[2015 Gib LR 53]

CHEVRON CORPORATION v. DELEON, TORVIA LIMITED, JARVIS, TC PAYMENT SERVICES (INTERNATIONAL) LIMITED, GT NOMINEES LIMITED and OTHERS

SUPREME COURT (Jack, J.): November 10th, 2014

Civil Procedure—disclosure—Norwich Pharmacal order—disclosure restricted to identity of wrongdoers and limited disclosure of documents necessary to disclose identity—no disclosure where documents sought could be subject of witness summons

Civil Procedure—disclosure—Norwich Pharmacal order—normal method of obtaining documents under CPR—Norwich Pharmacal exceptional jurisdiction, not to subvert normal method of seeking disclosure—claimant cannot obtain more wide-ranging disclosure against innocent third parties than against defendant under CPR

The claimant sought a *Norwich Pharmacal* order against the fifth and other defendants, and a pre-action disclosure order against the fourth defendant.

The claimant ("Chevron") alleged that the first defendant (Mr. DeLeon), the second defendant ("Torvia") and other defendants (including "Amazonia") had been involved in a conspiracy to injure it by both lawful and unlawful means. Between 1965 and 1990, Texaco Petroleum Co. was involved in a consortium drilling for oil in Ecuador. In 2001, a subsidiary of Chevron merged with Texaco Petroleum Co. In 2003, a group of Ecuadorians commenced proceedings in Ecuador against Chevron claiming "remediating environmental damages." The Provincial Court of Justice of Sucumbios in Lago Agrio gave judgment against Chevron for $18 bn. ("the Lago Agrio judgment"), which was reduced to $9.5 bn. on appeal. Chevron alleged that the Lago Agrio judgment had been obtained by grossly improper means, including the offering of a $500,000 bribe to the judge, and that this had been funded by Mr. DeLeon, Torvia, Amazonia and other defendants as part of a conspiracy to injure Chevron.

Chevron successfully brought proceedings in New York seeking an injunction against the enforcement of the Lago Agrio judgment in the United States.

The Supreme Court of Gibraltar (in proceedings reported at 2013–14 Gib LR 431) held that Chevron had established a reasonably arguable case in conspiracy against Mr. DeLeon and Torvia.

Chevron alleged that Torvia and Amazonia were used as vehicles for the funding of the litigation culminating in the Lago Agrio judgment and the beneficial owners of both companies were therefore proper defendants to the allegations of conspiracy. The fifth defendant, GT Nominees Ltd. ("GT Nominees"), held all of the shares in both Torvia and Amazonia, meaning that their beneficial ownership could not be discovered by Chevron. On September 22nd, 2014, the Supreme Court of Gibraltar granted a *Norwich Pharmacal* order against GT Nominees requiring the disclosure to Chevron of the names of the beneficial owners of Torvia and Amazonia.

In the present action, Chevron sought a further *Norwich Pharmacal* order against GT Nominees and other companies in the GT group ("the GT companies") for disclosure of all records of instructions and directions given by the beneficial owners of Amazonia and Torvia shares. Such an order would potentially encompass most of the documents held by the GT companies in relation to Torvia and Amazonia.

Chevron also sought a pre-action disclosure order under the Civil Procedure Rules, r.31.16 against the fourth defendant, TC Payment Services (International) Ltd. ("TC Payment"). TC Payment was a company used to make payments on behalf of Mr. DeLeon and his wife and it made payments totalling $3.3m. on the instructions of Mr. DeLeon to fund the litigation culminating in the Lago Agrio judgment. Chevron believed that TC Payment could have been a member of the conspiracy and therefore sought pre-action disclosure in respect of these payments.

Held, dismissing the application against the GT companies; allowing the application against TC Payment:

(1) The extensive disclosure sought by Chevron against the GT companies could not be sought through a *Norwich Pharmacal* order because the court lacked jurisdiction to make such an order. Only disclosure of the identity of wrongdoers and some limited disclosure of documents necessary for the purpose of disclosing their identity was within the scope of a *Norwich Pharmacal* order (para. 24).

(2) The order sought by Chevron was caught by the "mere witness" rule in that all of the documentation sought against the GT companies could have been the subject of a witness summons under the CPR, r.34.2(1)(b) (para. 31).

(3) A restrictive approach should be taken to the form of *Norwich Pharmacal* orders; an order should only be made when necessary and it was not necessary to make such an order here. Chevron knew the names of the beneficial owners of Torvia and Amazonia and had extensive documentation from legal proceedings in New York on which it could rely to prove the alleged conspiracy. It already had more than adequate information to bring a claim against the beneficial owners of Torvia and Amazonia and if it were to issue proceedings against them, disclosure would be ordered against them. It was seeking disclosure of documents from

innocent third parties simply as a useful means of acquiring documents which would assist it in its substantive actions. Such disclosure was not necessary and a *Norwich Pharmacal* order would therefore be refused (paras. 32–35).

(4) If the above conclusions were wrong, the court would exercise its discretion to refuse the *Norwich Pharmacal* order for the following reasons. (a) The normal method of obtaining documents was through the ordinary disclosure process under the CPR; *Norwich Pharmacal* was an exceptional jurisdiction which would not be allowed to subvert the normal method of seeking disclosure. Chevron would not be allowed to obtain more wide-ranging disclosure against innocent third parties (the GT companies) than it could obtain under the CPR against an actual party to the conspiracy action. (b) Many of the documents of which Chevron sought disclosure would be subject to a duty of confidence owed by the GT companies to their fiduciaries and could possibly contain personal details which would not be disclosed to third parties in the absence of compelling reasons. (c) The costs of the disclosure exercise were likely to be disproportionate to the benefit gained by Chevron as it would take the GT companies six weeks to comply with the order. (d) There was no urgent need for Chevron to obtain the information it sought, as shown by the fact that the action against Mr. DeLeon and Torvia was begun in 2012. There was no reason why disclosure could not proceed in the normal way against Mr. DeLeon, Torvia and any other alleged conspirators. Overall, Chevron was seeking to go on a fishing expedition and the court would therefore exercise its discretion to refuse to grant it a *Norwich Pharmacal* order (paras. 38–45).

(5) Chevron's application for pre-action disclosure against TC Payment under the CPR, r.31.16 would be granted. The threshold for jurisdiction was not a high one and the four jurisdictional requirements in r.31.16(3) were all made out. Rule 31.16(3)(a) and (b), requiring that both the respondent and the applicant were likely to be parties to subsequent proceedings, were satisfied in that it was a reasonable inference that TC Payment would have had at least some knowledge of the nature of Mr. DeLeon and Torvia's involvement with the litigation culminating in the Lago Agrio judgment, meaning that it was likely that Chevron could bring a conspiracy action against TC Payment. Rule 31.16(3)(c), requiring that, if proceedings had started, the respondent's duty by way of standard disclosure would extend to the documents of which the applicant sought disclosure, was satisfied in that Chevron sought disclosure solely in respect of identified discrete payments and these payments would satisfy the test for standard disclosure if proceedings were brought against TC Payment. Rule 31.16(3)(d), requiring that pre-action disclosure would be desirable to dispose fairly of the anticipated proceedings, and assist the resolution of the dispute without proceedings or to save costs, was satisfied in that disclosure would enable Chevron to determine whether to bring conspiracy proceedings against TC Payment. Finally, the court

would exercise its discretion in favour of disclosure because Chevron was not seeking to undertake a fishing inquisition and disclosure was likely to save costs and lead to the speedy determination of whether there would be substantive litigation between Chevron and TC Payment (paras. 59–65).

Cases cited:

(1) *Aoot Kalmneft* v. *Denton Wilde Sapte (a firm)*, [2002] 1 Lloyd's Rep. 417, not followed.
(2) *Arab Monetary Fund* v. *Hashim (No. 5)*, [1992] 2 All E.R. 911, referred to.
(3) *Black* v. *Sumitomo Corp.*, [2002] 1 W.L.R. 1562; [2003] 3 All E.R. 643; [2002] 1 Lloyd's Rep. 693; [2001] EWCA Civ 1819, applied.
(4) *Campaign Against Arms Trade* v. *BAE Sys. plc*, [2007] EWHC 330 (QB), referred to.
(5) *Compagnie Fin. & Comm. du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55, referred to.
(6) *Hollington* v. *F. Hewthorn & Co. Ltd.*, [1943] K.B. 587; [1943] 2 All E.R. 35, referred to.
(7) *Land Secs. plc* v. *Westminster City Council*, [1993] 1 W.L.R. 286; [1993] 4 All E.R. 124; (1992), 65 P. & C.R. 387, referred to.
(8) *Mercantile Group (Europe) AG* v. *Aiyela*, [1994] Q.B. 366; [1993] 3 W.L.R. 1116; [1994] 1 All E.R. 110, applied.
(9) *Mitsui & Co. Ltd.* v. *Nexen Petroleum UK Ltd.*, [2005] 3 All E.R. 511; [2005] EWHC 625 (Ch), considered.
(10) *Nikitin* v. *Richards Butler LLP*, [2007] EWHC 173 (QB), referred to.
(11) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 3 W.L.R. 164; [1973] 2 All E.R. 943, considered.
(12) *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.*, [1994] Ch. 142; [1994] 2 W.L.R. 241; [1994] 1 All E.R. 755, referred to.
(13) *Post* v. *Toledo, Cincinnati & St. Louis Railroad Co*. (1887), 144 Mass. 341, 11 N.E. Rep. 540; 59 Am. Rep. 86, referred to.
(14) *R. (Mohamed)* v. *Foreign & Commonwealth Affairs Secy. (No. 1)*, [2009] 1 W.L.R. 2579; [2008] EWHC 2048 (Admin), considered.
(15) *R.C.A. Corp.* v. *Reddingtons Rare Records*, [1974] 1 W.L.R. 1445; [1975] 1 All E.R. 38; [1974] F.S.R. 509; [1975] R.P.C. 95, referred to.
(16) *Secilpar S.L.* v. *Fiduciary Trust Ltd.*, 2003–04 Gib LR 463, applied.

Legislation construed:

Civil Procedure Rules, r.31.16: The relevant terms of this rule are set out at para. 49.

J.P. Corbett, *Q.C.*, *A. Stafford*, *Q.C.*, *S. Catania*, *R. Rathmell* and *P. Tyers-Smith* for the claimant;
C. Simpson for the first, second and third defendants;
G.C. Stagnetto and *O. Smith* for the fourth defendant;
C. Salter for the fifth and other defendants;

H. Warwick and *E. Phillips* for another defendant.

1 **JACK, J.:** Over October 30th and 31st, 2014, I heard a number of applications in various actions by Chevron Corp. ("Chevron"), the US oil company. The claims are brought against various defendants. I shall refer to the actions by the abbreviated name of the lead defendant. The applications are as follows:

(a) In the Jarvis claim, Chevron applied for pre-action disclosure. The action has now been discontinued. The only issue was costs and I gave a short judgment disposing of that issue.

(b) In the GT Nominees claim, Woodsford Litigation Funding Ltd. ("Woodsford") applied to be added as a defendant. Again, I gave a short judgment allowing that application.

(c) In the GT Nominees claim, Chevron seeks *Norwich Pharmacal* relief (see *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (11)) for the disclosure of a large number of documents. It has already, by an order of September 22nd, obtained limited *Norwich Pharmacal* relief from GT Nominees.

(d) In the TC Payment claim, Chevron seeks pre-action disclosure. Chevron also seeks to amend its application to seek third-party disclosure against TC Payment.

The background

2 Chevron claims that it is the victim of an extensive fraud and it brings substantive proceedings against four defendants, Mr. DeLeon, Torvia Ltd. ("Torvia," a Gibraltarian company), Amazonia Recovery Ltd. ("Amazonia," another Gibraltarian company) and Woodsford (an English company), who, it says, are parties to a conspiracy. The background is set out in detail in the judgment of my brother, Butler, J., delivered on March 14th, 2014, in the action brought against Mr. DeLeon and Torvia (reported at 2013–14 Gib LR 431). I shall summarize the position very briefly and omit various points which at trial will no doubt be of importance.

3 Between 1965 and 1990, Texaco Petroleum Co., a subsidiary of Texaco Inc., another US oil company, was involved in a consortium drilling for oil in the Oriente region of Ecuador. It ceased its involvement in 1992. In 2001, a subsidiary of Chevron merged with Texaco Inc. In 2003, some 48 Ecuadorians (the Lago Agrio plaintiffs, "the LAPs") commenced proceedings in the Provincial Court of Justice of Sucumbios in Lago Agrio, Ecuador, against Chevron, claiming "remediating environmental damages" under Ecuador's Environmental Management Act 1999. Those proceedings, and indeed the passing of the Environmental Management Act 1999 by the legislature in Ecuador, were arguably in breach of

an agreement reached between Texaco Petroleum Co., Petroecuador and the Government of Ecuador in 1995.

4 On February 14th, 2011, a judge of that court, Judge Zambrano, gave judgment against Chevron for some $18 bn. On January 3rd, 2012, the Lago Agrio Appeal Court dismissed Chevron's appeal against that judgment. A subsequent appeal to the National Court of Justice resulted in the judgment being reduced to some $9.5 bn. ("the Lago Agrio judgment").

5 Chevron, on February 1st, 2011, commenced substantive proceedings in New York (known as "the RICO proceedings") against, *inter alia*, Steven Donziger, a New York attorney and the LAPs' lead advisor in the Lago Agrio litigation. Chevron sought, among other things, an injunction against the enforcement of the Lago Agrio judgment in the United States and other equitable relief.

6 Both before and after the commencement of the RICO proceedings, Chevron had sought the US equivalent of third party disclosure against various persons in the United States under the US Code, Title 28, §1782 ("28 USC §1782") (assistance to foreign tribunals). Judgment in the first of these was given on June 11th, 2010, with various further judgments through 2011 and 2012, up to January 25th, 2013. (The dates are, I am told, pleaded in the amended particulars of claim in the DeLeon action and were given to me at the hearing on October 31st by Mr. Corbett, Q.C. without objection. After distributing my draft judgment, I was told that since January 2013 there have been more disclosure applications in the United States.)

7 The RICO proceedings came to trial before Judge Kaplan, sitting in the US District Court for the Southern District of New York. In an opinion dated March 4th, 2014, he found in favour of Chevron and granted the relief sought. None of the current defendants was a party to the New York litigation, so (subject to any issues of privity) they are not bound by Judge Kaplan's findings. Indeed, Judge Kaplan's findings of fact may not even be admissible in evidence: see *Hollington* v. *F. Hewthorn & Co. Ltd.* (6) and *Land Secs. plc* v. *Westminster City Council* (7). Nonetheless, Judge Kaplan's opinion refers to a large number of underlying documents which are, in principle, admissible in evidence in the Chevron litigation.

8 Chevron's case is that the judgment given by Judge Zambrano was obtained by grossly improper means, including the offering of a $500,000 bribe to the judge. The two appeals in Ecuador, Chevron says, did not cure the deficiencies in Judge Zambrano's judgment at first instance. In addition to the legal and other costs associated with the litigation in Ecuador, New York and elsewhere, Chevron says that it was the subject of a campaign of public pressure and media abuse, including a film called *Crude* which, it asserts, has caused permanent damage to its reputation.

9 Mr. Donziger, as already noted, acted on behalf of the LAPs. Chevron says that he was funded by a number of backers, including Mr. DeLeon and Woodsford. These funders, it alleges, were parties to a conspiracy whereby Chevron was injured by unlawful means (an unlawful means conspiracy) and to a conspiracy to injure Chevron by lawful means (a lawful means conspiracy). Other economic torts are also alleged. When the matter was before Butler, J., he was only considering the allegations against Mr. DeLeon and Torvia, which was said to be a vehicle for the alleged fraud. Butler, J. held, on the pleadings, that Chevron had reasonable grounds for bringing a claim in conspiracy against Mr. DeLeon and Torvia.

10 At that stage, no proceedings had been brought against Woodsford. Woodsford and Amazonia are the subject of substantive proceedings under Action No. 2014-C-110. The allegations are in similar terms to those made by Chevron in the DeLeon action. Woodsford is disputing the jurisdiction of the Gibraltarian courts and the hearing of that application is in December. An application by Amazonia challenging the jurisdiction was dismissed by me on consideration of the papers, but has been renewed by Amazonia and will be heard by me on December 1st or 2nd, 2014.

GT Nominees

11 Chevron originally sought *Norwich Pharmacal* relief solely against GT Nominees Ltd. ("GT Nominees"). The matter initially came before me on September 22nd, 2014 on what appeared to be an unopposed basis. GT Nominees' position was (and remains) one of neutrality. On that occasion, Torvia appeared by Mr. Simpson of counsel. He indicated that Torvia had substantial objections to the making of an order against GT Nominees. Woodsford sent a letter objecting to any order being made and asking for an adjournment.

12 In addition, it became apparent that some of the documents which Chevron sought might technically be in the hands of other Grant Thornton entities. As a result, three other GT companies were added as defendants. Since Torvia had a legitimate interest in opposing the application, it too was added as a fifth defendant. Further, as noted above, Woodsford has been added as a further defendant.

13 Before me on October 30th, 2014, Mr. Salter for the GT companies adopted a neutral position. Mr. Simpson, who appeared on behalf of Torvia, was willing to concede that an order for the wider disclosure of documents could be made, so long as various conditions were attached to the order, which I discuss below. Mr. Warwick, who appeared on behalf of Woodsford, opposed the granting of any *Norwich Pharmacal* relief, beyond that already granted on September 22nd.

14 The evidence on which Chevron relies is a witness statement of Stephen Catania dated June 18th, 2014. Although his witness statement mentions the possible making of orders under the Civil Procedure Rules, r.31.17 (third party disclosure) and r.31.16 (pre-action disclosure), Chevron argued this case solely on the basis of *Norwich Pharmacal* (11).

15 The background that I have set out above and, in particular, the judgment of Butler, J. show that Chevron has established a reasonably arguable case against Mr. DeLeon and Torvia. It follows that Chevron is likely to have (at any rate as a matter of law) an arguable case against other people involved in the funding of the Lago Agrio litigation. This, of course, is subject to issues about what knowledge an alleged conspirator might have. However, Chevron can legitimately say that someone putting substantial sums forward to fund litigation should be presumed to have some knowledge of at least some of the facts surrounding the Lago Agrio litigation. In particular, once matters started to be litigated in the United States, the allegations which were the subject of Judge Kaplan's opinion would, it can legitimately argue, have come to light and would be likely to have come to the attention of funders.

16 There does not seem to be a dispute that Torvia and Amazonia were used as vehicles, at least in part, for funding the litigation, both in Ecuador and the United States, and the other matters of which Chevron complains. The beneficial owners of both companies are proper defendants to the allegations of conspiracy for the reasons I have just given. The shares in both Torvia and Amazonia are held by GT Nominees, as nominees. There is, of course, nothing inherently wrong with such a nominee structure, but it means that the beneficial ownership is not a matter of public record.

17 It seemed to me on September 22nd, 2014, and still seems to me, that Chevron has shown a sufficient case under *Norwich Pharmacal* principles to have disclosed to it the names of the beneficial owners of Torvia and Amazonia. In addition, there was a trust deed in respect of Torvia which was relevant to showing who the beneficial owners were. In the event, Torvia conceded that the objections it had in relation to potential issues of privilege did not impact on the limited disclosure that I was considering ordering on that date (GT Nominees was neutral). Woodsford had written to the court, but did not appear by counsel to argue against the limited disclosure I was prepared to order.

18 Accordingly, I made the order for disclosure of that information and that one document. The balance of Chevron's application was adjourned to October 30th. Since then, GT Nominees has made the limited disclosure ordered. Chevron is apparently still considering whether to add further defendants to the DeLeon or the Amazonia actions in the light of the disclosure made pursuant to my order of September 22nd by GT Nominees.

19 Chevron now seeks a slightly more limited number of classes of documents than was originally sought on September 22nd, 2014. Classes, however, still include:

> "6. Records of instructions and directions (whether written or oral or otherwise) issued by the beneficial owners(s) (and/or any person or entity claiming to represent or in any way be related to or associated with those beneficial owners(s)) of the Amazonia and Torvia shares to the respondent . . ."

The documentation potentially encompasses most of the documents (and with certainty encompasses a very large number of documents) held by the GT defendants in relation to Torvia and Amazonia. Mr. Salter says that the burden on management time of the GT companies is such that it will take six weeks to comply. In addition, Chevron now concedes that Torvia (and I assume Woodsford and Amazonia, if they wish to) should have a right to vet documents before they are disclosed by the GT companies so that it can raise objections as regards legal professional privilege and the privilege against self-incrimination (Mr. Salter suggested that this might involve GT redacting documents, so that Woodsford would not see Torvia's documents and *vice versa*). Chevron does not agree to Torvia and the others being able to object to production on the grounds of relevance or confidentiality.

20 It is necessary to consider first whether this form of extensive disclosure can properly be sought as part of a *Norwich Pharmacal* application. In *Norwich Pharmacal* (11) itself, the House of Lords was considering whether it could order H.M. Customs & Excise to reveal the names and addresses of importers of drugs said to infringe the plaintiff's patents. The names and addresses were otherwise unknown to the plaintiff. Lord Reid said ([1974] A.C. at 173–174):

> "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 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 inquire: 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."

21 He proceeded to find that the defendants' involvement in the matter which was in issue made a difference and that disclosure of the identity of the wrongdoer should be ordered. Lord Morris agreed with Lord Reid's approval of the "mere witness" rule (*ibid.*, at 178). Viscount Dilhorne appears to agree (*ibid.*, at 186): see his comments on Grigsby, *Story's Equity Jurisprudence*, 2nd ed., §1483, at 1011 (1892) and his conclusion (*ibid.*, at 187–188). Lord Cross of Chelsea also limited relief to the disclosure solely of the identity of the malefactor (*ibid.*, at 199). This follows his exhaustive discussion of equity practice (*ibid.*, at 191 *et seq.*), which resulted (*ibid.*, at 196–197) in his approving the formulation in the American case of *Post* v. *Toledo, Cincinnati & St. Louis Railroad Co.* (13) (144 Mass. at 346–348). Lord Kilbrandon was to the same effect in *Norwich Pharmacal* (11) (*ibid.*, at 203 and 205–206).

22 Hoffmann, L.J. (as he then was), in *Mercantile Group (Europe) AG* v. *Aiyela* (8), summarized the position as being ([1994] Q.B. at 374)—

". . . [T]hat jurisdiction to order disclosure against a third party exists when two conditions are satisfied. First, the third party must have become mixed up in the transaction concerning which discovery is required. Secondly, the order for discovery must not offend against the 'mere witness' rule, which prevents a party from obtaining discovery against 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* . . .'"

23 In *Secilpar S.L.* v. *Fiduciary Trust Ltd.* (16) (2003–04 Gib LR 463, at para. 17), the Court of Appeal of Gibraltar approved the formulation of the *Norwich Pharmacal* principle in Hollander, *Documentary Evidence*, 8th ed., para. 5–03, at 75–76 (2003):

"What needs to be shown . . . is as follows:

(a) A wrong carried out, or arguably carried out, by an ultimate wrongdoer;

(b) The need for an order to enable action to be brought against the ultimate wrongdoer, usually to require the defendant to the *Norwich Pharmacal* order to identify the wrongdoer;

(c) a person who was mixed up in, or facilitated, the wrongdoing (albeit innocently) who is able to provide the information necessary to enable the wrongdoer to be sued."

24 These authorities support the proposition that only the identity of wrongdoers can properly be sought in a *Norwich Pharmacal* application, although I accept some limited disclosure of documents which is *necessary* for that limited purpose is within the scope of such an application.

25 Two authorities are cited for a wider scope for disclosure. The first is a decision of H.H. Judge McGonigal in *Aoot Kalmneft* v. *Denton Wilde Sapte (a firm)* (1) where he said ([2002] 1 Lloyd's Rep. 417, at para. 17): "I see no reason why the principle is limited to disclosure of the identity of an unknown wrongdoer and does not extend to information showing that he has committed the wrong."

26 However, the judge, sitting in the Mercantile Court, had only limited assistance from counsel, because the solicitors, Denton Wilde Sapte, against whom the *Norwich Pharmacal* order was sought, adopted a neutral approach. No one appeared actively to oppose the order sought. The case is thus weak authority for the court having any general power to order potentially very wide-ranging disclosure of documents on a *Norwich Pharmacal* application. Moreover, the judge does not explain why he fails to follow the passage quoted to him from Hoffmann, J. (as he then was) in *Arab Monetary Fund* v. *Hashim (No. 5)* (2) who said ([1992] 2 All E.R. at 914): "The *Norwich Pharmacal* case is no authority for imposing upon 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."

27 Hollander, *Documentary Evidence*, 11th ed., at para. 4–14 (2012) suggests that this passage of Hoffmann, J. was disapproved in *Panayiotou* v. *Sony Music Entertainment (UK) Ltd.* (12), but this is an error on the part of the learned author: *Hashim* was not even cited in *Panayiotou.* Hollander (*op. cit.*) contains a further error in footnote 70 to that paragraph. In *R.C.A. Corp.* v. *Reddingtons Rare Records* (15), Goff, J. did *not* order disclosure of the dates and quantities of supply of the pirated gramophone records which were the subject of the application: he expressly limited the *Norwich Pharmacal* relief to the names and addresses of the alleged bootleg record sellers. He (and the future Jacob, L.J., who represented the plaintiff record companies) treated that as clear law.

28 The other case where more extensive disclosure was given was *R. (Mohamed)* v. *Foreign & Commonwealth Affairs Secy. (No. 1)* (14). This was a very unusual case. Mr. Mohamed was facing criminal proceedings

before a US military tribunal in Guantánamo Bay. He alleged that confessions made by him to terrorism allegations had been obtained by torture in which the UK authorities had been complicit. To prove the allegations of torture, he sought disclosure of documents from the Secretary of State which would, he asserted, disclose the circumstances of his rendition and the knowledge by the UK secret service of his torture.

29 The circumstances of this case are wholly different from the current case. Moreover, the "mere witness rule" did not apply in that case, because the US tribunal could not issue a *subpoena duces tecum* which would run in the United Kingdom. It was not argued that there was any procedure other than a *Norwich Pharmacal* application whereby Mr. Mohamed could obtain the documentation sought. *Mohamed* does not, therefore, undermine the "mere witness rule," namely that documents which can be the subject of a *subpoena duces tecum* (now a witness summons) cannot be the subject of a *Norwich Pharmacal* order.

30 Insofar as *Aoot Kalmneft* (1) is authority for a far-reaching power to give disclosure, in my judgment it should not be followed in this jurisdiction.

31 In my judgment, the form of order sought by Chevron is caught by the "mere witness" rule. All of the documentation sought against the GT companies can be the subject of a witness summons under the CPR, r.34.2(1)(b) (it was not argued that emails cannot be the subject of a witness summons and in my judgment they can be: see 11 *Halsbury's Laws of England*, 5th ed., para. 1004, note 3 (2009). There may, in any event, be other powers to order the production of emails, for example the CPR, r.25.5(1)(b) and (2)(b).) The return date for the witness summons no longer needs to be the trial date: see the CPR, r.34.2(4)(b). Accordingly, on this ground, I consider that I have no jurisdiction to make the order sought.

32 Even if that were wrong, subsequent cases in England show that a restrictive approach should be taken to the form of orders. In *Mitsui & Co. Ltd.* v. *Nexen Petroleum UK Ltd.* (9), Lightman, J. held ([2005] 3 All E.R. 511, at para. 24):

> ". . . [T]he exercise of the jurisdiction of the court under *Norwich Pharmacal* against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy of last resort . . . The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information. The whole basis of the jurisdiction against them is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence . . . Whilst there is a public interest in achieving justice between disputing parties, there is also a public interest in not involving third parties if this can be avoided . . . The

jurisdiction is both exceptional and only to be exercised when it is necessary . . . The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information."

33 That approach was followed by Langley, J. in *Nikitin* v. *Richards Butler LLP* (10), but the stringency of both Lightman and Langley, JJ. was disapproved by the Queen's Bench Divisional Court in *Mohamed* (14), to which I have referred above. Thomas, L.J. (as he then was) giving the judgment of the court ([2009] 1 W.L.R. 2579, at para. 94) said that those judges—

". . . put an undue constraint upon what is intended to be an exceptional though flexible remedy. The intrusion into the business of others which the exercise of the *Norwich Pharmacal* jurisdiction obviously entails means that a court should not . . . require such information to be provided unless it is necessary. But in our view, there is nothing in any authority which justifies a more stringent requirement than necessity by elevating the test to the information being a missing piece of the jigsaw or to it being a remedy of last resort . . . Moreover it would be inconsistent with the flexible nature of this remedy to erect artificial barriers of this kind. In our view the approach of King, J. in the *Campaign Against Arms Trade* case is to be preferred."

The Divisional Court said (*ibid.*, at para. 93) that in *Campaign Against Arms Trade* v. *BAE Systems plc* (4) it had been argued by the defendant—

". . . that this test was not met where the claimant had failed to exhaust other available avenues through which the information might be obtained. King, J. observed that that was to put the matter 'too high' and to put the discretion of the court into too much of a straitjacket. He considered that the court was entitled to have regard to all the circumstances prevailing in the particular case including the size and resources of the applicant, the urgency of its need to obtain the information it requires and any public interest in its having its needs satisfied."

The Divisional Court concluded ([2009] 1 W.L.R. 2579, at paras. 95–96) that:

"95 If the information is necessary, it is common ground that it is not a condition of the exercise of the jurisdiction that the information is required pending proceedings in a court of law. That is clear from the decision in *British Steel Corpn.* v. *Granada Television Ltd.* [1981] A.C. 1096, another case concerned with information supplied to another in confidence. In the Court of Appeal both Lord Denning, M.R., at p.1127, and Templeman, L.J., at p.1132, made it clear that

the information could be obtained even if it was not necessary for the purpose of bringing an action. Templeman, L.J. said:

> 'In my judgment the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress.'

96 Those remarks were approved by the House of Lords in that case . . ."

34 In the current case, Chevron, as a result of my order of September 22nd, now knows the names of the beneficial owners of Torvia and Amazonia. It has extensive documentation from the New York proceedings and the other discovery proceedings in the United States on which it can rely to show the conspiracy which it alleges. It has more than adequate information to formulate a case against the beneficial owners. In due course, if proceedings are issued against those persons, disclosure will be ordered against those defendants. Far from being necessary at this stage, Chevron appears to be treating the disclosure of documents from an innocent third party, GT Nominees and its associated companies, as simply a useful means of acquiring documents which will assist it in its substantive actions.

35 In my judgment, for this reason too, the relief now sought stands to be refused. In order that Chevron be able to formulate a case against those identified by the limited *Norwich Pharmacal* relief already ordered, it is not necessary to grant further relief.

36 If I am wrong on these two jurisdictional issues, I would still need to consider whether to exercise my discretion in favour of granting relief. The width of the disclosure sought goes far beyond whatever might be ordered under standard, or indeed specific, disclosure. Few limits are placed on what must be disclosed. Indeed, Mr. Corbett, Q.C. submitted that this was a positive virtue of granting *Norwich Pharmacal* relief. Instead of the documentation to be produced being limited to standard disclosure, he said, there would be "full disclosure" (see *Norwich Pharmacal* (11) ([1974] A.C. at 175)). In my judgment, this is to take what Lord Reid said out of context. He was referring to full disclosure of the unknown tortfeasor's identity.

37 Now Mr. Simpson for Torvia argued that if the court considered that further *Norwich Pharmacal* relief should be granted, it should be granted on terms. The terms as to protecting legal professional privilege and the privilege against self-incrimination proposed by Mr. Corbett, Q.C. were in principle acceptable to him (they involved the making of a privilege log). However, Mr. Corbett objected to Torvia having a right to object to the production of documents on grounds of relevance and confidentiality.

38 Chevron's insistence on the production of documents from the GT companies, regardless of relevance, shows, in my judgment, the inherent problem in its application. Relevance can only be judged against some standard. Where standard disclosure is ordered, the test of relevance is measured against the issues disclosed by the pleadings and then only documents falling within the CPR, r.31.6. Even under the older *Peruvian Guano* test (see *Compagnie Fin. & Comm. du Pacifique* v. *Peruvian Guano Co.* (5)), it was necessary to have regard to what the issues were. Here, Chevron argues, in effect, that there is a chicken and egg situation: it cannot know what the issues are until it sees the documentation, therefore all the documents, regardless of relevance, should be produced.

39 In my judgment, that is to turn the matter on its head. The normal method of obtaining documents is through the ordinary disclosure process, usually against an opposing party to a substantive action, but sometimes against a third party under the CPR, r.31.17. *Norwich Pharmacal* is an exceptional jurisdiction which should not be allowed to subvert the normal method of giving disclosure. It is absurd that Chevron should obtain, as it is seeking to, much more wide-ranging disclosure against an innocent third party than it could obtain against an actual party to an action.

40 Likewise, confidentiality presents a problem. Very many documents will be subject to a duty of confidence owed by the GT companies to their fiduciaries. It is perfectly conceivable that some of those documents will reveal personal details, which on no basis should stand to be disclosed to third parties, such as Chevron, in the absence of compelling reasons.

41 The costs of the proposed exercise will also be disproportionate. It is true that the damages claim in this matter runs to tens or hundreds of millions of pounds, but it is still necessary to keep some control over costs. Mr. Salter for the GT defendants, as I have said, indicated that providing the disclosure would take some six weeks. This was the time needed for managers at Grant Thornton to make a proper assessment of documents. The managers would not be working on the documents full-time, admittedly, because they have the other business of Grant Thornton to carry on, but it was nonetheless a substantial burden on them.

42 Chevron was not willing, without the court ordering it to do so, to pay the cost of management time, although it accepts it would have to pay

the GT companies' legal costs. It refused to pay Torvia's legal costs of the vetting procedures. The total costs of the exercise are, in my judgment, likely to be disproportionate to the benefit gained by Chevron.

43 Looking at the circumstances identified by King, J., Chevron is obviously one of the biggest and wealthiest companies in the world, so financial means are irrelevant. There is no urgent need for Chevron to obtain the information it requires: the DeLeon and Torvia action was begun in 2012. There is no reason why disclosure cannot proceed in the usual way against Mr. DeLeon, Torvia and any other alleged conspirators who stand to be tried in Gibraltar (challenges by Woodsford and Amazonia to the jurisdiction of Gibraltar, as I have noted above, are still outstanding).

44 Mr. Warwick for Woodsford submits that Chevron is seeking to go on a fishing expedition. This reference to a fishing expedition tends to conjure a pleasant picture of the angler using consummate skill with rod, line and fly to lure a rare prize to the surface of a pristine river. That does not properly characterize the current application. Chevron's proposals more closely resemble an industrial trawler scraping a drag net along the ocean bed, stirring the mud and hoovering up everything found, however valueless.

45 Standing back and looking at matters in the round, I reach the firm conclusion that, if I had to exercise a discretion, there is no need, at present, for any further *Norwich Pharmacal* relief than that already ordered and I would refuse the order.

46 I should add that, if disclosure from the alleged conspirators proves unsatisfactory, Chevron can apply under the CPR, r.31.17 for a third party disclosure order. I neither encourage nor discourage such an application, but if one is to be made, as a matter of case management, it should (unless there are matters of which I have not been made aware) await the ordinary disclosure given by the substantive defendants.

47 I should also add that, if (contrary to my determination) I had reached the view that further disclosure should be ordered, then conditions of the sort canvassed in Mr. Simpson's skeleton argument, submitted on behalf of Mr. DeLeon and others, would have been necessary.

TC Payment

48 Chevron initially issued its application seeking pre-action disclosure under the CPR, r.31.16 against TC Payment on June 20th, 2014. On October 20th, 2014, it filed an amended application notice to seek, in the alternative, non-party disclosure. At the conclusion of argument on October 31st, I indicated that I intended to grant the order sought on the

unamended application and, for the reasons I gave, that I would adjourn the application to amend the application generally with liberty to apply.

49 The CPR, r.31.16 provides:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where—
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to—
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs.
>
> (4) An order under this rule must—
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require him, when making disclosure, to specify any of those documents—
>
> (i) which are no longer in his control; or
>
> (ii) in respect of which he claims a right or duty to withhold inspection.
>
> (5) Such an order may—
>
> (a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
>
> (b) specify the time and place for disclosure and inspection."

50 It is common ground between the parties that r.31.16(3) contains four jurisdictional requirements in paras. (a)–(d), each of which must be satisfied for the court to be able to make an order, and that, even if the four

jurisdictional requirements are satisfied, the court has a discretion whether to make an order under the rule.

51 So far as paras. (a)–(b) are concerned, TC Payment accepts that the threshold for jurisdiction is not a high one. In *Black* v. *Sumitomo Corp.* (3) Rix, L.J. said ([2002] 1 W.L.R. 1562, at paras. 71–72):

> "71 Two questions . . . arise. One is whether the statute requires that it be likely that proceedings are issued, or only that the persons concerned are likely to be parties *if* subsequent proceedings are issued. The other is whether 'likely' means 'more probably than not' or 'may well'. As to the first question, in my judgment the amended statute means no more than that the persons concerned are likely to be parties in proceedings if those proceedings are issued. That was what Lord Woolf had in mind when he wrote of the requirement that 'there is a likelihood that the respondent would indeed be a defendant if proceedings were initiated' . . . What the current language of the section appears to me to emphasise, as does the rule of court, is that the parties concerned in an application are parties who would be likely to be involved if proceedings ensued. The concern is that pre-action disclosure would be sought against a stranger to any possible proceedings, or by a party who would himself be unlikely to be involved. If the statute and rule are understood in this sense, then all difficulties, which might arise where the issue of proceedings might depend crucially on the nature of the disclosure sought and where it is impossible at the time of making the application to say whether the disclosure would critically support or undermine the prospective claim, disappear.
>
> 72 As to the second question, it is not uncommon for 'likely' to mean something less than probable in its strict sense. It seems to me that if I am wrong about the first question, then it is plain that 'likely' must be given its more extended and open meaning . . . because otherwise one of the fundamental purposes of the statute will have been undermined. If, however, I am right about the first question, the second question is of less moment. Even so, however, I am inclined to answer it by saying that 'likely' here means no more than 'may well'. Where the future has to be predicted, but on an application which is not merely pre-trial but pre-action, a high test requiring proof on the balance of probability will be both undesirable and unnecessary: undesirable, because it does not respond to the nature and timing of the application; and unnecessary, because the court has all the power it needs in the overall exercise of its discretion to balance the possible uncertainties of the situation against the specificity or otherwise of the disclosure requested. Clearly, the narrower the disclosure requested and the more determinative it may be of the dispute in issue between the parties to the application, the easier it is

for the court to find the request well founded, and vice versa." [Emphasis in original.]

52 There seems to be a fair measure of agreement between the parties that Mr. DeLeon and his then wife, Ms. Parasol, had a family office, Timbercove Ltd. TC Payment was a wholly-owned subsidiary of Timbercove Ltd. and was used to make payments on behalf of Mr. DeLeon and Ms. Parasol.

53 Mr. DeLeon and Ms. Parasol separated in 2010 and were subsequently divorced in 2014. In the course of the separation and divorce, the arrangements were varied and TC Payment became Ms. Parasol's company. There is nothing to gainsay the assertion in the response letter that TC Payment has no assets of its own and merely made payments on behalf of (as the case might be) Mr. DeLeon or Ms. Parasol. However, Mr. Stagnetto for TC Payment accepted in argument that Chevron was likely to sue anyone against whom it had a cause of action, so that TC Payment's impecuniosity was not a relevant factor. Since 2009, the sole director of TC Payment has been TC Management Services Ltd., of which, in turn, Mr. Croyden is a director.

54 The nature of the case against TC Payment has changed since the original letter of claim. At that stage, Chevron thought that TC Payment was funding the Lago Agrio litigation. It now accepts (at any rate for the purposes of this application) that that was wrong and that TC Payment was a payment vehicle for Mr. DeLeon and Ms. Parasol. There is no dispute that TC Payment did make payments totalling some $3.3m. on the instructions of Mr. DeLeon to fund the litigation in Ecuador and New York (and possibly elsewhere) and possibly to fund the public campaign being run against Chevron. These payments started on April 14th, 2011.

55 TC Payment asserts that "in processing these payments in accordance with those instructions, TC [Payment] had no knowledge of the detail of the Ecuadorian litigation and certainly was entirely unaware of any conspiracy as alleged or otherwise." This is the key factual dispute between the parties on this application.

56 A claim in conspiracy requires knowledge by someone acting on behalf of TC Payment of the facts giving rise to the alleged conspiracy and agreement on the part of the company to participate in that conspiracy. The other economic torts relied upon by Chevron also require knowledge by TC Payment (in considering what constitutes "knowledge," I include Nelsonian blindness).

57 Chevron does not allege any payments earlier than 2011. The latest payments were in October 2012.

58 Mr. Janos Libor is the only director in respect of whom Chevron has concrete evidence of a close association with Mr. DeLeon, an association

which might give potential knowledge of the alleged conspiracy. However, he resigned as a director of TC Payment on March 18th, 2009, long before the first payment relied upon. For the purpose of this application, Chevron does not rely on any knowledge of Mr. Libor as an *alter ego* of TC Payment to show that TC Payment was a member of the alleged conspiracy. Rather, Chevron relies on what it says can reasonably be inferred from what occurred in 2011 and 2012.

59 In my judgment, TC Payment's assertion that it had no knowledge of the purpose of the payments is possible, but not self-evident. On the contrary, just as it used to be said that a man had no secrets from his valet, so too one could sensibly infer that personnel in a family office may have good knowledge of the family's affairs. By 2011–2012, the Lago Agrio litigation was attracting wide attention and Chevron was, as I have noted above, pursuing actions under 28 USC §1782, a US form of disclosure application for evidence for use in a foreign court (in this case presumably the courts of Ecuador). It is a not unreasonable (but of course rebuttable) inference that officers of TC Payment would have had at least some knowledge of the nature of Mr. DeLeon's and Torvia's involvement with the Lago Agrio litigation, which was sufficient to fix TC Payment with membership of the alleged conspiracy.

60 It follows that the jurisdictional hurdles in the CPR, r.31.16(3)(a)–(b) are made out.

61 As to para. (c), Mr. Stagnetto for TC Payment argues that the allegations of fraud and conspiracy made against it are too vague to permit a proper exercise in disclosure to be carried out. In order to apply the modern test for standard disclosure, a party must, he submits, be able to determine which documents adversely affect its own or another party's case or support another party's case: see the CPR, r.31.6(b). Mere relevance is not enough. Without any precision in Chevron's case against TC Payment, TC Payment cannot, he argues, make an assessment under that test as to what documents may or may not be disclosable.

62 I disagree. Paragraphs 49–52 of the pre-action letter adequately define the issues. Disclosure is sought solely in respect of the discrete payments which have been identified (subject to formal confirmation that those were indeed the only payments made). The CPR, r.31.16(3)(c) is established, in my judgment.

63 As to the CPR, r.31.16(d), each of the requirements is, in my judgment, made out. Under r.31.16(d)(i), Chevron knows substantial payments were made by TC Payment at Mr. DeLeon's behest, but does not have evidence (beyond the inference set out above) of TC Payment's knowledge of the allegedly illicit purposes of such payments. If proceedings are brought against TC Payment, then disclosure will take place in any event; however, if (as TC Payment asserts) there is no evidence of

knowledge by a relevant officer of TC Payment, that is likely to be the end of the matter. Pre-action disclosure will ensure the anticipated proceedings are disposed of fairly. As to r.31.16(d)(ii), if the pre-action disclosure shows that TC Payment had no knowledge, the dispute between Chevron and TC Payment will have been resolved by Chevron taking no further action. Lastly, as to r.31.16(d)(iii), the limited and focused disclosure which is sought in the current application will save the costs of the action.

64 I then need to consider the exercise of my discretion. I do wish to associate myself with Butler, J.'s observation (2013–14 Gib LR 431, at para. 115) that the "court will need to keep a close eye on the proceedings in order to ensure that they are not abused, that unjustified fishing exercises are not allowed and that the matter does not escalate out of control." I also bear in mind that the English Court of Appeal has deprecated allowing "a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition" (*Black* v. *Sumitomo Corp.* (3) ([2002] 1 W.L.R. 1562, at para. 92)).

65 However, this application, in my judgment, is quite different from the *Norwich Pharmacal* proceedings against the GT companies that I have rejected above. It is not a fishing expedition (even in the more bucolic sense I have identified above), nor a "roving inquisition," but instead is likely to save costs and lead to speedy determination of whether there is going to be substantive litigation between Chevron and TC Payment. Standing back and looking at the big picture, the factors in favour of making the order very much outweigh those against. In the exercise of my discretion, I shall make the order sought against TC Payment.

Conclusion

66 The GT Nominees application is dismissed; the TC Payment application succeeds.

Orders accordingly.