Neutral Citation Number: [2024] EWHC 2751 (Comm)

Case No: CL-2021-000509

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30/10/2024

Before :

MR JUSTICE CALVER

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Between :

(1) FILATONA TRADING LIMITED **(2) OLEG VLADIMIROVICH DERIPASKA**	**Claimants**
- and -	
QUINN EMANUEL URQUHART & SULLIVAN UK LLP	**Defendant**

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Thomas Grant KC and James Sheehan KC (instructed by **Quillon Law LLP**) for the **Claimants**
Antony White KC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendants**

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JUDGMENT ON COSTS

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Wednesday 30 October 2024.

Mr Justice Calver:

The costs dispute before the court

1. On 14 October 2024 I gave judgment in respect of the Claimants' successful application for *Norwich Pharmacal* relief against the Defendant ("QE"). I ordered the Defendant to disclose to the Claimants the following information:

   a. The name and address of the "business intelligence consultancy" which provided the Russian language copy of the Glavstroy Report to the Defendant on or around 27 September 2019.

   b. The name(s) and address(es) of the natural persons at the "business intelligence consultancy" who were involved in the procurement of the Glavstroy Report and its provision to the Defendant.

2. I further ordered the Claimants to pay the Defendant's reasonable costs of complying with the Order, to be assessed on the standard basis if not agreed. All remaining issues relating to the costs of the Claimants' claim itself were to be determined by the court after the parties had lodged short written submissions on those issues, which they have now done.

3. QE submits that (a) Norwich Pharmacal applications are not like ordinary adverse proceedings where the starting point is that costs follow the event; (b) there is an established "general rule" that the respondent to such an application should have its costs of both the application and of providing the disclosure if ordered; (c) this "general rule" is applicable in the present case; and (d) it applies *a fortiori* where the respondent is a firm of solicitors who cannot consent to the application, and whose duty to act in the best interests of their client justifies them taking any point reasonably open to them.

4. QE accordingly submits that the Claimants should pay its costs of and occasioned by the application in the usual way, with such costs to be assessed on the standard basis if not agreed.

5. The Claimants accept that in an ordinary *Norwich Pharmacal* case the claimant pays the respondent's costs. However, the Court has a discretion to make a different order. The Claimants submit that this is an unusual case and the way in which QE has approached this claim, both in the pre-action stage and all the way up to the hearing itself, has been adversarial, unreasonable and has significantly increased the Claimants' costs. For these reasons, they submit, there should be no question in this case of the Claimants having to pay QE's costs. Indeed, QE should be ordered to pay 70% of the Claimants' costs.

Legal Principles

6. In *Totalise Plc v The Motley Fool Limited and Interactive Investor Limited* [2001] EWCA Civ 1897, Aldous LJ stated as follows:

"29.... Norwich Pharmacal applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by CPR r 48.3. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the Norwich Pharmacal case. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.

30. The court when considering its order as to costs after a successful Norwich Pharmacal application should consider all the circumstances. In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. There may be cases where the circumstances require a different order, but we do not believe they include cases where: (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntarily giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another."

7. As Popplewell LJ rightly observed in *Gorbachev v Guriev* [2023] 1 WLR 2457 at [29], "*these were not intended by Aldous LJ … to be an exhaustive list, or a rigid straight jacket, as to the circumstances in which the general principle may be departed from … the general principle [may] be displaced where the circumstances justify it, and the circumstances of individual cases are infinitely variable. However, they are listed as alternatives, and give guidance that each will usually be sufficient to prevent the general rule being displaced.*"

8. It follows that the correct starting point on an application for *Norwich Pharmacal* relief is that the applicant should normally be ordered to pay the costs of the party ordered to give disclosure, including the costs of the application: see also *Jofa Ltd v Benherst Finance Ltd* [2020] 1 All ER 849 at [22] per Leggatt LJ (as he then was). That "starting point" or "general rule" is less likely to be displaced if the application falls within one of Aldous LJ's five cases above, but it still may be displaced.

9. Paragraph 29 of *Totalise* was, as Popplewell LJ pointed out in *Gorbachev* at [24], cited with approval by Lord Sumption JSC in *Cartier International AG v British Telecommunications Plc* [2018] 1 WLR 3259 at [12]. Lord Sumption stated that *"[t]he ordinary rule, absent exceptional circumstances, is that the intermediary is entitled to the costs of compliance*."

10. Leggatt LJ further stated in *Jofa* at [31]: "*While accepting that there can be no absolute rule in the matter, I find it hard to envisage circumstances in which it would be just to award costs against a respondent to a Norwich Pharmacal application who, before agreeing to disclose documents, has done no more than require the applicant to satisfy the court that such an order is appropriate*."

11. The Judge also approved paragraph 29 of *Totalise* in *Jofa* where he said at [35]:

> *"The Court of Appeal also made the point (at para 29 of the judgment) that Norwich Pharmacal applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party, and that in general it is just that the applicant should recover its costs of obtaining the information that it needs from the wrongdoer rather than from an innocent party. It is relevant in that regard that, if the party from whom disclosure is sought is ordered to bear its own costs, or even to pay costs incurred by the applicant, it has no means (unlike the applicant) of recovering those costs from the wrongdoer".*

12. Leggatt LJ noted the analogy with pre-action disclosure applications and referred to the observations of Moore-Bick LJ in *SES Contracting Ltd v UK Coal Plc* [2007] EWCA Civ 791 at [17] that, by laying down a general rule that the person against whom the order is sought will be awarded their costs:

> "*I think that the Rules implicitly recognise that it will not usually be unreasonable for [that person] to require the applicant to satisfy the court that he ought to be granted the relief which he seeks. The reason for that lies, I think, in a recognition that a private person who is not a party to existing litigation which brings with it an obligation of disclosure is entitled to maintain the privacy of his papers unless sufficient grounds can be shown for overriding it and that it is for the person seeking to invade that privacy to justify doing so*."

13. Popplewell LJ summarised the costs principles as follows at [27] in Gorbachev:

> "*These authorities suggest that the same costs principles should apply to applications for disclosure under CPR r 46.1 as to Norwich Pharmacal applications and other applications against innocent third parties. The principles are that:*
> *(1) it is reasonable for an innocent third party to seek to protect private information by resisting a court order;*
> *(2) as between an innocent claimant and an innocent third party it is more unjust for the third party to bear the costs than the claimant, because it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket;*
> *(3) in general the costs should be recovered from the wrongdoer, not the innocent third party, which the third party has no means to achieve;*
> *(4) the principle does not treat a third party as entitled to do no more than adopt a neutral position before it is at risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself*

unreasonable behaviour or sufficient to deprive the third party of the benefit of the general principle that the applicant should pay its costs;
(5) if it is reasonable for the third party to resist disclosure, it is entitled to decide on what basis to do so, and with what evidence, without losing its costs protection, provided that it does take an unreasonable course which unnecessarily increases the costs;
(6) there may be cases which require a different order but that will not usually be the case (a) where the third party had a genuine doubt whether the applicant was entitled to disclosure; or (b) where the third party was under a legal obligation not to disclose; or (c) where the legal position was not clear; or (d) where the third party could be subject to legal proceedings or might suffer damage if it gave voluntary disclosure; or (e) where disclosure would or might infringe a legitimate interest of another."

14. In the *SES Contracting* case the applicant sought pre-action disclosure on the basis that it had a prospective claim against the respondent, UK Coal, for participating in a dishonest conspiracy to steal the applicant's business. UK Coal actively and unsuccessfully opposed the application. The Court of Appeal set aside the judge's order requiring UK Coal to pay the costs of the application, holding that it had not been unreasonable for UK Coal to oppose the application, albeit that the manner of its opposition had been unreasonable. The latter fact was held to justify departure from the general rule, but only to the extent of making no order as to costs.

15. In *Bermuda International Securities Ltd v KPMG (a firm)* [2001] EWCA Civ 269 the Court of Appeal thought it impossible to impugn the judge's exercise of discretion in ordering that the costs of an application for pre-action disclosure which had been resisted "root and branch", and of giving the disclosure, should be costs in the case if an action was brought but that, if no action was brought, there be no order as to costs.

16. In those two cases, however, the applicant had a prospective claim against the respondent itself for alleged wrongdoing, and the respondent vigorously contested the application as a result.

17. In *Jofa*, whilst the investors initially made allegations of wrongdoing against Jofa and Mr Farah in correspondence, by the time of the application to the High Court those allegations were no longer maintained and Jofa and Mr. Farah did not oppose the application (albeit they did not formally consent to it). The Court of Appeal made no order as to the costs of the *Norwich Pharmacal* application (although in that case Mr. Farah and Jofa had acted as litigants in person and accordingly incurred only limited costs). At [44] Leggatt LJ remarked that:

> "*it is reasonable to expect a person who receives a request to provide information, supported by evidence that the person has been mixed up, albeit innocently, in wrongdoing and that the information is needed for the purpose of proceedings against the wrongdoer, at least to indicate his position and to say whether he is prepared to provide the information voluntarily and, if not, whether and on what grounds he will oppose an application for a Norwich Pharmacal order*."

Analysis

18. In the present case, the Claimants complain that far from simply putting them to proof or drawing relevant matters to the Court's attention in a neutral manner, QE have treated this case as full-blown adversarial litigation, defended with signal vigour.

19. However, this is not in itself sufficient for QE to lose its costs protection as the innocent party. As Popplewell LJ explained in *Jofa*, the principle (that the innocent party should get its costs) does not treat a third party as entitled to do no more than adopt a neutral position before it is at risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself unreasonable behaviour or sufficient to deprive the third party of the benefit of the general principle that the applicant should pay its costs.

20. The Claimants also maintain, however, that QE resisted the application on every conceivable basis and acted unreasonably in their conduct of the matter so as to cause the Claimants to incur significant unnecessary expense. If this be factually correct, this would in principle justify a departure from the general rule on the costs of a *Norwich Pharmacal* application, although it is of course, in every case, a question of degree.

21. In support of this submission, the Claimants rely upon the fact that at the outset, QE refused to answer reasonable questions as to the circumstances in which the Glavstroy Report was obtained and any steps taken to confirm its authenticity: see Judgment [25]–[26]. Further, thereafter, and even after obvious discrepancies were drawn to QE's attention, QE failed to indicate their position on the Report and to make the urgent enquiries which they should have made to ascertain the authenticity or otherwise of it: see the Judgment at [40(i)-(iv)] and, in particular [106], where I stated as follows:

> *"On balance and taking all of the circumstances into account, I am not willing to make the serious finding that QE ought to have known that they were facilitating arguable wrongdoing at the time when the section 68 proceedings were issued in reliance upon the Glavstroy Report. However, I do find that (i) after they submitted the report and RPC raised serious questions about its authenticity just 7 days later, and (ii) after Mr. McGregor set out in his 12th witness statement served on 30 May 2020 the indicia of the alleged forgery in detail, QE failed to make the urgent enquiries which they ought to have made at that stage to satisfy themselves as to the authenticity of the report. (That was particularly so in circumstances where they accept that they did not know the ultimate source of the Glavstroy Report, and therefore how it came into being)."*

22. In response, QE contend in paragraph 16 of their written submissions on costs that the court's finding in paragraph 106 "does not bear on their conduct in relation to the application." I do not agree. As the Claimants submit, had QE taken these steps, they might well have been led to accept that the Glavstroy Report was a forgery, and the scope of this application might have been narrowed significantly. Instead the Claimants had to address this issue in some detail in both their evidence and

argument, which plainly increased the scope of the application and its cost. Indeed, it was only in the course of the hearing before me that Mr. White KC accepted that the "alterations" in the document must have been made for a sinister purpose unless – and this was a case that QE continued to float before me for which there was no evidential basis - the alterations were made in order to sabotage the case of the Chernukhin Parties [Judgment, [68-69]].

23. QE also contend that Mr. Greeno of their firm "genuinely believed" that the information sought was privileged and confidential and so he believed that he was under a legal obligation not to disclose it unless ordered by the court to do so. QE accordingly suggests that paragraphs 30(a), (b) and (e) of Aldous LJ's judgment in *Totalise* apply. I accept that this was a genuine belief held by Mr. Greeno, albeit it was a mistaken belief, as the information was neither privileged nor confidential.

24. In the present case I consider that it was reasonable, in all the circumstances, for QE to resist disclosure in principle; certainly it was not unreasonable. There were reasonable points to be made opposing the exercise of the Court's discretion in favour of the Claimants[1]. QE was then, as Popplewell LJ stated in *Jofa,* entitled to decide on what basis to do so, and with what evidence[2], without losing its costs protection, *provided that it did not take an unreasonable course which unnecessarily increased the costs*. I consider that the extent to which this (italicised) feature is applicable in the present case is the real issue between the parties.

25. I consider that QE's failure to make the urgent enquiries which they should have made to ascertain the authenticity or otherwise of the Glavstroy Report, set out in detail in the judgment and referred to in summary above, did lead to an unnecessary increase in costs. It is inevitably an imprecise science on the part of the court to determine the precise extent to which costs were unnecessarily increased as a result. I agree with QE's submission that QE cannot be deprived of their costs of considering the application, taking instructions on it and taking counsel's advice on it and that the costs in issue are confined to those resulting from QE resisting the application.

26. In exercising my discretion as to costs I bear in mind each of the following factors in particular:

    (1) the general rule that the costs incurred by the claimant on a *Norwich Pharmacal* application should be recovered from the wrongdoer rather than from an innocent party;

    (2) that QE is a highly reputable law firm which was motivated by a concern to maintain the privacy of its client's affairs;

    (3) Mr. Greeno's genuine belief referred to above; and

    (4) that if QE is ordered to bear its own costs it has no means (unlike the Claimants) of recovering those costs from the wrongdoer.

[1] which are recited in the judgment.
[2] QE served two witness statements of Mr. Greeno (consisting of 26 and 9 pages respectively).

27. However, I also bear in mind that it is only fair that the Claimants should not have to pay a proportion of QE's costs which reflects the unnecessary increase in costs caused by QE's failure to engage with the Claimants' forgery allegations as described in the judgment.

28. In all the circumstances I consider that a fair approach to the order for costs in the present case is to apply a 30% reduction in QE's costs of resisting the disclosure application. The remainder of QE's costs, as the party giving disclosure, should (in accordance with the general rule) be paid by the Claimants, to be assessed on the standard basis if not agreed.

29. I agree with QE that the parties should seek to agree a position in respect of sanctions licences in the light of this judgment and I therefore invite the parties to draw up an order reflecting the terms of this judgment.

30. Finally, and for the avoidance of doubt, I add that I do not consider that the additional submissions made by the Claimants by email dated 22 October 2024 and responded to by QE by email dated 24 October 2024 concerning the identity of the Consultancy, add anything to this analysis.