Neutral Citation Number: [2023] EWHC 1436 (Comm)

Claim No. CL-2022-000396

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

Judgment in public

Royal Courts of Justice
Strand, London

Date: 13/06/2023 (in private)
Date: 2/10/2023 (in public)

Before:
THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between :

(1) HULLEY ENTERPRISES LIMITED **(2) YUKOS UNIVERSAL LIMITED** **(3) VETERAN PETROLEUM LIMITED** **(4) GML LIMITED**	**Claimants/ Applicants**
- and – **(1) WHITE & CASE LLP** **(2) DAVID GOLDBERG** **(3) ALBERT JAN VAN DEN BERG**	**Defendants/ Respondents**

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Paul McGrath KC and David Peters (instructed by **Stephenson Harwood LLP**) **for the Claimants**
Lord Wolfson of Tredegar KC and Michelle Menashy (instructed by **White & Case LLP**) **for the First and Second Defendants**
Timothy Dutton CBE, KC, Richard Coleman KC and Leonora Sagan (instructed by **Russell-Cooke LLP**) **for the Third Defendant**

Hearing dates: 8-9 December 2022

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Approved Judgment

Robin Knowles J, CBE:

Introduction

1. This is the judgment of the Court on the substantive hearing of the Claimants' claim for orders against the Defendants (individually D1, D2 and D3) under the Court's powers to order delivery up or the provision of documents (or the information in them) and information about them. The substantive hearing was also, by agreement, used as the hearing of a challenge by D3 to the jurisdiction of the Courts of England & Wales in relation to the subject matter of the claim.

2. The claim is made in the context of major proceedings over the setting aside or enforcement of substantial arbitral awards against the Russian Federation (the RF). Those proceedings are (so far as relevant for present purposes) in The Netherlands (the seat of the arbitrations), in England & Wales (enforcement proceedings) and in the United States of America (enforcement proceedings).

3. The Claimants (individually C1, C2, C3 and C4) describe the documents involved as comprising two categories:

> "(a) documents held as part of an electronic archive … which the RF has claimed was handed over to it by an unidentified English journalist in September 2018 and (b) any copies of those documents which have made their way into the hands of any third party".

4. The Defendants are an English law firm (D1) and two individual lawyers (D2 and D3). D1 acted for the RF in the enforcement proceedings in England & Wales. D2 is a partner in D1. He is also a partner in the US firm associated with D1 and which acts for the RF in the US enforcement proceedings. The Claimants do not bring the claim against the US firm.

5. The Claimants' explanation to me for joining D2 personally, given in their written argument for an earlier interim hearing on 16 August 2022, was that relief was sought against D2 personally "so as to avoid a risk that he claims to have handled the information in a capacity other than as partner in [D1]". D2 has confirmed that he will not so claim. The Court is therefore able to treat any "handling" of documents or information by D2 as "handling" by D1.

6. D3 has acted for the RF in the Dutch proceedings since 2014. Although he withdrew from the record in May 2022, he continues, pursuant to a designation made by the Dean of the Amsterdam Bar on 27 June 2022 to act in his professional capacity as a lawyer to support the RF's present, designated, lawyer. He has also provided an expert report in the English enforcement proceedings.

Earlier interim hearings

7. The claim was first issued before this Court on 9 August 2022, after an interim order had been made by Jacobs J on 2 August 2022 to preserve confidentiality in relation to the court file and listing.

8. On 16 August 2022 and whilst dealing with vacation business I dealt with an application issued by the Claimants on 12 August 2022. It was made without notice to the Defendants and I heard the matter in private. I made an interim order pending a further hearing on a return date that all parties would have the opportunity to attend.

9. The order that would apply in the interim was, in summary, that the Defendants should not delete or return to the RF or otherwise lose control of any of the documents said to be at issue without first taking steps to retain a copy. The formulation of this interim order was largely in the form sought by the Claimants, and was directed at preserving information rather than the documents themselves.

10. I made orders for service (including service out of the jurisdiction on D3) and to preserve confidentiality, including by non-disclosure. I recorded that on the return date it was anticipated that the Court would also consider, including for the purposes of giving directions, the Claimants' substantive claims and any interim applications. All parties had, in addition, liberty to apply to the Court at any point before the return date. I declined to support the addition of a penal notice.

11. My concern, in the context of an overall dispute that has the greatest scale and complexity, was to "hold the ring" from the start and in a way for which this Court would take responsibility from the start, in the interests of all parties.

12. My preparedness to proceed without notice was not any adverse reflection on the Defendants. I was mindful of the possibility that they, if given notice of the application would face the question, and therefore the uncertainty, whether they were professionally bound to inform the RF and whether the RF could instruct them to take some immediate step in relation to any documents that would not at least preserve copies. Of course, the Defendants would, if given notice, and with or without confidentiality requirements, always wish to take a proper course, and would have immediate access to this Court, and to their respective professional bodies. However, the question and uncertainty that I have mentioned could arise in any context, and at any time, and in any part of the world.

The Norwich Pharmacal jurisdiction

13. The Claimants seek orders for delivery up and orders under what is known as the Norwich Pharmacal jurisdiction. Mindful of the different countries and legal traditions involved in the overall dispute, let me interpose here brief but I hope sufficient reference to the nature of the Norwich Pharmacal jurisdiction recognised in England & Wales.

14. In the decision (of the House of Lords) from which the jurisdiction derives its name (Norwich Pharmacal Co v Commissioners of Customs and Excise [1974] AC 133) at 175B-D Lord Reid described the principle as follows:

> "[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 wrong-doing 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."

15. In Ramilos Trading Ltd v Buyanovski [2016] EWHC 3175 (Comm) Flaux J (as he then was) set out the following and other key citations in relation to the Norwich Pharmacal jurisdiction:

> "11 The three conditions to be satisfied for the court to exercise its power to grant *Norwich Pharmacal* relief were set out by Lightman J in *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch); [2005] 3 All ER 511 at [21] …:
>
> > "The three conditions to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief are:
> > i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
> > ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
> > iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued."
>
> …
>
> 24 The second condition for relief is that the disclosure sought must be necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrongdoing and in considering the question of necessity, the cases emphasise the need for flexibility and discretion. This is clear from [57] of the speech of Lord Woolf CJ in *Ashworth* [Ashworth Hospital Authority v MGN Limited [2002] UKHL 29; [2002] 1 WLR 2033]
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> > "The *Norwich Pharmacal* jurisdiction is an exceptional one and one that is only exercised by the courts when they are satisfied it is necessary that it should be exercised. New situations are inevitably going to arise where it would be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which apply to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its appropriate use will continue to arise is illustrated by the decision of Sir Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309 where relief was granted because it was necessary in the interests of justice, albeit that the claimant was not able to identify without discovery what would be the appropriate cause of action."
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> To the same effect is a passage in the judgment of Lord Kerr in *The Rugby Football Union v Consolidated Information Services Limited (formerly Viagogo Limited) (in liquidation)* [2012] UKSC 55; [2012] 1 WLR 3333 at [15]."

16. For further reference there is a valuable recent review, to which all parties made reference, by Saini J in Collier v Bennett [2020] 4 WLR 16; [2020] EWHC 1884 (QB).**k,**

The arbitrations and the awards

17. Yukos was incorporated under the laws of the Russian Federation by Presidential Decree in 1993 as a joint stock company and became fully privatized in 1995-1996. It became the largest oil company in Russia.

18. The RF's case in the arbitrations was that the auctions by which Yukos was privatized in the 1990s were unlawfully manipulated by a number of Russian individuals who thereby engineered their acquisition of the company at an undervalue.

19. In 2005, C1-3 commenced arbitrations against the RF pursuant to the Energy Charter Treaty. C4 was not a claimant in the arbitrations, and is not a party to the Dutch proceedings brought by the RF to set aside the arbitral awards.

20. The central allegation of C1-3 in the arbitrations was that the RF had expropriated and failed to protect their investments in Yukos, resulting in enormous losses to them. The expropriation was said to have occurred through criminal prosecutions, harassment of Yukos and its personnel, tax reassessments, VAT charges, fines, asset freezes and other measures such as the forced sale of Yukos's core assets.

21. The RF's case was and is that certain of the individuals continued to exercise control over C4, and in turn C1-3 and Yukos, after 2003. Accordingly, the RF argued and argue that the alleged investments in the RF (i.e. the interests in Yukos) were tainted by the alleged illegalities committed in the acquisition of Yukos.

22. As outlined to me on behalf of the Claimants, the response of C1-3 to this includes the argument that (a) the relevant question was whether there was any illegality in connection with their acquisition of their investment in Yukos; (b) it was undisputed that the individuals controlled C1 and C2 at the time when their investments in Yukos were made and C3's investment derived from the investment made by C2 and (c) therefore the question whether individuals continued to exercise control over C1-3 after 2003 was (and is) irrelevant.

23. The arbitral tribunal rejected the RF's argument, finding that the "alleged illegalities to which [the RF] refers are [not] sufficiently connected with the final transaction by which the investment was made by Claimants".

24. On 18 July 2014 C1-3 obtained three final arbitral awards totalling in excess of US$50 billion against the RF. The tribunal found the primary objective of the RF was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets and that the RF destroyed the company and expropriated its assets for the benefit of the Russian state and two state-owned companies.

25. A fraud issue is being determined in the Dutch proceedings. As outlined to me on behalf of D3, the contentions and findings in the awards that are relevant to the fraud issue may be briefly summarised as follows.

26. First, the RF argued that certain individuals had acquired Yukos unlawfully in 1995-1996 by rigging the auction and bribing certain directors of Yukos, as a result of which they were able to obtain a public asset at a price far below its true value. The RF contended, therefore, that the Claimants' claims were not admissible before the Energy Charter Treaty, as that treaty protected only lawful investments made in good faith and further that any compensation should be reduced on the grounds of contributory fault.

27. Second, the tribunal had noted in its Final Award that C1-3 "did not engage with the detail of [the RF's] allegations", contending that they "amount to little more than innuendo based upon a handful of sensationalized journalistic accounts.". The case of C1-3, rather, was that any illegality on the part of the individuals could not be attributed to them as they were controlled by a trustee of a discretionary trust who made decisions independently of the individuals.

28. Third, the tribunal had agreed that the treaty did not protect an investment made illegally or in bad faith, accepting C1-3's evidence about the control of the Claimants. It held that any illegality on the part of the individuals was not sufficiently connected to the Claimants' investment, therefore, to be attributed to them. The tribunal stated that it reached that decision "with the benefit of a full presentation of the facts by the Parties on all aspects of the Yukos affair".

29. Fourth, the tribunal found: "Claimants should pay a price for Yukos' abuse of the low-tax regions by some of its trading entities, including its questionable use of the Cyprus-Russia [Double Taxation Agreement], which contributed in a material way to the prejudice which they subsequently suffered at the hands of the Russian Federation." It found contributory fault on the part of C1-3 and reduced the compensation by 25%.

The Dutch proceedings

30. In November 2014 the RF commenced proceedings in the Netherlands by which it sought to have the awards set aside.

31. That litigation is ongoing. The RF brought a cassation appeal to the Supreme Court of the Netherlands. By a judgment dated 5 November 2021, the Supreme Court rejected a number of the grounds of the RF's challenge to the awards. However the Supreme Court of the Netherlands concluded that the court below (the Court of Appeal) had been wrong to hold that the RF was precluded (as a matter of procedure) from advancing certain allegations of procedural fraud. In relation to that issue, it referred the proceedings to the Amsterdam Court of Appeal for further consideration.

32. Before the Amsterdam Court of Appeal, the RF contends that C1-3 presented a false factual case to the tribunal to the effect that the individuals did not control the Claimants after 2003, and failed to disclose relevant documents which revealed the true position, in breach of the tribunal's Procedural Orders.

33. In short, the RF contends that the undisclosed documents would have revealed to the RF and to the tribunal that the individuals maintained legal and de facto control over the Claimants (through C4) after 2003 and engineered frauds by which sums were extracted from Yukos and to their benefit.

34. Examples of documents that the RF alleges C1-3 failed to disclose and of alleged false evidence and statements are to be found in an expert report by D3 dated 6 May 2022 in the enforcement proceedings in England & Wales. On behalf of the Claimants it is represented to me that the correct characterisation of these documents is a matter which is highly contentious in the Dutch proceedings.

D3 and the English enforcement proceedings

35. D3 had no involvement in obtaining documents from the journalist.

36. He first received documents from the archive in 2019. The US firm associated with D1 and another Dutch law firm (not that of D3) acting for the RF provided him with copies of certain documents from the archive for the purposes of the Dutch proceedings. D3 understood that the documents were obtained by the RF.

37. He also understood that the US firm had outsourced the vetting of documents for legal professional privilege. To the best of D3's knowledge, all the documents he received and to which he had access had already been reviewed and confirmed as not privileged.

38. On 8 June 2016 the proceedings in England & Wales for recognition and enforcement in respect of the awards had been stayed.

39. C1-3 applied to lift the stay in March 2022. On 6 May 2022, and in response to that application, the RF filed an expert report from D3 in the enforcement proceedings in England & Wales. D3 had been directed in those proceedings to address the question of the prospects of success of the RF's case before the Amsterdam Court of Appeal. In answering that question, D3 exhibited to his report five to six documents that had been adduced in the Dutch proceedings.

40. As at 16 August 2022, on the hearing of the without notice application in the present proceedings for documents and information, it was not appreciated by the Claimants that D3 had a continuing professional role for the RF in the Dutch proceedings. The Claimants were aware only that he had withdrawn from the record.

41. In October 2022 the High Court of England & Wales ordered that the stay of the enforcement proceedings should be lifted for the purpose of resolving a jurisdiction challenge by the RF.

Curtis & Co

42. Curtis & Co was an English solicitors' firm which operated until 2004. Until 2002, the firm's senior managing partner was Stephen Curtis. James Jacobson was also a partner. In 2002 Mr Curtis moved to Gibraltar, where C4 is incorporated and James Jacobson took over the running of the firm. Mr Curtis became a director of C4 in August 2003 and was sole director from October 2003 until his death in March 2004. C4 is a Gibraltar-incorporated entity.

43. According to the Claimants, Curtis & Co advised C4 "over a period of years". Curtis & Co closed on 30 September 2004. James Jacobson and Robert Sprawson were the partners at the time of closure. There was no successor practice. Mr Jacobson took control of client files. It appears from internet searches that Mr Jacobson practises from Gibraltar.

The archive

44. The Main Investigation Department of the Investigative Committee of the Russian Federation has said that on 18 September 2018 it obtained an archive of electronic documents which had been provided to the RF by a British journalist.

45. The existence of the archive and its stated source (a British journalist) were disclosed in the Dutch proceedings by the RF. On or about 17 May 2022, the RF submitted to the Amsterdam Court of Appeal an 'Explanatory Statement After Referral' in the Dutch proceedings. This included the statement that:

> "The Russian Federation has obtained additional documents following the arbitrations. These include a large electronic archive provided by a journalist from the United Kingdom. These documents originate from the records of [the Claimants]."

The name of the journalist and the archive have not been disclosed.

46. Russia exhibited to the Statement a letter dated 25 April 2019 which explained that the electronic archive produced by the British journalist was obtained by Russia in the context of a criminal investigation, with Case No. 18/41-03, against Yukos regarding embezzlement and laundering of property. The letter is from Colonel SA Mikhailov, the Head of the First Investigation Department of the Office for Investigating Crimes against State Authorities and in the Economic Sphere of the Main Investigation Department of the Russian Ministry of Justice and addressed to the Director of the Department of International Law and Cooperation, Alexandra Vladimirovna of the Ministry of Justice of Russia. The letter states:

> "In accordance with your verbal request, we hereby confirm that on September 18, 2018 within the framework of the investigation of Criminal Case No. 18/41-03 regarding the facts of embezzlement and legalization (laundering) of the property of OJSC NK "YUKOS" and OJSC "Bank "MENATEP", as well as shares the "Yukos" oil company, the Main Investigation Department of the Investigative Committee of the Russian Federation obtained electronic documents relating to the so-called [redacted] archive", which was handed over to the Russian Federation by the English journalist [redacted]. These documents are recognized as material evidence and admitted into the materials of Criminal Case No. 18/41-03 as material evidence."

47. In their evidence in the present proceedings for documents and information the Claimants outline occasions on which they have been approached by a number of journalists and others who have asserted possession of the Claimants' documents or documents deriving from the files of Curtis & Co. As at the date of Ms Prince's third statement (9 August 2022), one such approach was said to have taken place recently. The Claimants' response to these enquiries is addressed in Ms Prince's evidence.

48. On the other hand there is no evidence from the Claimants that they have made follow up inquiries of those journalists and others or have taken further steps to uncover what documents each of them hold. The Defendants also point out that the Claimants have provided no evidence of inquiries having been made of their own personnel and officers, or of the individuals, or of the holder of legal title to the majority of the shares in C4, as to whether any records have gone missing or have been misappropriated.

49. The Claimants suggest that "in all likelihood" the journalist obtained the archive from Curtis & Co. The Claimants put forward what they describe as two "realistic possibilities" or "realistic scenarios". The first is that the documents were provided to the journalist by someone within Curtis & Co acting without C4's knowledge or consent. The second is that the documents were hacked off Curtis & Co's systems by the journalist or by someone who then provided them to the journalist, also without C4's knowledge and consent.

50. According to their written argument, the Claimants' argument proceeds as follows from its suggested "two realistic scenarios":

> "In either case, when the Journalist provided the Archive to the RF, it will have realised (or ought to have realised) that it had received documentation containing material, at least some of which was privileged and/or confidential to (at least) [C4] in circumstances where it was inconceivable that [C4] would have consented to that material being handed over to the Journalist (and a fortiori to the RF). In those circumstances it was (and remains) wrongful for the RF to retain, review or make any use of the Documents".

Deployment

51. On 25 June 2019, twenty seven of the documents were adduced in the Dutch proceedings. A further eight documents were adduced in those proceedings on 9 September 2019 and one further document on 17 May 2022.

52. The Claimants have not objected to the use or adducing of these documents in the Dutch proceedings. The Claimants have not challenged that they are admissible evidence in those proceedings.

53. On 10 December 2021, six of the documents were adduced in enforcement proceedings in the United States. On 13 July 2022, eleven further of the documents were adduced in the US proceedings. As noted above, on 6 May 2022, a small number (five to six) of the documents were adduced in the enforcement proceedings in England & Wales (appended to D3's expert report). These documents have also been adduced in the Dutch proceedings.

The Claimants' objectives

54. The Claimants describe the essential purpose of the present claim for documents and information as the protection of their rights to confidentiality and legal professional privilege. They say:

> "In particular, they wish to (a) recover documents containing their confidential information (and/or in which they are entitled to assert privilege); and (b) to take steps to prevent further leaks of their confidential materials and/or to take steps against any other third parties into whose hands such material has fallen".

55. It is important to note that the Claimants' position is that the documents already adduced in the Dutch proceedings do not belong to them. As to the remainder, they say they "are unable to confirm the position one way or the other … because they do not know what that remainder consists of". They maintain that where documents do not belong to them they are "entitled to an order for delivery up of the Documents as a means of protecting any rights of confidentiality or privilege in the contents of the Documents".

56. It is also important to note that the Claimants state, through Ms Prince of their solicitors in her [fifth] witness statement dated 26 October 2022:

> "… the Claimants do not bring these Claims in order to interfere with Russia's use of any Documents. They have not in the Netherlands opposed Russia's use of the Documents. What is not acceptable is for Russia to obtain documents unlawfully extracted from the files of the Claimants or, worse still, the Claimants' former English solicitors and, via these Defendants, 'drip feed' copies of Documents into proceedings over the course of years. Such Documents as exist should be before the Courts in which Russia is alleging fraud."

This statement appears to give more colour in relation to the Claimants' objectives. Their counsel, Mr McGrath KC, sought in oral argument at the substantive hearing to press that the Claimants' objectives were not limited to stopping the drip feed.

The nature of the allegations of the Claimants against the Defendants

57. It was made clear to me on the first hearing on 16 August 2022, which was without notice to the Defendants, that the Claimants did not challenge the honesty or integrity of the Defendants.

58. I further recorded that position, in terms, in a ruling at a further interim hearing, attended by all parties, on 21 September 2022. In my ex tempore judgment of that day I included the following:

> "2 … The defendants in the present case are each one of them of the highest professional distinction. It was, therefore, unsurprising to me at the ex parte hearing on 16 August to have the understanding that no challenge was made to the honesty or integrity of the defendants; rather, the claimants, putting this in summary fashion, said that the defendants had come into possession of documents that were the claimants' or that, innocently, the defendants had, in relation to documents, become mixed up in activity that was wrongful, not on their part but on the part of others.
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> 3 An illustration of my having this understanding of the claimants' approach firmly in mind appears in my decision at the ex parte hearing not to support

> the addition of a penal notice, and the transcript of the earlier hearing confirms that."

59. Yet at points the Claimants have seemed, in the course of their claim for documents and information, to attempt to challenge the Defendants' conduct. I wish to be clear that in the circumstances of the case it is not open to them to do so and it is wrong of them to attempt to do so.

60. The Claimants have brought the claim for documents and information using the procedure under Part 8 of the Civil Procedure Rules. This is normal practice where (as here) Norwich Pharmacal orders are among those sought. The Claimants have used it also to seek orders for delivery up of documents. As the Claimants will have been advised, the Part 8 procedure is not designed to resolve contested facts, and cross examination of witnesses is not contemplated by the procedure. There can be exceptions but none was applied for here.

61. In the present case the Claimants have a view about what the Defendants (and the US firm associated with D1) should have done on becoming aware that the archive was handed over to the RF by the journalist, and at any point when any documents from the archive reached them as the RF's lawyers. The Claimants have cited authorities that they contend support their view, including UL v BK (Freezing Orders: Principles and Safeguards) [2014] Fam 35 (Mostyn J).

62. Their view was put in this way in their written argument on the substantive hearing:

> "On the material available to the Court, the correct analysis (consistent with the principles identified in UL v BK) is that [D1] and [D2] were obliged to obtain the entirety of the Documents from the RF, and then either (a) hand them over to [the Claimants' solicitors]; or (b) apply to the Court for directions as to how to deal with them. Their failure to take these steps (a) constitutes relevant wrongdoing in its own right; and (b) directly facilitated the RF's continuous wrongdoing (in the form of its retention, and potential future use, of the Documents)."

63. On Mr McGrath KC referring to this passage as part of his presentation of the Claimants' case at the substantive hearing, Lord Wolfson KC for D1 and D2 understandably intervened and there was this exchange:

> "Lord Wolfson KC: My Lord, I understood my learned friend to be putting the application on the basis that no wrongdoing was alleged against my clients. We now seem to have slipped into wrongdoing. I'm not sure what case I have to meet now.
> Mr McGrath KC: My Lord, the primary submission is, and always has been, that we don't need to show wrongdoing. The secondary, fall back, position is that what my friend's clients should have done with the documents, pursuant to UK v BL – - one can call that criticism, one can say it is inconsistent with our understanding of how they should have handled themselves, etc. But it is important because it does refer to had that conduct been complied with, as one can see from the guidance, then the desire is that they should call for the documents and the documents should then have been handed over or court directions be given, which is, effectively, now requiring us to come here and do this application.

> But that's why we – we bring UL v BK to the court's attention. But irrespective of the arguments under UK v BL your Lordship has heard my submissions of the involvement of these defendants by way of instructing solicitors and [D3], as an expert, however unwittingly, in using and deploying the documents, takes them outside of the remit of a mere witness or bystander. And that, in itself, is sufficient for me to get home on the application before you."

64. In the present case the idea that the Defendants, who do not have the archive, should have asked for it, when it had already been made available by the RF to enable the US firm associated with D1 to have it vetted or reviewed for legal professional privilege, is, with respect, not sensible and is not guided on any reading of UK v BL. And nor does the current application in any way ask the Court to direct that D1 and D2 ask the RF for the archive and then seek directions from the Court.

65. But whether the Claimants' view about what the Defendants should have done is right or wrong it has no real relevance to the question of delivery up or the exercise of the Norwich Pharmacal jurisdiction in the present case. The claim for delivery up has to be based on the Claimants' entitlement to the documents or information. The wrongdoing that is the focus of the Norwich Pharmacal jurisdiction is that of persons other than the defendants to the claim; indeed the defendants to the claim will usually be completely innocent.

66. In fact, as noted above, in the present case the Claimants have specifically said to this Court that they "do not bring these Claims in order to interfere with Russia's use of any Documents". This brings home the irrelevance of the Claimants' view about what the Defendants should have done based on the RF's dealings with the archive.

67. But further, on 16 August 2022 the Claimants also sought and obtained permission to serve D3 out of the jurisdiction. Their argument is illuminating. It was that D3 was a necessary and proper party to the claim against D1 and D2 (applying the gateway under para 3.1(3) of CPR PD 6B; the hearing preceded the recent revision designed for Norwich Pharmacal claims specifically). Their written argument included the following:

> "*Legal principles*
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> …
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> 22 A *Norwich Pharmacal* respondent has been held not to be a "necessary or proper party" to a substantive claim for fraud being pursued in England in circumstances where no claim for fraud is made against the *Norwich Pharmacal* respondent: *AB Bank Ltd v Abu Dhabi Commercial Bank PJSC* [2017] 1 WLR 810 *per* Teare J at §5 ….
>
> 23 However this case does not stand for the broader proposition that this gateway is never available for *Norwich Pharmacal* claims: *AB Bank* at §19-21. Hollander, *Documentary Evidence* (14th Ed) at §4-22 is wrong on this aspect.
>
> 24 Teare J's reasoning (if correct) demonstrates that a defendant to *Norwich Pharmacal* proceedings is not to be regarded as a necessary or proper party to any claim based on substantive wrongdoing in respect of which [a Norwich

> Pharmacal Order] is sought. That conclusion flows from the proposition that a *Norwich Pharmacal* claim is distinct from a claim concerning the substantive wrongdoing in respect of which information is sought: *a fortiori,* if the *Norwich Pharmacal* respondent is innocent.
>
> 26 The present case involves an altogether different scenario where (a) a *Norwich Pharmacal* Claim is brought against three Ds; (b) two of those Ds are capable of being served as of right in England and Wales; and (c) Cs seek permission to serve the other D to the *Norwich Pharmacal* claim out of the jurisdiction on the basis that he is a necessary or proper party to that particular claim i.e. the *Norwich Pharmacal* claim.
>
> 27 In the absence of authority, Cs submit that the correct approach is to apply the principles identified in *Gunn v Diaz* to the relevant *Norwich Pharmacal* claim as they would be applied to any other claim."

It is clear from this that the Claimants were not alleging D3 was a wrongdoer; that was why they had to work around the AB Bank decision.

68. In his oral reply on the substantive hearing, Mr McGrath KC took up a later passage in the skeleton argument from 16 August. This read as follows, and it was paragraph 32.2 and 32.3 that Mr McGrath KC took up:

> "*Gateway analysis in relation to the [Norwich Pharmacal Order] Claim*
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> 31 The [Norwich Pharmacal] Claim can be served as of right on [D1] and [D2] and gives rise to real issues between them and Cs which it is proper for the Court to try.
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> 32 [D3] is a necessary or proper party to that claim. This can be illustrated by considering the requirements which must be satisfied for a grant of *Norwich Pharmacal* relief to be appropriate, as set out in §19 above:
>
> 32.1 There needs to be a good arguable case that there is underlying wrongdoing. In this case, to the extent that the wrongdoing consists of the original misappropriation of Cs' documents, it is a common feature of the claim against all of the Ds (including [D3]).
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> 32.2 There is further potential wrongdoing, in the form of the retention, use and/or dissemination of the Documents. There are aspects of that wrongdoing in which (by sharing the Documents between themselves and others e.g. [the US firm associated with D1], to an extent which is presently unknown) all of the Ds have jointly participated.
>
> 32.3 [D3] is mixed up in that wrongdoing by the sharing of the documents between [D3] and [D1], and their deployment (by [D3], on instructions from White & Case) in the enforcement proceedings in England & Wales.
>
> 32.4 [D3] is likely to be able to provide relevant information given his use of the Documents in circumstances where it would be expected that he would familiarise himself with their provenance and consider them in the context of other documents in order to draw inferences from them.

> 32.5 The question of whether a [Norwich Pharmacal order] is appropriate in all the circumstances requires inquiry into all the circumstances of the [Norwich Pharmacal order] Claim – many of which are common to [D3] and the other Ds. There may well be particular discretionary factors which are specific to [D3], but that would not itself be any reason to regard him as an inappropriate defendant to the [Norwich Pharmacal order] Claim.
>
> 33 The key question is whether, if the parties had both been within the jurisdiction, they would both have been proper parties to the action: *Gunn v Diaz* at §86(ix) …. For the reasons set out above, Cs submit that the requirements that the claims against all the Ds will involve one investigation or there is a sufficient "common thread" between them are satisfied."

69. After taking up paragraph 32.2 and 32.3 Mr McGrath KC stated:

> "And so, my Lord, the point on UL v BK has been out there from the outset."

But crucially, when he reached the end of paragraph 32.2 and its reference to "wrongdoing in which … all of the Ds have jointly participated", Mr McGrath KC said (my emphasis):

> "Participation being, my Lord, the traditional understanding, together with the facilitation, of the requirements for a Norwich Pharmacal [order] by an innocent respondent."

70. The one thing about what was done when the electronic archive was handed over to the RF by the journalist that is relevant to the present claim by the Claimants is that the US firm associated with D1 caused a "vetting" or review of the documents to be undertaken for legal professional privilege. The vetting of documents was outsourced and is addressed further below. The review is relevant because it addresses the concern that privileged documents may be involved.

71. At the end of his oral reply at the substantive hearing Mr McGrath KC said:

> "… our main submissions are to do with the role of my friends' clients as instructing solicitors and [D3] as an expert. All of which is to do with the conduct [in the England & Wales enforcement] proceedings, not … over in Holland.
>
> Well, the problem is that that's not where we're saying the wrongdoing takes place. The relevant wrongdoing, as we made clear to Mr Justice Jacobs, and is clear in the jurisdictional challenge, relates to the use of the documents – the handling and use of the documents here, in England & Wales, for the purposes of the enforcement proceedings."

This is not the wrongdoing that the Claimants developed and which is summarised at paragraphs 49 and 50 above.

72. In England & Wales, for the purpose of the enforcement proceedings a small number of documents have been adduced, and those are appended to D3's expert report served by the RF and have already been adduced in the Dutch proceedings. And the Claimants themselves have stated to this Court that they "… do not bring these Claims in order to interfere with Russia's use of any Documents" and further that

"[s]uch Documents as exist should be before the Courts in which Russia is alleging fraud." (see paragraph 56 above)

Delivery Up

73. In my judgment, having regard to all the circumstances of the case, the Claimants are not entitled to any order for delivery up.

74. D1 has stated to the Court, through its Leading Counsel, on 21 September 2022 and at the December 2022 hearing that it does not have the archive or any substantial subset. The position was confirmed in correspondence on 4 October 2022, and by witness statement from a partner in D1 who has conduct for D1 and D2.

75. I accept that position. It is provided by officers of this Court well aware of their professional responsibilities to this Court and I have no good reason to doubt their appreciation of the importance of truth and accuracy in reporting the position to the Court.

76. D3 also does not have the archive. He has undertaken or caused to be undertaken thorough searches of his files.

77. I accept the position D3 states to the Court. He is not an officer of this Court, but I have every confidence that he holds himself to standards that are just as high, and I have from him a cogent account by a distinguished and responsible professional with expertise in the field. I have no good reason to doubt his appreciation of the importance of truth and accuracy in reporting the position to the Court.

78. Notwithstanding the thorough searches in his files, D3 adds that he cannot rule out the possibility that he has a very small number of other unadduced documents which his searches have not yet uncovered. This is in my judgment an understandable and professionally responsible caveat in the circumstances of the case. (With similar professional responsibility, D1 and D2 have explained to the Court that it is possible D1 has other documents amidst others received from a variety of sources but if so it is not now known which are documents from the archive.)

79. D3 does possess eight additional documents which have not been adduced in proceedings anywhere. I accept that D3 holds these additional documents only in connection with his duties as a Dutch lawyer.

80. The Claimants' case against the Defendants involves their seeking to rely on the RF stating (if this is what the 'Explanatory Statement After Referral' seeks to state) that the archive is from the records of the Claimants. However the Claimants' own position in relation to the adduced documents is that they "do not appear to belong to them". They also do not accept that the adduced documents are from their records. These points tend against the Claimants' case including in relation to the eight additional documents. They give rise to a more powerful inference against the Claimants' argument than those inferences suggested by the Claimants (in Ms Prince's fifth witness statement).

81. More generally, and as regards documents and information in the documents, again the Claimants have made clear that their position is that they "do not bring these Claims in order to interfere with Russia's use of any Documents". In that

circumstance I cannot see how any documents or information in the documents are confidential between the Claimants and the RF. If they are not confidential between the Claimants and the RF I am not persuaded they are confidential between the Claimants and the Defendants who have only been involved as the RF's lawyers. The Claimants' position is a voluntary one and the situation is not one that raises the question of loss of confidentiality through an unauthorised act, discussed by Mr McGrath KC in his submissions by reference to Imerman v Tchenguiz & Others [2011] 2 WLR 592.

82. As regards the possibility of documents being subject to legal professional privilege and not simply confidential, Mr McGrath KC pointed to the undertaking of a review for privilege as indicating a concern that the archive might contain privileged documents. But the fact of the review for privilege is an answer to that concern. The information available is that the US firm outsourced the vetting of documents for privilege. There is no reason to consider that decision as other than professional and prudent. Had it identified privileged documents there is no ground to believe that those documents would not have been dealt with appropriately.

Norwich Pharmacal orders

83. In my judgment no Norwich Pharmacal order should be made in the Claimants' favour.

84. Tugendhat J in United Company Rusal plc and Others v HSBC Bank and others [2011] 404 EWHC (QB) at [6] and [150]:

> "6. … There are few reported cases in which a Norwich Pharmacal order has been sought against a law firm. Any form of claim by one litigant against the lawyers retained by an opposing litigant is rare. …
> …
>
> 150. Norwich Pharmacal orders are always exceptional, because they interfere with the rights of third parties who are not said to have done anything wrong. Where the third parties are lawyers in a professional relationship with the alleged wrongdoer, then the case must be all the more exceptional. The facts of the reported cases appear to suggest that an appropriate case for an order against an innocent lawyer will be likely to be a case where fraud is alleged against the client."

85. This is important and relevant guidance and I have regard to it, although I accept Mr McGrath KC's point that there is flexibility in the remedy and its availability.

86. Lord Wolfson KC and Ms Menashy correctly make the point that if the Claimants do not seek to interfere with the RF's use of any documents (as the Claimants say to this Court they do not), then maintaining a claim to confidentiality does not prevent the drip feed that the Claimants say is their purpose in seeking orders from this Court.

87. Lord Wolfson KC and Ms Menashy, together with Mr Dutton CBE, KC, Mr Coleman KC and Ms Sagan for D3 correctly make the point that if the Claimants are concerned that such documents exist then this should be put before the Courts in which the RF is alleging fraud and it is open to them to invite the Court in question (and particularly

the Dutch Court) to address that concern in the context of the proceedings in which fraud is alleged.

88. The Claimants' evidence (which included an expert opinion, which whilst helpful was of limited compass) and argument that the Dutch Court would not allow an application to recover non-adduced documents does not go to this point. The point is about the Claimants inviting the Court in question to consider requiring information or for the documents to be before that Court (rather than recovered by the Claimants). The difficulty that the Claimants have in not being able to describe them to the Dutch Court is no doubt reduced by the fact that they can be identified and D3 has said they are relevant.

89. No request is made by the Claimants in the enforcement proceedings that are before the Courts of England & Wales that the RF should bring before those Courts further documents including the eight additional documents. Mr McGrath KC made a different point in argument:

> "If an expert is asked to opine on his view of the likelihood of success based upon documents -- success being to establish fraud and allegations of concealment – it's important that the expert properly explain to the court whether they've had a full run of documents; whether they've been allowed to have a look at potentially exculpatory documents as well. …
>
> But in the production of the report, my Lord, which is conduct that took place here, the relevant information as to the limitations on selection and how they were selected by the unidentified individual and drip fed to [D3], all of that is not mentioned; nor is the provenance of the documents made known until the explanatory – after referral statement is produced in the Dutch proceedings subsequently."

However this, in my judgment, is a matter for the Court when dealing with the enforcement proceedings and is not for this present claim for documents or information.

90. In considering the appropriateness of Norwich Pharmacal orders in the present case, I also have regard to all the facts of the case and to the grounds for my refusal of an order for delivery up, including the evidence that very few documents from the archive reached any of the Defendants, that none of those very few documents were legally professionally privileged, and that the greater proportion of the very few documents to reach any of the Defendants is already available to the Claimants because they have been adduced. The fact that the Claimants themselves challenge the relevance of that greater proportion to existing proceedings between the Claimants and the RF is also a material consideration.

91. In the exercise of my discretion, in all the circumstances I conclude this is not an appropriate case for Norwich Pharmacal relief.

The identity of the journalist

92. In the written argument before me on 16 August 2023 the Claimants also said:

> "Further, one critical aspect of the [Norwich Pharmacal Order] Claim is the identification of the British Journalist. It is a reasonable inference that once the Journalist is identified further steps against that individual will need to be taken and these are likely to be before the English Court."

93. In circumstances where the journalist provided the archive to the RF and the Claimants say they "do not bring these Claims in order to interfere with Russia's use of any Documents", I am not persuaded that there is any basis for identification of the journalist. Nor on the material before me is it credible that "further steps" would "need to be taken".

94. I add that D3 also explains, to my satisfaction, that the name of the journalist and information such as the circumstances of receipt by the RF "is privileged as a matter of Dutch law … and [he is] not at liberty to disclose it without breaching [his] duties to the RF". He has also explained, and I accept, that he does not know how the journalist obtained the documents.

95. For similar reasons, and having regard to all the matters referred to in this judgment, I am not persuaded that there should be any order as to the identity of others who may have been involved with the archive.

Jurisdiction: D3

96. In light of my conclusions on the substantive claims, I apprehend that the question of jurisdiction as against D3 may not be so material in practice. However I shall give my conclusions briefly. It was understandably dealt with briefly in oral argument, although I of course had the benefit of written argument in addition.

97. I do not propose to say more on the question of whether there is a serious issue to be tried. I remain sufficiently persuaded that D3 was a necessary and proper party to the Claimants' claim against D1 and D2. However, as at the date of the substantive hearing challenging jurisdiction, the Claimants failed to persuade me that England & Wales is clearly and distinctly the most appropriate forum.

98. As to that last point, it is now clear that the claim against D3 involves eight additional documents against someone who continues to have a professional role as a Dutch lawyer in the Dutch proceedings. As to his role in providing an expert report in the enforcement proceedings in England & Wales, that was and is, in truth, marginal in the context of this claim for delivery up and Norwich Pharmacal relief directed to the archive.

99. Further, the question of any steps D3 should or should not take as an expert in the enforcement proceedings in England & Wales is a quite separate matter for the Court dealing with the enforcement proceedings; it is not a matter that makes England & Wales clearly and distinctly the most appropriate forum for this claim for documents and information.

Conclusion

100. The Claimants' claim fails.

101. The stakes are clearly very high between the parties in the wider dispute that has been to arbitration and is now before a number of Courts. That is a situation that puts everyone under pressure. But it is exactly the situation in which it is more important than ever that there is clearheaded respect between the legal professionals involved. I wish to be quite clear that there is no basis whatsoever for any challenge to or adverse criticism of the integrity, honesty or professionalism of any of the Defendants in these proceedings, both the individuals (D2 and D3) and the firm (D1).

102. All the Defendants (and the partner who has given evidence for D1 and has conduct for D1 and D2) are distinguished leaders, of international standing in their professions, and they are entitled to be treated as such. It is so important to keep this in plain sight because it is one of the things that underpins professional aspiration and standards, on which all parties and the Courts depend. It also helps underline how serious a matter is, and how ready a Court will be to act and act rigorously, when (in complete contrast to the present case) there is truly a ground for challenge or criticism. I greatly regret that at least at times the Claimants have lost sight of this.

Note: These proceedings were heard in private. This Judgment was originally handed down in private on 13 June 2023. After hearing the parties further on 21 September 2023 I decided that this Judgment should now be handed down in public, and without redaction.