copy documents had been left at his home by an anonymous individual. The references in the email he had sent were to materials in that package. In that same email Mr Stanford undertook not to use or disclose the documents further, although in a later email dated 29 December 2017 he said that he considered the papers included evidence of fraud and criminal activity, and further said that he could either deliver them to Forsters and then to the police, or hold onto them for an agreed interim period, it seems with a view to holding a without prejudice discussion.
10. Subsequently, a package of documents comprising about 500 pages of email correspondence was delivered up to Forsters. No further action was taken at that stage, however. Nonetheless, Mr Stanford's conviction in the idea that he had been the victim of a fraud remained undiminished, and he continued to investigate his concerns and press them in other ways.
11. About two and a half years later, in April 2020, the Claimants received from Mr Stanford a document headed "*Criminal Complaint*". It was a draft document, and as I understand it remains a draft. It makes allegations of criminal conduct against a number of individuals including the Claimants. The draft was sent by email to a number of recipients, including Lord Bridges at Farrer & Co, who Mr Stanford understood to be acting for the Lord Chamberlain.
12. In the draft Complaint, Mr Stanford gave a different account as to how he came into possession of the documents referenced in his emails of October and November 2017. He said as follows:

*"In April 2015, I received a file of documents in the form of a hard drive ('the Archive') (Exhibit 15) from a former employee of the Rowland family who had become aware of the abuse of my assets. The Archive contained evidence to prove the criminal conduct of David and Jonathan Rowland against my assets after the launch of Banque Havilland which is reported in the chronology (Para. 19.4 to 20.5) and (Exhibit 16)."*
13. Mr Stanford also indicated in the draft Complaint that he had provided materials from the Archive to the journalist, Isabel Oakeshott, who was writing an article for the Mail on Sunday.
14. I should pause at this point to say that I have not seen a copy of the Archive, but I am told it contains up to 30,000 emails generated over a decade or more. I am told the relevant account was used both for business related communications but also for the sending of private emails dealing with things such as medical matters. Jonathan Rowland's position is that it was a personal account and was confidential to him, and was not a Banque Havilland account. That is borne out by the domain name used, and as I understood it, was not seriously disputed by Mr Stanford.

## The Present Proceedings

15. To return to the narrative, receipt of the draft Complaint prompted a pre-action letter from the Claimants, sent by Forsters on 26 June 2020. In that letter they asked for various items of information, including information as to how the Archive had come into Mr Stanford's possession. That letter referenced a possible claim for relief on Norwich Pharmacal grounds.
16. I need not recite the course of the proceedings, but I will mention four points by way of background.
17. First, Mr Stanford has maintained his allegations that the Claimants and others have engaged in criminal activity including fraud. There is no doubting the sense of conviction he feels in his position, and his sense that he has been the victim of a substantial wrong.
18. Second, as to use of the Archive, Mr Stanford has offered to provide it to the authorities in Monaco and Luxembourg, including to the Judge in Monaco who is conducting a criminal proceeding concerning the circumstances in which the Archive came to be taken in 2013. Mr Stanford's emails also make it clear that he provided a copy of the Archive to the Lord Chamberlain in May 2020.
19. Third, until shortly before the hearing of the application, Mr Stanford resisted the totality of the relief sought against him by the Claimants.
20. Fourth, in January 2021, Mr Stanford made what turned out to be an aborted application to Master Teverson for a direction that the present proceeding be continued as a Part 7 rather than a Part 8 Claim. The Master declined to make that order, which in the event was not pressed for by Mr Stanford's counsel at the time. The stance taken at that hearing however reflected a point running through Mr Stanford's submissions before me, namely that the Claimants should not be permitted to make use of the Norwich Pharmacal jurisdiction, and instead should be bringing a claim against Mr Stanford, or perhaps making an application for pre-action disclosure. The gist of Mr Stanford's point was that the Claimants should not be able to adopt a procedure which allows them to evade cross-examination and scrutiny in a Court. He suggested that the present procedure has that effect and allows the Claimants to hide behind their solicitors. In support of his argument he relied on the decision of Lightman J. in Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] 3 All ER 511, in which an application against a Norwich Pharmacal defendant was refused on the basis that there was an alternative remedy available, namely an application for pre-action disclosure against the prospective defendant, whose identity was known.
21. At the hearing before Master Teverson, these matters were left open for argument at a later hearing, but Mr Stanford's application before the Master was dismissed, and an order for costs made against him in the sum of approximately £27,000. That costs liability remains unpaid.
22. I come to the period immediately prior to the hearing before me, during which there was some important correspondence between the parties. In order to understand it, I should explain more precisely the relief the Claimants seek by their application. I will

do so by reference to the revised draft Order circulated just before the hearing. The operative parts are as follows:

- “1. By 4 pm on [the date 14 days from the date of this Order], the Defendant shall permit the Claimants’ solicitors to take an image of (i) the documents and all other data contained upon the hard drive received by him in April 2015 (being the hard drive referred to in paragraph 34 of the draft complaint which he sent to the Claimants on or about 20 April 2020), such hard drive containing the data in an email account belonging to the First Claimant as it stood at or about 21 June 2013 (the ‘**Archive**’); (ii) the documents and all other data transferred on or about 11 October 2015 from a laptop in the possession or control of Mr Michael Wright to a laptop acquired by or on behalf of the Defendant (being the laptop referred to in the letter dated 17 February 2021 from the Defendant to the Claimants’ solicitors); and (iii) each and every copy and each and every partial copy of the Archive stored on any device in the Defendant’s power, possession or control or within any cloud repository (including, without limitation, Google Drive) to which the Defendant has access
2. By 4 pm on [the date 21 days from the date of this Order], the Defendant shall swear and serve on the Claimants’ solicitors an affidavit:

  - (1) Providing full and accurate details of:

    - (a) The precise circumstances in which the Defendant came into possession the Archive, including, without limitation, the date of the supply of the Archive and whether any payment was made in respect of the supply (and if so in what amount, on what date and to whom)
    - (b) The name and position of the person who supplied the Archive to the Defendant (the ‘**Supplier**’)
    - (c) Any copies of or material from the Archive which the Defendant has provided to any third party (‘**Third Party Recipient**’)
    - (d) The name and contact details of each and every Third Party Recipient
    - (e) The circumstances in which the Defendant provided each and every Third Party Recipient with copies or material from the Archive (including, without limitation, the date and means of provision, identifying what material from the Archive was actually provided to that Recipient and setting out details (insofar as the Defendant is aware)

*of what use the Recipient intended to and did make of the material)*

*(2) Exhibiting copies of all correspondence or communications (in whatever physical or electronic form) passing between:*

*(a) the Defendant and the Supplier which led to the supply of the Archive*

*(b) the Defendant and each and every Third Party Recipient that contains any reference to, material from or information about the Archive.”*

23. To summarise, the requested relief falls broadly into following parts:

- i) Under para. 1 of the draft Order, an order enabling the Claimants to take an image or images of the Archive;
- ii) Under para. 2 of the draft Order, an order requiring Mr Stanford to swear and serve an Affidavit which (broadly) -
  - a) sets out the circumstances in which the Archive came into his possession and identifies the Supplier of the Archive,
  - b) gives details of communications about the Archive with *Third Party Recipients*,
  - c) exhibits copy correspondence and other communications falling within (a) and (b) above.

24. Against that background, I can summarise the position reached in correspondence as follows.

25. Prior to the hearing, Mr Stanford had in fact (i) confirmed the identity of the Supplier of the Archive, (ii) indicated he was willing to make a copy of the Archive available to the Claimants, (iii) indicated he would provide copies of correspondence with the Supplier of the Archive if the Claimants provided an assurance that they would not initiate any proceedings against him (i.e., against Mr Stanford), but also (iv) (and here I quote from Mr Stanford’s email of 18 February 2020), he would “ ... *not provide third-party correspondence concerning dissemination of parts of the Archive that were in the Public Interest.*”

26. As to the identity of the Supplier of the Archive, Mr Stanford gave the following account of the circumstances in which he came by the Archive in a letter to Forsters dated 17 February 2021:

*“My former driver, Colin Hayward picked up Michael Wright from 31 Morden Road, Blackheath on 10 October 2015 at 3 pm and drove him to the Dower House (Exhibit 1). Later that day Michael Wright granted my wife (Andrea Stanford) and I access to his laptop which contained the Archive. Michael*

*Wright stayed at our home that Saturday night and on the following day, Colin Hayward went to the Tunbridge Wells branch of PC World to buy a laptop to store a copy of the Archive. My IT consultant, Gavin Vickery then came to the house to copy the Archive on to the new Laptop. On Monday (12 October) Colin Hayward drove Michael Wright to Heathrow Airport.”*

27. As to imaging of the Archive, I was informed that Mr Stanford had sought to make a copy of the Archive available to the Claimants by sharing a link to a Google Drive folder, although as at the time of the hearing, the Claimants had not been able to access that folder.
28. As to Mr Stanford’s indication that he would provide copies of correspondence with the Supplier of the Archive if the Claimants provided an assurance not to bring proceedings against him, Mr Shacklady, the solicitor from Forsters with conduct of the matter, said as follows in his Fifth Witness Statement at para. 7:

*“... for the avoidance of doubt, as matters currently stand, the Claimants do not intend to commence proceedings against Mr Stanford in relation to the receipt or use of the Archive.”*

### **The Parties’ Arguments**

29. The consequence of the above exchanges was that, prior to the hearing, Mr Stanford appeared to maintain his resistance only to those proposed forms of relief which required him to disclose (i) his communications with the Supplier of the Archive (identified as Mr Wright), and (ii) information about Third Party Recipients to whom he had supplied the Archive or parts thereof.
30. The parties’ arguments as developed both during and after the hearing were as follows.

### The Claimants

31. Mr Grant QC argued that the case involved a straightforward application of the Norwich Pharmacal jurisdiction.
32. Specifically on the main point of apparent contention, i.e. the provision of information about, and copies of, communications with Third Party Recipients, Mr Grant QC relied on the overall breadth and flexibility of the jurisdiction. He emphasised that the Archive contains information which is confidential and private to Mr Jonathan Rowland, including medical information, and said that it is entirely appropriate to use the jurisdiction to find out how such information has been used or may be used. In making that submission, Mr Grant QC drew attention to the following passage in the judgment of Lord Denning MR in the Court of Appeal in British Steel Corpn v. Granada Television Limited [1981] AC 1096, which was later quoted with apparent approval by Lord Woolf CJ in Ashworth Hospital Authority v. MGN Ltd [2002] UKHL 29, [2002] 1 WLR 2033, at [45] (emphasis added):

*“Mr Irvine suggested that this was limited to cases where the injured person desired to sue the wrongdoer. I see no reason why it should be so limited. The same procedure should be available when he desires to obtain redress against the wrongdoer – or to protect himself against further wrongdoing.”*

33. Mr Grant QC said that further wrongdoing here might involve misuse or threatened misuse of the Archive by persons to whom Mr Stanford has given it. That may lead to further steps needing to be taken against Third Party Recipients, if there is a risk of them taking steps which infringe the Claimants’ rights, but equally it may not. Such steps, if taken, may engage public interest factors, and may require the Court to balance the public interest in disclosure against the private rights of the Claimants, but such matters are for the future and not for now.
34. As to the possibility of further action being taken against Mr Stanford himself, Mr Grant reiterated the position set out in Mr Shacklady’s Statement. He said that the Claimants had no interest in incurring what may be irrecoverable costs in unnecessary proceedings against Mr Stanford. At the same time, he said they cannot give, and cannot be expected to give, any guarantee or warranty that they would never bring any such proceedings, because they are in the dark about what may or may not have been done with the Archive.

#### Mr Stanford

35. In his First Witness Statement, Mr Stanford relied on four points, as follows: (i) he said that the Archive contains material which ought to be in the public domain, and he would resist any form of “gagging” order, (ii) he queried ownership of the Archive, (iii) he queried whether the settlement entered into by his Trustee in Bankruptcy with Banque Havilland precluded the Claimants from bringing the present application, and (iv) he asserted the privilege against self-incrimination.
36. During the hearing before me, Mr Stanford expressed particular concern about communications with Third Party Recipients, and in that context particularly emphasised point (i) - i.e., he stressed the argument that the Archive contains material which the public interest required to be revealed.
37. Mr Stanford also advanced the argument originally made before Master Teverson about the appropriateness of the Norwich Pharmacal jurisdiction, insofar as it is not a substantive cause of action, so that pursuing this form of relief enables the Claimants to avoid putting forward a case against Mr Stanford and shields them from the rigours of the court process, including in particular cross-examination.
38. Additionally, Mr Stanford said he was concerned about the possibility of claims being made against him, and thus of what he sees as continued harassment by the Claimants. As to this, Mr Stanford drew my attention to an exchange of emails he had with the First Claimant, Jonathan Rowland, in December 2019. In an email dated 16 December 2019, Mr Rowland said:

*“All the people who have supported you in stealing my data/emails and using it as blackmail are charged criminally*

*under 5 different counts awaiting trial. You have joined the list of blackmailers with them ... any other people who have joined the party late will also be assumed as blackmailers. We both know who they are so you should ask them the position.*

...

*I have copied a link to the Cambridge Dictionary entry for blackmail .. my emails were stolen and used against me and my family for almost 7 years now from you and others that won't go unanswered ... we are prepared for our own long term project ...*

*Again Merry Xmas."*

39. Mr Stanford also referred me specifically to paragraphs 87-99 of his First Witness Statement, which contain links to a number of recordings which Mr Stanford has posted on YouTube. Relying on these, Mr Stanford argued he was fearful that the real purpose of the present application was to give the Claimants further information with which to harass and pursue him. After the hearing had concluded, Mr Stanford filed three further Notes with the Court on 23 February, 24 February and 8 March. Among other matters, he drew attention by means of these Notes to other communications from Mr Jonathan Rowland in which Mr Rowland had exhibited an animus towards him and referred to him (i.e., Mr Stanford) as a bankrupt and a blackmailer. In one Tweet Mr Rowland said that Mr Stanford had been "*dealing in my stolen data for several years now.*"
40. Relying on these materials, Mr Stanford argued that the Claimants did not come to the Court with clean hands, because they sought to maintain the position that they had no present intention of making claims against him, whereas the truth of it (he argued) is that they do, at least in the sense that Mr Jonathan Rowland has exhibited a continued animus against Mr Stanford which he is likely to act on if given the opportunity.
41. I should also mention the privilege against self-incrimination. This developed greater prominence during the hearing as a result of certain interventions by me, and after the hearing Mr Stanford also filed a Note on this topic, prepared for him by Mr John McDonnell QC (who as I understand it was acting *pro bono*). By means of this Note Mr Stanford took the position that he objected wholesale to paragraph 2 of the Claimants' draft Order, on the basis that being compelled to provide the information sought by paragraph 2 would infringe the privilege against self-incrimination. In support of this position, Mr McDonnell QC said at para. 6 of his Note:

*"It would be very surprising if the circumstances in which Mr Stanford obtained the Archive and the use he made of it were not investigated by those responsible for prosecuting breaches of the criminal law if the facts came to their attention with a view to considering whether Mr Stanford has committed any criminal offence; and there must be a 'real and appreciable danger' to Mr Stanford of being prosecuted for some criminal offence."*

42. The Claimants also filed two Notes after the hearing dealing with the topic of self-incrimination. I will have to come back to the arguments on this issue in more detail below.

## **The Norwich Pharmacal Jurisdiction**

43. I think it is sufficient as a statement of the overall position for me to quote the following, recent formulation taken from the judgment of Saini J in Collier v Bennett [2020] 4 WLR 116 at 5 [35]-[36]:

*“(i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person (‘the Arguable Wrong Condition’).*

*(ii) The respondent to the applicant must be mixed up in so as to have facilitated the wrongdoing (‘the Mixed Up In Condition’).*

*(iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued (‘the Possession Condition’).*

*(iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction (‘the Overall Justice Condition’).*

*The Arguable Wrong, Mixed Up In, and Possession, Conditions each raise threshold hurdles and one does not get to the Overall Justice Condition unless the applicant overcomes those three hurdles. However, certain matters which arise in relation to the Arguable Wrong Condition, such as the strength of what has been established as a good arguable case, will feed into the court’s assessment when considering the Overall Justice Condition.”*

44. I gratefully adopt this framework and will use it as a structure for stating my conclusions in this case.

## **Discussion and Conclusions**

### The Arguable Wrong Condition

45. To begin with, it is obviously right to say that the Claimants have a good arguable case that a form of legally recognised wrong has been committed against them. It is clear on the evidence that someone – Mr Stanford now identifies that person as Mr Wright – has obtained data in the form of the Archive, which has been passed to Mr Stanford. There is plainly a good arguable case that the data was taken without authorisation, and a good arguable case that it is data belonging to Mr Jonathan Rowland, and containing information which is personal and confidential to him. I do not think the settlement achieved by Mr Stanford’s Trustee in Bankruptcy with the Kaupthing entities can have any bearing on this question: I have not been provided with a copy, but it seems unlikely it would inhibit personal claims by Mr Jonathan

Rowland of the present type. Overall, therefore, I conclude that Saini J's first condition – the Arguable Wrong Condition – is satisfied.

### The Mixed-Up In Condition

46. I also find it inescapable that Mr Stanford has been mixed up in the wrongdoing so as to have facilitated it. Mr Stanford has received the Archive, and not only as a passive recipient, but as someone who seems to wish to make use of its contents, and indeed has sought to do so. I accept Mr Grant's submission (see [32] above) that the jurisdiction extends to protection against further wrongdoing, and that that principle is relevant here insofar as material from the Archive is in the hands of Third Party Recipients, giving rise to a risk that they may seek to misuse it.
47. It is convenient at this point to deal with one of Mr Stanford's main arguments, namely that the present procedure is an inappropriate one, and what the Claimants should really be doing is bringing proceedings against him, or perhaps an application for pre-action disclosure, or at any rate a form of claim or application which would require them to be exposed to the rigours of the English litigation process. What Mr Stanford seemed to be saying in this submission was that, if it was right to characterise him as having been involved in wrongdoing, then the proper course was for the Claimants to sue him as defendant to a substantive claim, rather than relying on the Norwich Pharmacal jurisdiction. I raised this point with Mr Grant QC in the course of the hearing, by reference to the decision of Lightman J in the Mitsui case, which I have already mentioned.
48. It seems to me the proper analysis is as follows. First, the fact that Mr Stanford may be more than an entirely passive and innocent facilitator does not mean the Norwich Pharmacal procedure is an inappropriate one. Although Norwich Pharmacal itself was a case in which the respondent was an entirely innocent participant, other cases show that the jurisdiction is not limited in the sense of only being available against such participants: see for example, X Ltd v Morgan Grampian (Publishers) Ltd [1991] 1 AC 1, in which Lord Lowry at [54] held that, where a party had received confidential information from a source and then sought to publish that information, the case was "*not only covered by Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 but is a fortiori, because he and the source were joint tortfeasors.*" Mr Grant QC emphasised that in the present case, his clients do not press any allegation that Mr Stanford is a joint tortfeasor, but they say that even if he were, that does not mean the remedy is not available; on the contrary, the case for a remedy in such a case is even stronger.
49. Second, it seems to me that on proper analysis the Mitsui decision is not really in point. The essential feature of that case was that Norwich Pharmacal relief was not necessary, because the claimant already had a basis for seeking pre-action disclosure against a prospective defendant (who was identified), and so it was not necessary for the claimant to obtain relief against a third party. It seems to me the key part of Lightman J's reasoning is the following passage, from paragraph [28]:

*"It must be quite exceptional where necessary information is available both from a likely party to proceedings and an innocent third party (in this case the defendant) that an order for disclosure should be made against the innocent third party*

*and not the likely party to proceedings ... . Yet that is the position which the claimant says prevails in this case.”*

50. That is saying that if the relevant information is available both from an innocent Norwich Pharmacal defendant and a person who is already identifiable as a prospective party to a substantive claim, the information should be sought from the latter not the former. I do not see a parallel with this case. Here, there is no more suitable or appropriate person to supply the requested information than Mr Stanford himself. Indeed, if one thinks of the main item which remains substantively in dispute, namely information about Mr Stanford’s communications with as yet unidentified Third Party Recipients, Mr Stanford is the only person who can supply that information.

#### The Possession Condition

51. In my view, this condition is also obviously satisfied. Mr Stanford is in possession of information both about the Supplier of the Archive and about his communications with Third Party Recipients. The former is relevant to the identification of possible historic wrongdoing involving the Archive, and the latter to the prevention of possible future wrongdoing.

#### The Overall Justice Condition

52. I come on to the fourth of Saini J’s conditions, what he called the *Overall Justice Condition*. It is convenient under this heading to address three topics, namely (1) Mr Stanford’s concern about the materials in the Archive not being suppressed, their possible disclosure being in the public interest, (2) Mr Stanford’s argument that the Claimants do not come to the Court with “*clean hands*”, and finally (3) the relevance of the privilege against self-incrimination.

#### *Public Interest*

53. As to this, Mr Stanford’s concern seemed really to be about the Claimants trying to take steps to cover up the criminality he alleges against them. He said he had been concerned about the Claimants seeking some form of gagging order. I think that is a misplaced concern, because the Claimants have sought no such order from me. In fact, they have said expressly that nothing in the order they seek is intended to have any gagging effect. That is obviously correct. It is designed simply to enable them to identify what use has been made of the Archive. In principle, and subject to the observations made below, it seems to me they should be entitled to do that.
54. Of course it may be that at some future stage, the Claimants will want to restrain the use of information deriving from the Archive in the hands of Third Party Recipients. At that stage, the public interest factors which Mr Stanford has referred to may come into play, and it may be highly relevant precisely what sort of information is sought to be used. There may well be a difference, for example, between medical information and commercial or business information. But I do not consider that such factors come into play at the present stage, given the conclusions I have already expressed that the Claimants have shown at least an arguable case that information belonging to Jonathan Rowland has been taken without proper authority. The starting point, in my

judgment – although it may only be a starting point – is that in principle the Claimants are entitled to know what has become of it.

### *Clean Hands*

55. Mr Stanford originally said that the Claimants did not come to court with clean hands because of their involvement in the fraud against him concerning his assets held by the Kaupthing Group. As I pointed out in argument, however, the “*clean hands*” doctrine is perhaps narrower than one might think as a matter of first impression. In RBS v. Highland Financial Partnerships [2013] EWCA Civ 328, Aikens LJ said as follows (my emphasis):

*"It was common ground that the scope of the application of the 'unclean hands' doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in Dering v. Earl of Winchelsea the misconduct or impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for'. ... Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."*

56. Faced with this, Mr Stanford adapted his argument in one of his Notes submitted after the hearing, and said that the Claimants lacked clean hands because they were not being truthful about their actual intention, which in fact was to bring claims against him. There are a number of problems with this, however. For one thing, I have the evidence of Mr Shacklady, already referred to above, about his clients' present intention, and it seems to me I have to attach appropriate weight to that. For another, even if one acknowledges the qualified nature of that evidence (i.e., no “*present intention*”), and even if one accepts there is therefore some risk that proceedings may be commenced against Mr Stanford, that is not a reason to deny the relief: see my reference at [48] above to the speech of Lord Lowry in the Morgan Grampian decision. For yet another thing, there was a basic inconsistency in Mr Stanford's position, because as I have already noted, another part of his argument was that he wished to be made the subject of proceedings by the Claimants, and complained about use of the Norwich Pharmacal procedure because it did not involve the Claimants actually suing him.

### *Privilege Against Self-Incrimination*

57. The next point is the privilege against self-incrimination. As mentioned above, this formed the basis of Mr Stanford's wholesale objection to paragraph 2 of the draft Order (he appeared to make no real objection at all to paragraph 1 – i.e. the imaging provision).
58. As already noted, this was raised as a point by Mr Stanford in his First Witness Statement, but not really developed in his submissions. It was nonetheless a matter of concern to me, principally in light of the email from Jonathan Rowland mentioned above at [38], in which he accuses Mr Stanford of blackmail. I was conscious also of Mr Stanford's status as a litigant in person, who may not have appreciated the relative strength of the arguments available to him. I therefore invited Mr Grant's comments on the possibility of including in any order a proviso along the lines of that typically included in freezing orders, which entitles the respondent to decline to provide information likely to incriminate him - see, e.g., the present version of the

Commercial Court Guide, Appendix 11, paragraph 9, under the heading, “*Provision of Information*”. Paragraph 9(2) is as follows:

*“If the provision of any of this information is likely to incriminate the Respondent, she or he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of Court and may render the Respondent liable to be imprisoned, fined or have its, her or his assets seized.”*

59. Mr Grant resisted the idea of including such a proviso. He said there was a particular reason for it in the standard freezing order case, which is that the order is typically made without notice, and so there is no opportunity for the court to consider on a reasoned basis whether there was in fact any appreciable risk of incrimination. He said the same logic does not apply here. Mr Grant submitted that the burden rested on Mr Stanford to identify a real and appreciable risk of his prosecution for a criminal offence recognised by the law of any part of the United Kingdom, and he had failed to do so. This was despite being on notice of the proceedings for many months, and apparently having some degree of access – as Mr Stanford accepted during the hearing before me – to legal advice from Bindmans and others on criminal law matters. Mr Grant said there was thus nothing to suggest any real risk of incrimination in actual or threatened criminal proceedings in England.
60. I have already mentioned above (see at [41]) the Note on self-incrimination provided by Mr McDonnell QC after the hearing, and the further Notes filed by the Claimants dealing (amongst other things) with the same topic. This exchange of Notes revealed a further complexity. That is whether the privilege against self-incrimination, even if otherwise available to Mr Stanford, could be relied on as a basis for resisting the production of documents which came into existence independently of any legal obligation compelling their production. The Claimants said not, and so argued that come what may, there was no basis for Mr Stanford to resist disclosure of copies of the documents sought by para. 2(2) of the draft order, i.e. (i) communications between him and the Supplier (apparently Mr Wright) which led to the supply of the Archive, or (ii) communications with Third Party Recipients in relation to the Archive.
61. In order to evaluate these arguments, it is necessary to summarise the principles of law in play.
62. As regards the test to apply in determining whether the privilege is properly invoked, both parties drew my attention to the following statement of Sir Robert Megarry V-C in British Steel Corporation v Granada Television Ltd [1981] AC 1096, at p. 1106D-E:

*“[Counsel for Granada] had to establish that Granada had reasonable grounds for believing, and did believe, that if they disclosed the source of the documents, there would be a ‘real and appreciable danger’ that ‘in the ordinary course of things,’ and under ‘the ordinary operation of law,’ they would be prosecuted for some criminal offence: Reg v Boyes (1861) 1 B & S 311 at 330, approved in Ex parte Reynolds (1882) 20 ChD*

*294. The latter case makes it plain that the privilege against self-crimination can be invoked only by someone who does so in good faith for his own protection, and not for some ulterior purpose”.*

63. Mr Grant QC also drew attention to the following summary in the latest edition of Matthews and Malek on Disclosure (5<sup>th</sup> Edn, Sweet & Maxwell 2017) at [13.11]:

*“The mere fact that the party concerned believes, even swears, that his supplying information would tend to incriminate him is not conclusive. Instead, what matters is that the risk should be apparent to the court. The court does not try to assess the probability of the risk of proceedings being taken. But it must be satisfied that ‘there is reasonable ground to apprehend danger’ to the party claiming privilege, or that the risk is ‘reasonably likely’ or that ‘there must be grounds to apprehend danger to the witness, and those grounds must be reasonable, rather than fanciful’, or that there is a ‘real and appreciable’ risk of prosecution if the documents are produced for inspection. A ‘mere possibility’ of grounds for charge being disclosed is insufficient.”*

64. As regards the question of whether the privilege extends in any event to documents coming into existence independently of any legal obligation compelling their production, both parties referred me to C plc v. P (Attorney General intervening) [2008] Ch 1. In that case, there was a division of view on this issue in the Court of Appeal. At [28] Longmore LJ (with whom Nourse LJ agreed) drew a distinction between “*admissions obtained in breach of a defendant’s right to remain silent and material which is obtained by the use of compulsory powers but which has an existence independent of the will of the defendant*”, the former engaging the privilege against self-incrimination but the latter not doing so. At [36] Longmore LJ concluded that on the facts, there was “*no privilege in the offending material itself which is material which existed independently of the order.*”
65. Lawrence Collins LJ dissented on the point of principle. He did not think it appropriate to rule on the question whether “*it is open to this court to find as a general rule that there is no privilege in respect of what has been described as pre-existing or independent material*” (see at [44]). That was in light, in particular, of the earlier decisions of the House of Lords in Re Westinghouse [1978] AC 547, Rank Film Ltd v. Video Information Centre [1982] AC 380, and Istel (AT&T) v. Tully [1993] AC 45.
66. Mr Grant QC said that the majority view in C Plc was binding on this Court, and therefore that the documents sought by means of the Claimants’ order were not on any view covered by privilege. Mr McDonnell argued that they were, on the basis that even taking the majority view in C Plc v. P as the starting point, the documents sought in this case could not properly be described as “*independent documents*” or “*independent evidence.*” That is because their provision is sought under paragraph 2 of the draft Order, and that requires the provision by Mr Stanford of an Affidavit, setting out details of the relevant communications and producing copies as an Exhibit.

Thus, what was sought could not fairly be described as something which came into existence independently of the will of Mr Stanford.

67. Drawing the threads together, my views on the topic of the privilege against self-incrimination are as follows.
68. To begin with, it is clear that the exercise for the Court is to evaluate the risk of prosecution: is there a real and appreciable risk or something less than that? On this basic question, the parties had entirely polarised views: Mr Grant QC said there was no appreciable risk (or at least that none had been made out); and Mr McDonnell (see at [41] above) said there was a real danger to Mr Stanford of being “*prosecuted for some criminal offence*” (my emphasis).
69. Both positions, if I may say so, are somewhat crude responses to a situation which in reality is rather more complicated. Mr Grant’s submission ignores the background, which includes the circumstances in which the Archive first came to be taken, and also the efforts made by Mr Stanford to make use of it, which Mr Grant’s client has himself described as involving blackmail (see [38] above). Bearing in mind that background, it seems to me the Court is entitled to have, at a minimum, real sensitivity as to the risks involved in Mr Stanford being required under compulsion to answer questions about the manner in which he came to receive the Archive and the steps he has taken to deploy it.
70. On the other hand, Mr Stanford’s position is also unsatisfactory. He says only that there is a risk of prosecution for *some* offence, but he does not say which, and as the Divisional Court explained in R (Malik) v. Manchester Crown Court [2008] 4 All ER 403, at [68], it is important that the relevant offence is identified, since that is of great assistance in the evaluating the associated risk. That is perhaps particularly so in the present case given the different types of information sought by paragraph 2 of draft order. Depending on the offence said to be relevant, it may be that some topics can be addressed without any real risk of incrimination, but not others. (I should add at this point that nothing in my comments above should imply any criticism of Mr McDonnell QC, who stepped in to help Mr Stanford at short notice and with limited time to take instructions. I am extremely grateful to him for his assistance).
71. Given the uncertainty, how best to proceed? I am not persuaded that I should adopt the position advocated by the Claimants, and say that Mr Stanford’s attempted invocation of the privilege should simply be rejected. Given Mr Stanford’s status as a litigant in person and the manner in which the privilege issue developed, I think it would be wrong and unfair to adopt such a blanket approach. At the same time, however, I also think it would be wrong on a blanket basis to decline to make any order at all in the terms of paragraph 2 of the Claimants’ draft.
72. Instead, it seems to me the better approach is to make an order modelled on paragraph 2 of the Claimants’ draft, but with two important modifications. The first, despite Mr Grant’s objection to the idea, is to include as a proviso to what is presently para. 2(1), wording along the lines of that mentioned at [58] above, based on the language found in the model form freezing order.
73. I accept that this may be a novel approach, and that the circumstances are different to those of the typical freezing order case. Nonetheless, it seems to me the same basic

principle of fairness applies. In the unusual circumstances of this case, Mr Stanford, like the respondent to a freezing order, should both be encouraged to consider his position and to take advice in relation to it, and then, if it is justified, should be entitled to decline to provide some or all of the information otherwise demanded by what is presently para. 2(1). If his position is challenged, it can then be further considered but with the benefit of a clearer explanation of Mr Stanford's position than is presently available.

74. I should say that in stating that conclusion, I am conscious of Mr Grant's concern that the inclusion of a proviso might only lead to further obfuscation and delay in the provision of the information his clients say they are entitled to. Avoiding delay is a legitimate concern, but I think not a material point in this case given that the Claimants have had suspicions about Mr Stanford's possession of the Archive since late 2017 (see [8] above). In any event, nothing in what I have said should be construed as an encouragement to take unfounded objections with a view to buying time. It is axiomatic that the privilege against self-incrimination may only be invoked by someone acting in good faith and for his own protection, and not for some ulterior purpose. The proviso I suggest makes it clear that the wrongful refusal to provide the information sought is a contempt. My hope and expectation is that, with the benefit of the legal assistance which appears to be available to him, Mr Stanford will be able to undertake a properly considered examination of his position on this important point which was rather lost in the mix in his earlier written and oral submissions.
75. The second point requiring a modification concerns the documents sought by means of the draft order, i.e. the present para. 2(2).
76. As to pre-existing documents, I note that the Divisional Court in Malik (at [74]) said that the issue revealed by C Plc v. P had been the subject of considerable debate in domestic law and in the Strasbourg jurisprudence. At the point in time at which Malik was decided, the House of Lords had in fact given leave to appeal against the majority decision in C Plc v. P, although in the event the appeal did not proceed.
77. Before me, however, the controversy reflected in the difference of view in C Plc v. P is not a matter of direct concern. What is of concern is whether there is authority on the issue of pre-existing documents which is binding on this Court. As to this, I was referred to the very careful analysis of the authorities (including C Plc v. P) conducted by Popplewell J (as he then was) in JSC BTA Bank v. Ablyazov [2012] EWHC 2784 (Comm) at [52]-[72]. At [72], Popplewell J summarised the position as follows:
- “In my view, it has been established by the authorities that the privilege against self-incrimination does not extend to provide a person with protection against the risk of incriminating himself by the provision of a document or documents which come into existence independently of any order, statute or other instrument of law which compelled their production. It does not normally cover documents other than those which come into existence by an exercise of will pursuant to a testimonial obligation imposed upon the party.”*
78. I respectfully agree with that summary, and indeed I did not understand Mr McDonnell QC in his Note to take issue with it.

79. What are the consequences for para. 2(2) the Claimants' proposed order?
80. Mr McDonnell QC's point in his Note at para. 19, as I understand it, is effectively that because the order requires the provision of such documents as exhibits to the proposed Affidavit, they cannot properly be viewed as "*independent documents*" or "*pre-existing documents*." Mr Grant QC, on the other hand, said he found this conclusion "*baffling*," and submitted that the law is clear that the documents sought by para. 2(2) do not engage the privilege against self-incrimination.
81. On this point, I have concluded that I prefer Mr Grant's position.
82. In my view, Mr McDonnell's position is one of form over substance. The substance of it on the evidence is that documents in the relevant categories are in Mr Stanford's possession. Their production, on the basis of the law as it stands, does not engage the privilege against self-incrimination. Mr McDonnell's objection is really about the format in which the documents are produced, i.e. as exhibits to an Affidavit. It seems to me that point is easily addressed by decoupling the requirement to produce documents from the requirement to provide information on Affidavit. In other words, I propose to modify the draft order so as to contain a stand-alone provision for the production of the documents sought. That is the substance of the Claimants' request, and will have the consequence that, however Mr Stanford chooses to respond or not respond on Affidavit to what is presently para. 2(1) of the draft order, the specified documents will need to be produced.

### **Conclusion**

83. For all those reasons, I propose to accede to the Claimants' application, and to make an Order in terms of the revised draft annexed to this Judgment.

**ANNEX: FORM OF ORDER**

UPON the application of the Claimants made by Part 8 Claim Form dated 4 September 2020 for relief against the Defendant in accordance with the principles established in Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133

AND UPON READING the written evidence filed

AND UPON HEARING Counsel for the Claimants and the Defendant appearing in person

IT IS ORDERED that:

1. By 4 pm on [the date 14 days from the date of this Order], the Defendant shall permit the Claimants' solicitors to take an image of (i) the documents and all other data contained upon the hard drive received by him in April 2015 (being the hard drive referred to in paragraph 34 of the draft complaint which he sent to the Claimants on or about 20 April 2020), such hard drive containing the data in an email account belonging to the First Claimant as it stood at or about 21 June 2013 (the "**Archive**"); (ii) the documents and all other data transferred on or about 11 October 2015 from a laptop in the possession or control of Mr Michael Wright to a laptop acquired by or on behalf of the Defendant (being the laptop referred to in the letter dated 17 February 2021 from the Defendant to the Claimants' solicitors); and (iii) each and every copy and each and every partial copy of the Archive stored on any device in the Defendant's power, possession or control or within any cloud repository (including, without limitation, Google Drive) to which the Defendant has access
2. By 4 pm on [the date 28 days from the date of this Order], the Defendant shall provide to the Claimants copies of all correspondence or communications (in whatever physical or electronic form) passing between:
  - (a) the Defendant and the person who supplied the Archive to the Defendant (the "**Supplier**") which led to the supply of the Archive
  - (b) the Defendant and each and every third party ("**Third Party Recipient**") that contains any reference to, material from or information about the Archive.

3. By 4 pm on [the date 28 days from the date of this Order], the Defendant shall swear and serve on the Claimants' solicitors an affidavit providing full and accurate details of:

(1) The precise circumstances in which the Defendant came into possession the Archive, including, without limitation, the date of the supply of the Archive and whether any payment was made in respect of the supply (and if so in what amount, on what date and to whom)

(2) The name and position of the Supplier

(3) Any copies of or material from the Archive which the Defendant has provided to any Third Party Recipient

(4) The name and contact details of each and every Third Party Recipient

(5) The circumstances in which the Defendant provided each and every Third Party Recipient with copies or material from the Archive (including, without limitation, the date and means of provision, identifying what material from the Archive was actually provided to that Recipient and setting out details (insofar as the Defendant is aware) of what use the Recipient intended to and did make of the material)

PROVIDED THAT if the provision of any of the information in this paragraph is likely to incriminate the Defendant, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of Court and may render the Defendant liable to be imprisoned, fined or have his assets seized.