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ROYAL COURT
(Samedi Division)

6th November, 1990

Mr. V. A. Tomes, Deputy Bailiff
Jurat J. H. Vint
Jurat Mrs. M. J. Le Ruez

<u>Between</u>	I.B.L. Limited	<u>First Plaintiff</u>
<u>And</u>	Meridian Group (U.K.) Limited	<u>Second Plaintiff</u>
<u>And</u>	Planet Financial & Legal Services Limited	<u>First Defendant</u>
<u>And</u>	Brian Harrison Webbe	<u>Second Defendant</u>
<u>And</u>	Philip Arthur Coussens and John Trevor Howard Henderson	<u>Intervenors</u>

Advocates A. R. Binnington and P. de C. Mourant
for both plaintiffs.
Advocates G. R. Boxall and M. St. J. O'Connell
for both defendants.
Advocate J. G. White for Intervenors.

JUDGMENT

THE DEPUTY BAILIFF: On the 12th April, 1990, I signed an Order of Justice which can be summarised thus:- the first plaintiff, an English company, carries on computer business in Western Europe and the United States of America; the second plaintiff is the owner of the first plaintiff; the first defendant is a Jersey company carrying on the business of company and trust administration and the second defendant, a barrister-at-law, is Chairman and a director of the first defendant. Up to November, 1987, the first Intervenor owned 37,792,296 ordinary shares in the first plaintiff (about 54% of its issued share capital) and up to 19th November, 1988, was its Chairman. The second Intervenor owned 5,185,905 ordinary shares in the first plaintiff and was a director of the first plaintiff up to 17th November, 1987. On the 2nd November, 1987, the Intervenors sold their shareholdings in the first plaintiff to the second plaintiff. The plaintiffs alleged that whilst a director of the first plaintiff the first Intervenor acted in breach of his fiduciary duties by artificially

inflating the profits of the first plaintiff and its German subsidiary IBL Computer GMbh (IBLG), with the effect that the auditors and prospective purchasers were deceived as to the true value of the first plaintiff. The plaintiffs further alleged that the defendants had been involved in the wrongful acts of the first Intervenor so as to facilitate the wrongdoing and were thus under a duty to assist the plaintiffs by giving them full information and disclosing all relevant documentation.

The Order of Justice went on to particularise the alleged wrongdoing of the first Intervenor in relation to a transaction involving IBLG and an Isle of Man company called Continental Equipment Supplies Limited (the C.E.S. transactions) and claimed that the defendants were under a duty to assist the plaintiffs, by giving them full information and disclosing all relevant documentation relating to the CES transactions.

The Order of Justice further alleged that whilst directors of the first plaintiff, the Intervenors had acted in breach of their fiduciary duties by transferring or arranging the transfer of sums due to the first plaintiff to companies not owned or controlled by the first plaintiff, in particular to Malverda Trading Limited, a Jersey company administered by the first defendant and of which the second defendant was a director until its dissolution on or about 10th August, 1988 (the Malverda transactions). Some of the payments were particularised. Without further information as to dealings by Malverda with funds due to the first plaintiff and its subsidiaries the first plaintiff claimed to be unable to ascertain the extent of the loss allegedly caused to it.

The Order of Justice was supported by an affidavit sworn by David James Burger, a Director of Network Security Management Limited, an English subsidiary of Hambros Banking and Financial Services Group, which specialises in the prevention, detection and investigation of corporate and computer fraud, who had investigated the allegation of fraud in considerable detail, which satisfied me that the plaintiffs had a good arguable case against the Intervenors. It was not necessary, in my view, to go further at this interlocutory stage and the Court should not allow itself to try the substantive action; a good arguable case is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than fifty per cent chance of success (see Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft GmbH ('Niedersachsen, The') (1983) 2 Lloyd's Rep 600 at p.605 per Mustill J re a Mareva injunction).

Consequently, I granted injunctions that service of the Order of Justice upon the defendants should operate as an immediate order requiring the defendants to disclose and produce to the plaintiffs within five working days of service, documents in their possession or custody or control or to which they had access, as detailed in the Order of Justice, and to permit the plaintiffs to

inspect and take copies thereof at the offices of the plaintiffs' advocates or at such alternative location as might be agreed by the plaintiffs. The documents affected were those relating to any transactions entered into by C.E.S. in which the first plaintiff or any of its subsidiaries had an interest, any transactions entered into by Malverda in which the first plaintiff or any of its subsidiaries had an interest, and documents relating to the beneficial ownership of Malverda. The subsidiaries were defined as eight named companies. Pending compliance, the defendants were restrained from altering, destroying, disposing of or transferring out of their possession, custody or power, all or any of the documents.

The plaintiffs undertook to pay the reasonable costs of the defendants and gave an undertaking in damages. The plaintiffs further undertook not without the leave of the Court to use any documents or information obtained save for the purposes of consolidated actions in the Queen's Bench Division of the High Court in England against the Intervenors, - actions 1988 1 No 2329 and 1988 1 No 6396 - commenced by the second plaintiff and its parent company, Inspectorate International S.A., or in proceedings to be commenced by the first plaintiff against the Intervenors in respect of breach of their fiduciary duties as aforesaid.

The injunctions were served on the 18th April, 1990, and the action came before the Court on Friday, 27th April, 1990, when, by consent, the action was adjourned, with the injunctions remaining in force.

On Tuesday, 10th May, 1990, the Court sat to hear a summons by the defendants seeking an order that the interim injunctions be lifted and that the Order of Justice be struck out on the grounds that the Order of Justice disclosed no reasonable cause of action and/or that it was otherwise an abuse of the process of the Court.

At the hearing Mr. Boxall, for the defendants, sought an adjournment of the hearing of the Summons. The application was opposed by Mr. Binnington. The Court heard preliminary arguments. The application had been made on the basis of the "Norwich Pharmacal principle". This refers to Norwich Pharmacal Co. and others v. Commissioners of Customs and Excise (1973) 2 All ER 943 HL. There was a dispute as to whether the Norwich Pharmacal principle applied. Mr. Binnington claimed that the principle had been extended and cited Bankers Trust Co. v. Shapira and Others (1980) 3 All ER 353 CA. Mr. Boxall argued that discovery of the documents did not fall within the Norwich Pharmacal principle, that questions of jurisdiction arose, that the order amounted to a subpoena duces tecum, that the action was a means of circumventing the provisions of the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order, 1983, and the application of the plaintiffs amounted to a "fishing expedition".

The application for an adjournment was supported by an affidavit from the second defendant.

The Court granted only a very short adjournment for the further inter partes hearing of the substantive issues. The Court was concerned about the effect and development of the Norwich Pharmacal principle, which had been applied in Jersey on a number of occasions. The Court was also concerned about the interests of justice. The defendants had had since the 18th April, 1990, to consider the principles of law involved and, in the opinion of the Court, should have been ready to argue the substantive matters. Indeed, the defendants had been saved from being in contempt only by my willingness to abridge time so that the matter could come before the Court that day. The Court adjourned the further hearing, on the principles of substantive law to be applied, until the 15th May, 1990, and indicated that it would expect to be addressed further, by Mr. Boxall (or Mr. O'Connell), in particular, on the development of the Norwich Pharmacal principle and why we should not, in the interests of justice, further extend the principle, if it were necessary to do so, in order to enable the plaintiffs to obtain the information sought, even if we were to go beyond the decisions of the English Courts in the process; and by Mr. Binnington, in particular, on the question which concerned us, raised by Mr. Boxall, that the Jersey proceedings amounted to a "fishing expedition" and no more.

In the meantime, the Court noted the undertaking, contained in the second defendant's affidavit, that he was able to and would abide by the restraining order set out in the prayer of the Order of Justice which restrained the defendants from altering, destroying, disposing of or transferring out of their possession, custody or power all or any of the documents sought to be disclosed and produced, and further ordered that the CES material already obtained by the plaintiffs as a result of the part compliance by the defendants with the disclosure and production order should not be used for any purpose until after the completion of the inter partes hearing and the delivery of the Court's decision upon it.

On the 15th May, 1990, leave was given to the defendants, without objection from Mr. Binnington, to amend their summons by the addition of two new paragraphs: (3) asking that the plaintiffs be compelled to return to the defendants all copy documents disclosed to the plaintiffs pursuant to the Order of Justice together with all copies of the copy documents made by the plaintiffs and all working papers made by the plaintiffs on the contents of either the originals or the copy documents referred to; and (4) seeking an injunction restraining the plaintiffs from using, disclosing or passing on information in their possession.

Throughout the 15th and the afternoon of the 16th May, 1990, the Court heard lengthy submissions from Mr. O'Connell and Mr.

Binnington. At the conclusion of the hearing the Court reserved its decision and judgment. On the 4th June, 1990, when work on the reserved judgment was proceeding, Mr. White attended on me in Chambers to advise me that he had been instructed by the intervenors to apply to intervene in the action. On the 8th June, 1990, the intervenors entered a representation seeking leave to intervene and, in particular, sought to be heard in the matters raised in the defendants' summons before the Court issued its judgment; the representation also alleged a possible contempt of Court by reason of an alleged breach of the stay of execution and applied for a further stay of all interim orders; the representation also sought an order for delivery to the Viscount of all copy documents disclosed pursuant to the Order of Justice together with all copies made by the plaintiffs and all working papers made therefrom.

The Court sat on the 20th June, 1990, to hear the application for leave to intervene. Judgment was delivered on the 21st June, 1990. The Court granted the application solely on grounds of natural justice. The Court was persuaded that the intervenors are affected by the allegations of fraud made against them and, therefore, that they should be permitted to be heard. We do not propose to repeat our reasons which were set out in our judgment of the 21st June, 1990. The Court granted the application on terms as to costs and otherwise which also are set out in the judgment. The second defendant remained bound by his undertaking to preserve the documents sought to be disclosed and produced. And the stay preventing the use of documents already disclosed and produced likewise remained in force.

Consequently, the Court was convened again on the 23rd and 24th July, 1990, to hear Mr. White on behalf of the intervenors and, of course, the parties to the action in answer to him, and Mr. White in reply.

At the commencement of the hearing there were further surprises. The plaintiffs had served two summonses upon the defendants and the intervenors. The first of these sought leave to amend the Order of Justice in accordance with the amended document annexed to the summons. The purpose of the amendments was to add details of a second C.E.S. transaction. The application for leave was not opposed by the defendants and the intervenors consented to leave being given. Accordingly, leave to amend was given with the usual order as to costs.

The second summons sought leave to use certain documents already obtained pursuant to the orders contained in the Order of Justice for the purposes of the consolidated actions in the Queen's Bench Division of the High Court in England against the intervenors (*supra*) and/or in proceedings to be commenced by the first plaintiff against the intervenors in respect of breach of their fiduciary duties. By consent that matter was left over

until the conclusion of the main hearing when the application was pressed by Mr. Mourant and opposed by Mr. White. After some discussion the summons was adjourned sine die. At the end of the main hearing, the Court's decision and judgment were again reserved. Those decision and judgment we now proceed to give.

The starting point is the Norwich Pharmacal case (*supra*). That case involved a tortious infringement of the appellant's patent. The appellants tried to discover the identity of the importers of the infringing material in order to bring legal proceedings against them, but were unable to do so. The respondents, in the exercise of their statutory duty, had obtained information relating to the goods including the names of the importers. The appellants asked the respondents to supply them with the names of the importers but the respondents replied that they had no authority to do so. The appellants then brought an action against the respondents claiming, *inter alia*, an order for discovery of the names of the importers. Graham J granted the order but the Court of Appeal reversed his decision holding (i) that since the appellants had no cause of action against the respondents they could not obtain an order for discovery against them and (ii) that in any event, since the names of the importers had been given to the respondents in confidence and under a statutory duty, the public interest required that they should not be compelled to disclose them. On appeal the House of Lords held that the appeal would be allowed and an order for discovery made for the following reasons:- (i) although as a general rule no independent action for discovery would lie against a person against whom no reasonable cause of action could be alleged, or who was in the position of a mere witness in the strict sense, the rule did not apply where (a) without discovery of the information in the possession of the person against whom discovery was sought no action could be begun against the wrongdoer, and (b) the person against whom discovery was sought had himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. In such circumstances, although he might have incurred no personal liability, he was under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoer. (ii) Even if the respondents had been right in treating the information relating to the identity of the importers as confidential, there was no statutory provision which prohibited the Court from ordering discovery for the purpose of legal proceedings if the public interest in the proper administration of justice required it. In the circumstances the public interest in such confidentiality as might attach to the names and addresses of the importers was outweighed by the interests of justice in disclosure for the purpose of the appellants' intended proceedings.

Relevant to the position of the defendants in the present case, Lord Reid, Viscount Dilhorne and Lord Cross of Chelsea also stated that in any case in which there is the least doubt whether

a person asked to disclose the name of a third party should do so, that person would be fully justified in saying that he would only make disclosure under an order of the court, the costs of the application to the court being borne by the person making the request.

At pp947 - 949 we find that Lord Reid said this:-

"They (the appellants) alleged infringement by the respondents and sought wider discovery than they now seek. But they now admit that they have no cause of action against the respondents....."

"Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date to assist a person who contemplated litigation against the person from whom discovery was sought, if for various reasons it was just and necessary that he should have discovery at that stage. Such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants....."

"But it is argued for the respondents that it was an indispensable condition for the ordering of discovery that the person seeking discovery should have a cause of action against the person from whom it was sought. Otherwise it was said that the case would come within the 'mere witness' rule."

"I think that there has been a good deal of misunderstanding about this rule. It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum. Whether the reasons justifying that rule are good or bad it is much too late to enquire; the rule is settled. But the foundation of the rule is the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information."

"To apply the mere witness rule to a case like this would be to divorce it entirely from its proper sphere. Its purpose is not to prevent but to postpone the recovery of the

information sought. It may sometimes have been misapplied in the past but I see no reason why we should continue to do so.

"But that does not mean...that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. (His Lordship went on to give examples).

"So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. 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. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed.....

"They (the authorities) seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

".....I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.....

".....If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted the court at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done".

Lord Morris of Borth-y-Gest at page 951 said that:

"In my view it would be reasonable, and in a broad sense of the word just, if the desired information could be supplied".

The Court is of the same view in the present case and the first of two questions posed by Lord Morris is very relevant: "Is

it within the power of the court to assist the appellants or is the law powerless?"

Lord Morris, at page 952, also said:

"....I am left with the impression that it would be very unfortunate if the law could not come to the aid of the appellants".

The Norwich Pharmacal case was applied by the Court of Appeal in Bankers Trust Co. -v- Shapira and others (1980) 3 All ER 353, which was a tracing action. The Court of Appeal held that the court was entitled, for the purpose of giving effect to a defrauded plaintiff's equitable right to trace his money, to order a bank to disclose the state of, and the documents and correspondence relating to, the account of a customer who was *prima facie* guilty of fraud even though the bank had not incurred any personal liability for the fraud, for unless there was the fullest possible disclosure the fund could not be traced.

The facts of that case are interesting. In September 1979, Walter Shapira and Max Frei presented for payment to a bank in New York two cheques totalling \$1m. which purported to be drawn on a Saudi Arabian bank. The New York bank honoured the cheques and credited \$708,203 to accounts kept by Shapira and Frei at a discount bank in London. Six months later the Saudi Arabian bank alleged that the cheques were forgeries and took up the matter with the New York bank. The New York bank recredited the Saudi Arabian bank with the \$1m. On 20th May, 1980, the New York bank commenced an action in England against Shapira and Frei (as first and second defendants) and against the London discount bank (as third defendant) seeking, inter alia, to trace the money they had paid to the discount bank. Shapira and Frei had gone outside the jurisdiction in circumstances which prevented the New York bank from effecting service on them, but service was effected on the discount bank.

At p.357, Lord Denning M.R., who delivered the leading judgment, said this:-

"Having heard all that has been said, it seems to me that Mustill J. was too hesitant in this matter. In order to enable justice to be done, in order to enable these funds to be traced, it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which they have gone, were exemplified in *Norwich Pharmacal Co. v. Customs and Excise Comrs.* (1973) 2 All ER 943, (1974) A.C. 133. The customs authorities were perfectly innocent; but they had to disclose the names of infringers of patents whose goods had passed through their hands."

Lord Denning M.R. then cited a short passage from Lord Reid's speech which we have cited already but which we repeat in order to add emphasis to it:-

"They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers".

We cite a further paragraph from Lord Denning's judgment (at page 357) :-

"So here Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men; and they come under a duty to assist Bankers Trust by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is 'full information'."

In the Norwich Pharmacal case what was needed was the identity of the wrongdoers. In the Bankers Trust case what was required was information - access to and copies of all correspondence, debit vouchers, transfer applications and orders and internal memoranda. Waller L.J. at p.359 expressed the opinion that *"an order of that breadth is completely justified in a case of this sort because, unless there is the fullest possible information, the difficulties of tracing the funds will be well nigh impossible".*

In the present case there is very strong evidence of breaches of fiduciary duty. There is *prima facie* evidence of fraud. There is a tracing element in the Malverda transactions. The requirement is complex. It is a requirement for full information as to possible fraud, for disclosure of additional wrongdoers and for the tracing of funds paid to Malverda. Why then, should the Court not come to the assistance of the plaintiffs? Are we powerless to act in the interests of justice? We do not think so.

In the matter of the Representation of Donald Charles Lucas (1981) JJ 83 the learned Bailiff, then Deputy Bailiff, considered and applied the Norwich Pharmacal principle and ordered a person not party to an action for defamation where the defendant was pleading, *inter alia*, justification, to give discovery of documents. If the representation were to be refused then when the case came before the Royal Court, the non-party could be summoned and compelled to bring to the Court such documents as the defendant required. The non-party was compellable and the "mere witness" rule applied unless he was "in some way mixed up in the tortious act, if it was a tortious act". The application was not made by the plaintiff, but the Court said that:-

"The whole point of an action of this sort is to be sure, as far as the Court can be, that there will be no denial of justice to litigants before this Court.....I fail to see that the present action can in any way be said to be other than assisting the course of justice. It would be a denial of justice, in my view, seeing that Mr. Lucas has pleaded justification, if he is unable to examine those parts of the rate list on which he bases his defence".

So here we find a robust application of Lord Reid's principle in favour not of the plaintiff or potential plaintiff but in favour of the defence in a case where the third party was a compellable witness on Jersey's equivalent of a subpoena duces tecum.

In G. H. Bass & Company -v- The Royal Bank of Scotland (1987) Jersey Unreported, application was made for a declaration that leave was not required for the plaintiff to use documents obtained by it from the defendant pursuant to an order of the Court for the purposes of a related action to be brought against third parties within the jurisdiction of the Courts of the Island of Guernsey or alternatively for such leave. The learned Bailiff ruled that leave must be obtained and that the application should be supported, unless there are exceptional circumstances, by affidavit. The relevance to the present case is that the order had been made on the basis of the principle enunciated in the Norwich Pharmacal case as applied in In the matter of the Representation of Donald Charles Lucas.

The Court also applied Bankers Trust Co. -v- Shapira and Others, and thus the Norwich Pharmacal principle, in Guinness plc -v- Market & Acquisition Consultants Limited (10th December, 1987) Jersey Unreported. That was a tracing action, but the Court equated the orders made with those relating to Mareva injunctions and Anton Piller orders. The learned Bailiff cited the extract of Lord Denning's judgment in Banker's Trust Co. -v- Shapira and others which we have already cited and said:

"It seems to me that this is a very similar position particularly when we have had regard to the orders that, in fact, were issued by the Court in the Mediterranea Raffineria Siciliana Petroli case".

That case - Mediterranea Raffineria Siciliana Petroli SpA -v- Mabanagt GmbH (1978) Court of Appeal Transcript 8 16 was not a fraud on a bank. Nor a fraud at all. Owing to mistake in a commercial transaction, moneys payable to the plaintiffs were paid to other people. It was desired to trace them. A Mareva injunction was granted and also an order for discovery of documents to discover where the money had gone.

The same principles were applied in Paramount Airways Ltd -v- Anser General Investments S.A. and others (6th October, 1989) Jersey Unreported.

It follows from all that we have said that we must carefully examine the objections of the defendants and of the intervenors in order to decide whether there are grounds upon which we should decline to apply the Norwich Pharmacal principle in the present case.

"Mere witness" and subpoena duces tecum. In the Court's view the defendants are not "mere witnesses". At p.960 of Norwich Pharmacal Co. -v- Comrs. of Customs, Viscount Dilhorne says this:-

"Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. In Orr v. Diaper (1876) 25 WR 23, 4 Ch. D 92, Diapers were involved, so were Elkans in Upmann -v- Elkan (1871) LR 12 Eq. 140, so was the East India Company in Moodalay -v- Morton (1785) 1 Bro. CC 469, and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing".

Lord Kilbrandon also disposes of the 'mere witness' rule at pages 973 and 974 of the report.

The Court is satisfied that the defendants are not "mere witnesses". Through no fault of their own they became mixed-up in the tortious acts of others and they are under a duty to give full information.

The defendants cannot be subject to a subpoena duces tecum because they are without the jurisdiction which is the forum of the litigation. Therefore, they are not compellable as witnesses either to testify or to produce documents at the trial. But even if they were so compellable the disposal of the "mere witness" argument likewise disposes of the subpoena duces tecum argument. And, within this jurisdiction, the fact that a witness was compellable both to testify and to produce documents at the trial was insufficient to prevent an order for pre-trial discovery being made against a non-party (In re representation of Donald Charles Lucas).

Order 70 of the Rules of the Supreme Court; the Evidence (Proceedings in Other Jurisdictions) Act 1975; the Service of Process and Taking of Evidence (Jersey) Law, 1960; the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983; the Service of Process and Taking of Evidence (Amendment) (Jersey) Law, 1985; the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial matters. It was argued on behalf of the defendants and the intervenors that the correct procedure which the plaintiffs should have followed was to be found in these

statutory provisions; that the obtention of evidence has always been exclusively statutory; that the plaintiffs were to be criticized for seeking to circumvent the statutory provisions; that there is no right to general discovery under the statutes; that if the statutory machinery which is established will not permit the very wide and swinging order for discovery obtained by the plaintiffs then it is wrong to circumvent that machinery by the means employed in order to improve their position.

The defendants relied on Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation and others (1986) 1 Ch. 482. In that case, in an action brought by the plaintiff against certain company and individual defendants alleging fraud, the plaintiff obtained an order ex parte under section 7 of the Bankers' Books Evidence Act 1879 against an American bank which was not a party to the action. The order required the bank to produce books and other papers, held at its head office in New York, which related to an account of one of the defendants. The plaintiff then issued a *subpoena duces tecum* against an officer of the bank at its London office. Hoffmann J. discharged the order and the subpoena on the grounds that, save in exceptional circumstances, the Court should not require a foreigner who was not a party to the action, and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept, to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction; that the order and the subpoena, taking effect in New York, were infringements of the sovereignty of the United States; and that in all circumstances and particularly as legitimate alternative procedures were available to the plaintiff, such infringements were not justified.

But in the present case no question of infringement of sovereignty or international jurisdiction arises. The English court has not sought to do anything in this jurisdiction. It is true that Hoffmann J accepted a submission that as between states which are party to the Hague Convention or similar bilateral treaties, evidence should ordinarily be obtained only by the methods prescribed or permitted in the Convention (Emphasis added). But he did not rule out an application directly to the courts of New York.

The defendants and the intervenors relied on Rio Tinto Zinc Corporation and others -v- Westinghouse Electric Corporation et al contra, RTZ Services Ltd and others -v- Westinghouse Electric Corporation et al contra, (1978) 1 All ER 434 to demonstrate the limitations. Mr. O'Connell also cited Re Asbestos Insurance Coverage Cases (1985) 1 All E.R. 716 H.L. The Court accepts that a strict attitude is taken by the English Courts in giving effect to foreign requests for the production of documents by non-party witnesses. Under the statutory provisions what must be requested

is "evidence" and not pre-trial discovery. Thus the documents are to be identified.

But Mr. O'Connell summed up the argument when he said that on the one hand the plaintiffs should use only the appropriate procedure under the statutory provisions but that on the other hand that procedure was not available to them because there was no or insufficient basis for a letter of request because they had pleaded none or insufficient of the matters raised in the Jersey proceedings in the English proceedings.

The Court does not accept that the existence of the statutory provisions resulting from the Hague Convention prevents, in a proper case, the grant of orders applying the Norwich Pharmacal principle in its widest form.

"Fishing Expedition". The defendants and the intervenors both claim that the purpose of the orders contained in the Order of Justice is to enable the plaintiffs to engage in a 'fishing expedition'.

It is not in dispute that under the statutory provisions resulting from the Hague Convention the Court is prohibited from making an order against a stranger to the proceedings requiring him to make general discovery of documents. Such an order would be in the nature of a 'fishing expedition' which is never allowed in the English Court (see per Lord Goddard C.J. in Radio Corporation of America -v- Rauland Corporation (1956) 1 QB 618 p.649).

Mr. O'Connell said that the orders granted in the Order of Justice constitute a 'fishing expedition' because the plaintiffs are merely seeking to obtain evidence to strengthen their existing arguments before the English court and they should not be permitted to 'fish' in this way.

Mr. White said that what the plaintiffs want is to have a look at the documentation and to ascertain whether it leads to a train of enquiry which in its turn leads to admissible evidence, and that the Courts of this Island and of England have found that to be an unacceptable approach. What the Court was being asked to do was simply to order third parties to deliver up all their files so that the plaintiffs might sift through them to see if they "could hook a big fish", which was contrary to all established principles.

Mr. Binnington suggested an analogy. If he was situated next to a pond and he had not the faintest idea whether the pond contained fish or not, then to cast his line would be to 'fish' in a way the principles to be applied do not allow. However, if he has seen someone put fish into the pond but does not know how many or what type, he is entitled to cast his line into the pond

to catch the fish. To some extent all tracing actions are a form of 'fishing'. In this case there had been a series of payments for which there was no evidence of any commercial justification. If the plaintiffs were totally wrong, then the documentation to be obtained would show that everything had been 'above board' and no action would lie on discovery. But it was in the nature of wrongdoers to cover their tracks and the plaintiffs were entitled to discovery to uncover those tracks.

The Court rejects the argument of the defendants and the intervenors. The defendants are not "strangers" to the proceedings in respect of whom an order for general discovery could not be made. The defendants, through no fault of their own, are mixed up in the tortious acts of others. Mr. Binnington's analogy is sound and the Norwich Pharmacal principle applies.

Relevancy. Mr. O'Connell alone raised this objection. The Jersey proceedings raise issues not raised in the English proceedings. Mr. Burger did not exhibit the English pleadings which, Mr. O'Connell argued, he should have done, and had he done so the relevance of the English proceedings would have been obvious. There was thus, he submitted, a failure to make full and frank disclosure. Furthermore, Mr. Burger, who stated so categorically that the Norwich Pharmacal case was applicable, had misled me because the main reason why I had made the order was the belief that the Norwich Pharmacal case was on all fours with the present one. That was shown, he claimed, by the Court's interest in the Norwich Pharmacal case and its subsequent development, its application in Jersey, and the possibility of extending the principle in Jersey. The affidavit of Mr. Burger was flawed and the Court was entitled to discharge the order, and not re-grant, it as a form of punishment.

In the view of the Court there is no substance in this point. The primary interest of the Court is that justice should be done. Even if the Court were to feel constrained to discharge the orders for a failure to make full and frank disclosure, it has inherent jurisdiction to impose new orders in identical terms if the interests of justice so require [see Walters and twenty-eight others -v- Bingham (1985-86) JLR 439].

Confidentiality. Mr. O'Connell made two submissions. The first was the narrow aspect of the duty of confidentiality of the defendants to their clients, although he conceded that the defendants would be protected under an order of the Court requiring disclosure; nevertheless, he said, confidentiality was a factor to be weighed in the balance when orders of the type with which the Court is here concerned are sought. The second was a wider aspect: Jersey has an international reputation as a finance centre; persons who conduct legitimate business should be able to come to our jurisdiction and conduct such business in the knowledge that their private business affairs, properly conducted,

are confidential. He questioned the desirability of permitting persons not resident to swoop on unsuspecting residents with swinging orders, seeking almost limitless discovery against local entities. Mr. White did not address the matter of confidentiality specifically.

The issue of confidentiality was considered in the Norwich Pharmacal case. The court was entitled to order discovery of documents for the purpose of legal proceedings if the public interest in the administration of justice required it. The court found that in the circumstances of the case the public interest in the confidentiality of the information was outweighed by the interests of justice.

The Court applies the identical test in the present case. Of course, we have weighed confidentiality in the balance in reaching our decision. But we do not share Mr. O'Connell's fears for the future of the finance industry. Confidentiality depends upon legitimate private business affairs being properly conducted. Here, there is a strong *prima facie* case to the contrary.

Other authorities. Nothing would be gained by a detailed review of the many other authorities placed before us. Re Tucker (a bankrupt), ex parte Tucker (1988) 1 All E.R. 603 concerned the powers of a trustee in bankruptcy to serve summonses outside the jurisdiction or to make orders for the examination out of England of a person and In the Matter of the Bankruptcy of Tucker and the Representations of McFadyen and others and of (No.2) of Clyde-Smith (4th July, 1988) Jersey Unreported concerned interlocutory matters in the same bankruptcy. They are not relevant to the exceptional character of the Norwich Pharmacal principle. The latter principle is an exception to the general rule (Abbott Industries Incorporated -v- Warner and Others (1985 - 86) JLR 375) that an injunction can only be granted in support of and ancillary to a substantive cause of action within the jurisdiction. In Dreyfus v. Peruvian Guano Company (1889) 41 Ch.D. 151, the sole purpose of the action was to obtain evidence for an existing case; there was no element of identification of wrongdoers or tracing of assets. In any case we are not sure that the same decision, which has no regard to the principles of comity, would be reached today. Loose -v- Williamson and another (1978) 3 All E.R. 89 is merely an example of the straightforward application of the Norwich Pharmacal principle. British Steel -v- Granada Television (1981) A.C. 1096 dealt with the question whether the media of information, and journalists who wrote or contributed for them, had an immunity based on public interest which protected them from the obligation to disclose in a court of law their sources of information, when such disclosure was necessary in the interests of justice, but, insofar as it is relevant to the present case, it involved another straightforward application of the Norwich Pharmacal principle. A reading of that case shows how wide the Norwich Pharmacal principle really is - and that it is nothing

new, being a revival of the old bill of discovery. The real question in that case was whether an exception should be made for the press. But the breadth of the Norwich Pharmacal principle strengthens us in our view of its application to the present action. X Ltd and another -v- Morgan-Grampian (Publishers) Ltd and others (1990) 2 All E.R. 1 is yet another example of the application of the Norwich Pharmacal principle to a case involving a journalist's source of information. However, proceedings were already in existence when the order for discovery was made, but the fact that the publishers had been successfully restrained already by *qua timet* injunctions from disseminating the confidential information did not affect the court's jurisdiction to order discovery; and what was ordered to be disclosed was not the name of the source but the journalist's notes from which the identity of the source might be discovered. The point, relevant in the present case, was that it was not until it was disclosed that the relevance of the material could be determined.

We must comment upon the affidavit evidence. The evidence of Mr. Burger satisfied me that I should sign the Order of Justice containing the injunctions. After the Order of Justice was served two affidavits were sworn by the second defendant and one by a Solicitor of the Supreme Court instructed by the intervenors to which was annexed an Opinion from English Counsel (who is Junior Counsel representing the intervenors in the English proceedings) seeking to argue that the Norwich Pharmacal principle does not apply in the present case and is precluded by the 'mere witness' rule and that the principle should not be extended to encompass the present case. However, none of the three affidavits contain any evidence to contradict any of the evidence given in these proceedings by Mr. Burger. At the main hearing on the 23rd July, 1990, the Court, having overruled the objections of Mr. Mourant, allowed in and considered an affidavit from Mr. William Donald Ashcroft who deposed that he was from May 1981 to approximately February 1988 a director of the first plaintiff. His affidavit was in response to that of Mr. Burger, but limited to the Malverda transactions. Indeed he had been advised that "it would not be appropriate" for him to deal in detail with the matters specified by Mr. Burger in his affidavit. Mr. Ashcroft deposed that in approximately 1987 all shares in Malverda were transferred to a Jersey Trust (unnamed) of which he was one of the beneficiaries. He failed to name the other beneficiaries. His memory had been faulty in an earlier deposition, which had been in draft form only. There were other unsatisfactory aspects to Mr. Ashcroft's affidavit. Nevertheless, it did raise questions on some of the statements contained in Mr. Burger's affidavit. The production of Mr. Ashcroft's affidavit at such a late stage must affect the weight to be given to it. It is, we think, of particular significance that there was no affidavit from either of the intervenors upon the substantive matters we had to consider. The reliance on the affidavit of Mr. Ashcroft appears to us to be a device whereby the intervenors avoid filing affidavits upon which

they could be cross-examined. Thus the intervenors do not raise any issues at all on the CES transactions where the Court has found that there is a *prima facie* case of fraud. And without the documents which may be disclosed it is not possible necessarily to identify all the perpetrators of that fraud. We are not persuaded by Mr. Ashcroft that there are insufficient reasons to justify injunctions based on the Norwich Pharmacal principle.

Conclusion: The Order of Justice alleges breaches by the Intervenors of their fiduciary duties involving deception (the C.E.S. transactions). The conduct alleged amounts to fraud. The Order of Justice alleges the payment of monies due to the first plaintiff to companies not owned or controlled by the first plaintiff (the Malverda transactions). Without the discovery sought the first plaintiff is unable to trace the funds paid to Malverda by the first plaintiff.

The fact that this case is not on all fours with the Norwich Pharmacal case or with the Bankers Trust case does not, in our judgment, preclude us from maintaining the orders contained in the Order of Justice.

We have here a "mixed bag" of allegations. Whilst actions have been brought in England alleging breaches of warranties and misrepresentation there is disclosed in the Jersey proceedings a *prima facie* case of fraud. Information is sought within this jurisdiction which could give rise to amended proceedings or new proceedings in England for fraud. Those proceedings could involve additional wrongdoers whose identity would be disclosed on discovery. Insofar as Malverda is concerned the plaintiffs seek to establish on discovery its true beneficial ownership and to trace monies paid to it which are unaccounted for.

In our judgment we are not, by maintaining the orders made, extending the Norwich Pharmacal principle. But even if we are so doing, we must not be afraid to do so in the interests of justice. There were old cases for discovery long before the Norwich Pharmacal case and which were considered in that case. In Mandalay v. Morton (1785) 1 Bro CC 469 discovery was sought not to ascertain the identity of anyone but who it was that was responsible for the injury the plaintiffs had suffered. It was information, not names, that was sought. In the Norwich Pharmacal case Lord Kilbrandon, at page 974, cited, with approval, Bray's Principles and Practice of Discovery (1885) at p.612:

"A party might file a bill of discovery before he commenced his action, where he required discovery in order to ascertain what form of action to bring...or in order to ascertain the proper person against whom to bring the action...."

The Court cannot see why the principle should not apply equally to what re-amended form of action or new form of action the plaintiff should bring.

In South Carolina Insurance Co. -v- Assurante Maatschappij "De Seven Provincien" N.V. (1987) A.C.24 at p.44, Lord Goff of Chieveley said:

"I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute and it is impossible at the present time to foresee every circumstance in which it may be thought right to make the remedy available".

We share that reluctance because we believe that the interests of justice are paramount. In the same case, at p.42, Lord Brandon of Oakbrook said that:

"It is...of the utmost importance to appreciate that the reason why English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action is for the protection of those third parties, and not for the protection of either of the persons who are parties to the action".

Complaint is made that even if the Malverda transactions could be a tracing matter, it is stale, that Malverda no longer exists and that what allegedly happened, happened many years ago. It is also claimed that the first plaintiff was then a private company and that the matters complained of were fully approved by the company. That may be so, but a company is an entity, a "person" in law, separate and apart from its shareholders and/or directors. In the Bankers Trust Co. v. Shapira and others case the fact that a considerable period of time had elapsed did not deprive the court of its power to make the order.

At the end of the day this is a matter of inherent jurisdiction and of discretion. The Court does not share the views of the defendants and of the intervenors and in its judgment the injunctions or orders were properly granted in the interests of justice.

Accordingly, the defendants' summons is dismissed.

Authorities referred to:

Ninemia Maritime Corporation -v- Trave Schiffahrtsgesellschaft GmbH ('Niedersachsen, The') (1983) 2 Lloyd's Rep 600 at p.605.

Norwich Pharmacal Co. and others -v- Commissioners of Customs and Excise (1973) 2 All ER 943 HL at pp 947-949, 951, 952, 960, 963, 974 and (1974) AC 133.

Bankers Trust Co. -v- Shapira and others (1980) 3 All ER 353 CA at pp 357, 359.

In the matter of the Representation of Donald Charles Lucas (1981) JJ 83.

G.H. Bass & Company -v- The Royal Bank of Scotland (1987) Jersey Unreported.

Guinness plc -v- Market and Acquisition Consultants Limited (10th December, 1987) Jersey Unreported.

Mediterranea Raffineria Siciliana Petroli SpA -v- Mabanagt GmbH (1978) Court of Appeal Transcript 816.

Paramount Airways Ltd -v- Anser General Investments SA and others (6th October, 1989) Jersey Unreported.

Orr -v- Diaper (1876) 25 WR 23, 4 Ch. D. 92.

Upmann -v- Elkan (1871) LR 12 Eq. 140.

Mackinnon -v- Donaldson, Lufkin and Jenrette Securities Corporation and others (1986) 1 Ch. 482.

Rio Tinto Zinc Corporation and others -v- Westinghouse Electric Corporation et y contra, RTZ Services Ltd and others -v- Westinghouse Electric Corporation et y contra, (1978) 1 All ER 434.

Re Asbestos Insurance Coverage Cases (1985) 1 All ER 716 HL.

Radio Corporation of America -v- Rauland Corporation (1956) 1 QB 618 at p.649.

Walters and twenty-eight others -v- Bingham (1985-86) JLR 439.

Re. Tucker (a bankrupt), ex parte Tucker (1988) 1 All ER 603.

In the matter of the Bankruptcy of Tucker and the Representations of McFayden and others and of (No. 2) of Clyde-Smith (4th July, 1988) Jersey Unreported.

Abbot Industries Incoporated -v- Warner and Others (1985-86) JLR 375.

Dreyfus -v- Peruvian Guano Company (1889) 41 Ch. D. 151

Loose -v- Williamson and another (1978) 3 All ER 89.

British Steel -v- Granada Television (1981) AC 1096.

X Ltd and another -v- Morgan Grampian (Publishers) Ltd and others (1990) 2 All ER 1.

Mandalay -v- Morton (1785) 1 Bro CC 469.

Bray's Principles and Practice of Discovery (1885) at p.612.

South Carolina Insurance Co. -v- Assurante Maatschappij "De Seven Provincien" N.V. (1987) AC 24 at PP 42 and 44.

Arab Monetary Fund -v- Chase Bank and Trust Company (CI) Limited (20th April, 1989) Jersey Unreported.

Secretary of State for Defence -v- Guardian Newspaper (1984) 1 All ER.

Ricci -v- Chow (1987) 3 All ER.

Dunning -v- Board of Governors of United Liverpool Hospitals (1973) 2 All ER.

Shaw -v- Vauxhall Motors (1974) 2 All ER.

The Supreme Court Practice (1988) Vol. 1 70/1-6/8.

Speed Seal Products Ltd -v- Paddington (1985) 1 WLR.

Cranleigh -v- Bryant (1965) 1 WLR.

R.S.C. (1991 Ed'n) O.70.

Evidence (Proceedings in Other Jurisdictions) Act 1975.

Service of Process and Taking of Evidence (Jersey) Law, 1960.

Evidence (Proceedings in Other Jurisdictions) (Jersey) Order 1983.

Service of Process and Taking of Evidence (Amendment) (Jersey) Law, 1985.

Hague Convention on the Taking of Evidence Abroad in Civil or
Commercial Matters.

Bankers' Books Evidence Act 1879.