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# *Norwich Pharmacal* relief – costs, rights and obligations in pre-action disclosure

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In a decision handed down last week, *Jofa Limited and Joseph Farah v Benherst Finance Limited and Chestone Industry Holding* [2019] EWCA Civ 899, the Court of Appeal considered the rules regarding the costs of applications for obtaining pre-action disclosure against third parties, referred to as *Norwich Pharmacal* relief.[1] The decision provides helpful guidance to parties (often financial institutions) looking to understand the extent of their obligations when approached with a request for this type of disclosure.

## Background

The respondents to the appeal, Benherst Finance Limited and Chestone Industry Holding (the "**Investors**"), had invested in a property development in relation to which they believed they had been defrauded. In seeking to recover the stolen funds, the Investors sought information and documents to help them bring their claim from Jofa Limited ("**Jofa**"), a building contractor, and its sole director and shareholder, Joseph Farah. Following lengthy correspondence with Mr Farah with which he did not engage, the Investors sought (and ultimately obtained) a *Norwich Pharmacal* order for the production of documents from him and Jofa.

The present appeal concerned the costs of those *Norwich Pharmacal* proceedings. The judge at first instance had ordered that Jofa and Mr Farah pay a proportion of the Investors' costs of applying for the order, on the basis that they had failed to engage with pre-action correspondence or comply voluntarily with the disclosure requests. The Court of Appeal was asked to determine whether the judge was incorrect in taking as her starting point that there be no order as to costs.

## Costs and *Norwich Pharmacal* relief

Giving the leading judgment, Leggatt LJ (with whom the Master of the Rolls agreed) held that the judge's starting point had been incorrect. The long established principle for *Norwich Pharmacal* relief is that the applicant (in this case the Investors) should pay the respondent's costs, including the costs of making the disclosure. The rationale for this is that the respondent is not at fault and (as a non-party to the future proceedings) would have no way of recovering its costs from the wrongdoer. The principle is set out by the Court of Appeal in *Totalise plc v The Motley Fool Ltd*[2], which was recently approved by the Supreme Court in *Cartier International AG v British Sky Broadcasting Ltd*[3].

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1 After *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

2 [2001] EWCA Civ 1897.

3 [2018] UKSC 28.

In terms of how the court's discretion should thereafter be applied, the Investors argued that it may be unreasonable for a respondent to require an application to court in cases where the justification for the order is plain and there are no other impediments (such as an obligation of confidentiality on the part of the respondent). In those circumstances, the Investors argued, the respondent should contribute to the costs of that application.

The Court of Appeal disagreed. It held that, while there is no absolute rule, it was difficult to envisage circumstances in which it would be just to award costs against a respondent who has required the applicant to satisfy the court that such an order is appropriate before providing disclosure (§31). Citing *Cartier International*, the Court noted that a respondent owes no legal duty to provide disclosure to the applicant without a court order (§32). Additionally, even though they did not oppose the Investors' application, it was not unreasonable for Jofa and Mr Farah to require the Investors to satisfy the court that an order should be made, given that the Investors sought disclosure of bank statements that Jofa and Mr Farah were *prima facie* entitled to keep private (§42). Further, it was not unreasonable for them to insist that the undertaking to pay their costs was enshrined in a court order, rather than remaining a mere promise in correspondence (§42).

## Guidance for banks in responding to disclosure requests

At the first instance hearing, the Investors also sought and obtained an order from National Westminster Bank plc ("**Natwest**") for disclosure of documents relating to the bank accounts of the alleged fraudsters. Natwest were not represented at the hearing, but had indicated in correspondence that, although it did not consent, it would not oppose the order sought. The Investors had agreed to pay Natwest's costs of complying with the disclosure order and that there should be no order for costs in respect of the application itself (§16).

Although Natwest were not a party to the appeal, the judgment nevertheless provides helpful guidance for banks and other institutions who are looking to understand their obligations (and rights) when approached with these requests. In particular:

- While a respondent is obliged to comply with an order, it is similarly entitled to have the costs of doing so reimbursed by the applicant. In *Cartier International*, Lord Sumption (giving the leading judgment, with which the other Justices agreed) noted (at §13) that this also applies to orders for disclosure to trace the proceeds of fraud[4] and to freezing orders[5].
- A respondent will not be penalised in costs for requiring the applicant to obtain a formal court order before complying with the request. In this case, Leggatt LJ (at §41) considered the interplay with a bank's duty of confidentiality to its customers and noted that if a bank were to give such disclosure without an order from the court, it would be exposed to a potential claim by its customer for breach of confidence. A bank is not required by its duty of confidentiality to oppose a disclosure application in respect of its client, or otherwise to probe the evidence in support of the application or inform the customer that such an order is being sought, where such information is sought for use in criminal or civil proceedings.

## Conclusion

This decision is a helpful reminder for banks of both their obligations and their rights when faced with disclosure requests relating to their clients. In particular, the decision provides assurance that banks in this position will be entitled to their costs of compliance and will not be penalised in costs if they require an applicant to obtain a court order. Nonetheless, respondents will not be required by any duty of confidentiality to their clients to oppose such applications, nor otherwise to probe the evidence in support.

4 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274.

5 *Z Ltd v A-Z and AA-LL* [1982] QB 558, as now embodied in the model wording contained at PD 25A of the Civil Procedure Rules.

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