[2010–12 Gib LR 214]

SNS PROPERTY FINANCE NV and SNSFP FINANCIERING PARTICIPATIES BV v. BELLWETHER NOMINEES (IBERIA) LIMITED, STM FIDECS NOMINEES LIMITED, PLUMMER and CAMBLE

COURT OF APPEAL (Kennedy, P., Parker and Tuckey, JJ.A.): September 7th, 2011

Civil Procedure—disclosure—Norwich Pharmacal order—court has discretion to allow disclosed information to be used in foreign proceedings subject to informing person about whom disclosure made of Norwich Pharmacal proceedings and orders made—fair, in appropriate cases, that persons likely to be seriously affected by use of information have opportunity to challenge disclosure

The appellant companies applied to the Supreme Court to use information obtained by a *Norwich Pharmacal* order in foreign proceedings.

The appellants signed a joint venture agreement with Multiplan Group S.A. to pursue a high-profile construction project in Luxembourg, to be undertaken by subsidiaries of Multiplan, and for that purpose provided credit facilities. Before negotiating the agreement, Multiplan had substantially increased its share capital, financed by Caldwell Ltd. and a Mr. Van Erp. The respondents had been directors and shareholders of Caldwell Ltd., which had later been struck off the register of companies. Construction work commenced, but despite payment of the full construction price, the project remained incomplete and there were allegations that funds had been misused. The appellants terminated the agreement and commenced civil and criminal proceedings in Luxembourg, the Netherlands, Belgium and Switzerland, claiming that Multiplan had fraudulently increased its share capital to deceive them into believing that it was a company of sizeable standing, and enable Mr. Van Erp, Multiplan, and its associated companies to misappropriate funds. Mr. Van Erp had not yet been joined as a defendant in the foreign proceedings.

The appellants obtained an *ex parte Norwich Pharmacal* order against the respondents in the Supreme Court (Dudley, C.J.) for, *inter alia*, disclosure of the ultimate beneficial owners of the shares held by the respondents in Caldwell Ltd. and information about Multiplan's share capital increase. Part of the order stipulated that the existence of the proceedings and provisions of the order should not be disclosed to any person concerned. A return date was fixed, before which the respondents

had complied with the order and revealed information about the involvement of Mr. Van Erp. At the return hearing, the appellants sought permission to use that information in the foreign proceedings. The court granted permission, with the qualification that the appellants were to serve Mr. Van Erp with a copy of the *Norwich Pharmacal* proceedings and the orders made. It further ordered personal service at Mr. Van Erp's Zurich address, in accordance with the CPR, r.6.40.

The appellants sought the removal of that restriction, submitting that (a) the court had misused its discretion in requiring service on Mr. Van Erp of information about the *Norwich Pharmacal* proceedings and orders but that, as the restrictions on disclosure of the proceedings had ceased when the respondents complied with their disclosure obligations, it would be open to the respondents to reveal such information; alternatively, (b) the method of service ordered was excessively burdensome and the court should amend the order to allow service by registered post.

Held, dismissing the appeal, except in respect of the method of service:

(1) It had been within the proper exercise of the court's discretion to qualify its order permitting the appellants to use the information disclosed under the *Norwich Pharmacal* order in the foreign proceedings by requiring that they first inform the person about whom the disclosure had been obtained, Mr. Van Erp, about the *Norwich Pharmacal* proceedings and the orders that had been made. Although the respondents probably had the obligation to convey such information to the subject of the disclosure, as the restrictions on their revealing that information had ceased when they complied with the order, there was no guarantee that they would do so. It was therefore fair that a person likely to be seriously affected by the use of such information in foreign proceedings should have the opportunity to challenge the disclosure. However, it was not necessary to determine whether information about orders relating to *Norwich Pharmacal* disclosure should in all cases be notified to those capable of being affected by them (paras. 6–7; para. 10).

(2) The method of service ordered was excessively burdensome. The court's reference to the CPR, r.6.40 had been inappropriate and unreasonable in requiring personal service in accordance with international conventions. The court would, therefore, amend the order to allow service abroad by registered post (paras. 7–10).

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.6.40:

"(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served—

(a) by any method provided for by—

(i) rule 6.41 (service in accordance with the Service Regulation);

(ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or

. . .

(b) by any method permitted by a Civil Procedure Convention or Treaty . . .”

C. Simpson for the appellants;
The respondents did not appear and were not represented.

1 **KENNEDY, P.:** On May 24th, 2011, Dudley, C.J. granted to the appellants, SNS Property NV and SNSPF Financiering Participaties BV, an extension of time for the filing of their notice of appeal and leave to appeal to this court against paras. 1, 2 and 4 of his order of March 4th, 2011. In that order, the Chief Justice granted to the appellants permission to use information obtained in response to an earlier order dated February 11th, 2011 in certain identified proceedings in other jurisdictions, subject to a requirement that the appellants serve a copy of these proceedings and of the orders obtained in these proceedings on Mr. Cornelius Van Erp of Zurich, Switzerland, who is not a party to these proceedings. The requirement was introduced into the order of March 4th, 2011 at the instigation of the Chief Justice, and it is the appellant’s contention made before this court by Mr. Charles Simpson that no such requirement should have been imposed.

2 In order to deal with the issue which we have to decide, it is necessary to say something about the background. Caldwell Ltd. is a Gibraltar company which was struck off the register of companies on November 13th, 2004. The respondents were directors and shareholders of Caldwell Ltd. before it was struck off. The first appellant is a Dutch bank and the second appellant is a subsidiary of the first appellant. Early in 2005, the first appellant commenced discussions with Multiplan Group S.A. in relation to a high-profile construction project in Luxembourg called the Belval Plaza Project and on April 4th, 2006 they signed a joint venture agreement in relation to that project. On March 30th, 2004, before entering into negotiations with the first appellant, Multiplan had increased its share capital very substantially. It is the contention of the appellants that Multiplan did that in order to present itself as a company of sizeable standing. It is also the contention of the appellants that the mechanism used by Multiplan to increase the share capital was to issue 97,704 preferred equity stock certificates, each having a par value of €453.78. This was financed in part by Caldwell Ltd., which subscribed to one-third of the shares, at a cost of €14.8m. Caldwell, it is said, was able to do that by assigning the value of a Swiss company, ITP Holding AG, controlled by Mr. Van Erp, and the other two-thirds of the financing for the increase in the capital of Multiplan, was achieved by the participation of Mr. Van Erp. When the joint venture agreement was signed, Mr. Van Erp was again involved. In essence, the first appellant provided credit facilities and the construction project was to be undertaken by subsidiaries of Multiplan.

But by March 2009, although the full construction price had been paid to Multiplan companies, the project was far from complete, and there were significant allegations of misuse of funds. In September 2009, the first appellant served notice of termination, and thereafter Luxembourg and Switzerland civil and criminal proceedings were commenced. In those proceedings it is the case for the appellants that they were the victims of fraud. The Caldwell participation in the increase of capital by Multiplan was, it is said, a manoeuvre to deceive the appellants into believing that Multiplan was a substantial company with which it could safely enter into a joint venture, and enable Mr. Van Erp, Multiplan and its associated companies to misappropriate substantial amounts in excess of any contractual entitlement. The appellants also suspected that Mr. Van Erp was the beneficial owner of Caldwell Ltd. So much for the background.

3 It was against that background that these proceedings were launched by the appellants to obtain what is commonly known as a *Norwich Pharmacal* order, that is to say an order directed to the respondents requiring them to disclose to the appellants the identity of the ultimate beneficial owners of the shares held by each of them in Caldwell Ltd., and other information about the incorporation of Caldwell, the operation of that company, the increase of its share capital and its ultimate demise.

4 The order was made *ex parte*, as is usual in such circumstances, on February 11th, 2011. It required the information sought to be provided within 7 days of service of the order and para. 8 of the order was in these terms:

> "The defendants be restrained for a period of 30 days from the date of service of this order (as applicable to each defendant) from directly or indirectly informing anyone of the existence of these proceedings or of the provisions of this order, or otherwise warning anyone that proceedings may be brought against that person by the claimants or any other person concerned, otherwise than for enabling the defendants to obtain legal advice in relation to these proceedings and the order obtained."

A return date was fixed for a further hearing in respect of the order, that return date being March 1st, 2011.

5 On February 22nd, 2011, Mr. Gardner, the Managing Director of STM Fidecs Management Ltd. swore an affidavit which disclosed information and which for present purposes is taken to have complied with the requirements of the order of February 11th, 2011. So when the matter came back before the Chief Justice on the return date, what the appellants were seeking was an order in para. 1 giving them permission to use and disclose the information obtained in the affidavit of Mr. Gardner in the various civil and criminal proceedings in relation to Multiplan which by

then existed in the Netherlands, Luxembourg and Belgium. It was proposed by the appellants that the order should be in that general form but, as we were told by Mr. Simpson this morning, no draft order was in fact placed before the judge at the time when the matter was argued.

6 Clearly, in the proposed order, the appellants envisaged that the injunction imposed by para. 8 of the original order could no longer be sustained and would have to be revoked and that is expressly conceded by Mr. Simpson in his submissions to us today. That meant that after March 1st, 2011, when the order was drawn up, it was envisaged by the appellants that the respondents in the present proceedings would be at liberty to notify Mr. Van Erp of the existence of these proceedings and of the orders made in relation to them. What then could happen? Inevitably Mr. Van Erp, if so minded, could instruct lawyers in Gibraltar to take out proceedings to bring the matter back to court so that he could argue that the material disclosed by Mr. Gardner should not be used in other jurisdictions. Again, Mr. Simpson concedes that that would have been a realistic possibility, and it is furthermore to be noted that in all probability it would be the obligation of the respondents in the present proceedings to convey the information to Mr. Van Erp along the lines which I have just indicated. They might not have done so, however, and so the judge, in accordance with general principles of fairness, was concerned that someone who was likely to be seriously affected by the order that the material could be used in other jurisdictions should have an opportunity, if so minded, to put before the court his objection. It is against that background that the judge decided to impose that part of the order which is the subject of the present appeal, namely an obligation upon the appellants to notify Mr. Van Erp of the existence of these proceedings.

7 Mr. Simpson concedes that the judge did have a discretion to exercise when deciding whether or not to permit the use of the material, but he submits that the discretion should not have been used as it was by the judge. That is something which I find difficult to understand. I would not for a moment suggest that as a matter of course, a judge should order that anyone who might be described as a wrongdoer should be informed. In the context of the present proceedings, whether Mr. Van Erp was a wrongdoer has yet to be determined. But courts are concerned to ensure that those who may be entitled to be heard in relation to a particular issue, should have every opportunity to advance any arguments they wish to advance and against that background, given that the judge did have a discretion to exercise, I find it extremely difficult to understand why in the circumstances of this particular case he should not have imposed an obligation upon the appellants to notify Mr. Van Erp. That issue was canvassed during the course of the hearing and the judge plainly came to the conclusion that notification had to be given. Mr. Simpson argues that that is against the whole spirit of the *Norwich Pharmacal* jurisdiction. Again, I

find that difficult to understand. The jurisdiction is exercised in order to enable those who can put forward a proper case for a *Norwich Pharmacal* order to obtain information which they seek and, in order to get that information, it is almost inevitably necessary to order that nothing be said to disclose the existence of the order until disclosure has been made pursuant to it; but once disclosure has been made, the obligation to restrict knowledge of the existence of the order is immediately at an end. Indeed, Mr. Simpson concedes that the injunction in para. 8 of the order had to be revoked at the time of the second hearing. Once that is conceded, it seems to me that when a judge, as in the present case, decides that someone ought to have an opportunity to make representations before the court, all that is left is the decision as to how he or she should be notified in order to enable them to take advantage of the rights which the judge considers that they ought to have. That brings me to what is, in effect, Mr. Simpson's second point and that is that the procedure laid down by the judge was in fact onerous and inappropriate. What the judge ordered was in these terms: "The claimants shall serve a copy of these proceedings and orders in accordance with CPR, r.6.40 upon Mr. Cornelius Van Erp of . . . Zurich, Switzerland."

8 Mr. Simpson submits that in practice it is extremely onerous. The method of notifying Mr. Van Erg was not in fact argued before the judge, what happened was that, there being before the judge no draft order submitted by the applicants, after the judge had indicated the way in which he considered that the matter should proceed, he left it to the applicants to prepare a draft order. We have that draft order, in which it was proposed that the claimant should notify Mr. Van Erp of the terms of the order, such notification to be effected by sending a copy of the order by post in a registered letter addressed to Mr. Van Erp at his official address, and it is there set down.

9 The judge, as can be seen from the copy, altered that draft order without any further form of hearing and on the basis of his alterations the appellants then redrafted the order in the form in which it was finally entered. We understand that the appellants did in fact seek an opportunity to bring the matter back before the judge as to the form of service but for practical reasons that did not happen before the hearing before us today.

10 Today Mr. Simpson has explained that not only does he submit that the reference to the CPR, r.6.40 is inappropriate, but also that any requirement to serve in accordance with the provisions for service in that order would, in itself, be onerous because it would involve service in accordance with international conventions, with all the factors thereby involved. I, for my part, have no difficulty in accepting that the reference to the Civil Procedure Rule was inappropriate. Even if one interprets that reference on the basis that, although the rules themselves did not apply, that was the method of service which the judge had in mind, I have no

difficulty in accepting Mr. Simpson's submission that that would impose a considerable obligation upon the appellants and that there was no need for such a heavy obligation to be imposed. It would have been sufficient to meet the judge's concern if the order were to be roughly in the form originally proposed by the appellants in the first draft which they submitted to the judge after the 10-day period. In other words, it seems to me that if para. 1 of the order were to be altered so as to read—

> "the claimants shall serve a copy of these proceedings and orders upon Mr. Van Erp, and service shall be sufficient if made by registered letter posted to his address [in] . . . Zurich, Switzerland . . ."

then the order will achieve that which the judge had in mind without imposing any unreasonable obligation upon the appellants. Beyond that, I see no reason whatsoever to alter the order made by the judge. But as I have attempted to indicate, I am not, by anything said in this judgment, indicating that in every case it will be appropriate that a return date, if one is fixed, shall be used to decide whether an order obtained in accordance with *Norwich Pharmacal* principles shall be brought to the attention of anyone else. If on the return date the judge considers that someone ought to be notified on the particular facts of the case, so be it, but it would not be a matter of course to give such notification, and all that I would say in relation to the present circumstances is that, in the exercise of judicial discretion, it seems to me that no criticism can be made upon the course embarked upon by the judge and accordingly I would, save for the alteration into the method of service, dismiss this appeal.

11 **PARKER** and **TUCKEY, JJ.A.** concurred.

Orders accordingly.

[2010–12 Gib LR 221]

MARRACHE v. TRUSTEE OF THE PROPERTY OF MARRACHE

COURT OF APPEAL (Kennedy, P., Parker and Tuckey, JJ.A.): September 8th, 2011

Bankruptcy and Insolvency—adjudication of bankruptcy—adjournment—debtor bears heavy burden of showing that refusal of adjournment wrong—court's speculation about creditors' accepting composition or scheme of arrangement no justification for refusal—giving time for creditors to consider statement of affairs with view to composition or scheme potentially good reason to adjourn but outweighed by debtor's delay in providing statement of affairs and need to preserve effectiveness of bankruptcy proceedings—composition or scheme may be approved after adjudication

An official trustee applied to the Supreme Court for an adjudication of bankruptcy in respect of the appellant.

The appellant had been the senior partner in the law firm Marrache & Co. when the firm was wound up and joint liquidators appointed. He and his two brothers faced bankruptcy proceedings and criminal charges for, *inter alia*, allegedly misappropriating client funds. A receiving order was made against him and the respondent, who was the official trustee, was appointed as the receiver of his estate. The appellant's appeal against that order was dismissed by the Court of Appeal and the respondent then requested the appellant to submit a statement of affairs, which, by the Bankruptcy Act 1935, s.15(2), had to be provided within seven days of the receiving order being made. Solicitors for the appellant requested an extension of time, which the respondent granted. The appellant failed to comply with the extended deadline and complained to the respondent that he had been unable to do so because he had not been given sufficient access to the firm's affairs. A further extension of time was refused and the first creditors' meeting then resolved to have the appellant adjudged bankrupt. The appellant's solicitors requested an adjournment of two weeks so that a proposal could be put forward to settle the debt, but after two weeks no proposal had been made. An application was made and, one clear day before the hearing, the appellant submitted a statement of affairs which, on his own figures, showed a deficit of £800,000 on the amounts due. The respondent had served its affidavit late shortly before the hearing.