Neutral Citation Number: [2020] EWHC 3312 (QB)

Case No: QB-2020-002218
QB-2020-002492

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2020

Before :

MR JUSTICE WILLIAM DAVIS

- -

Between :

	STOKOE PARTNERSHIP SOLICITORS	**Claimant/ Applicant**
	- and -	
	(1) MR PAUL ROBINSON	**Defendant/ Respondent**
	(2) COMPANY DOCUMENTS LIMITED	
	(3) MR OLIVER MOON	**Defendants**
AND		
BETWEEN:-	**STOKOE PARTNERSHIP SOLICITORS**	**Claimant/ Applicant**
	(1) MR PATRICK TRISTRAM FINUCANE GRAYSON	
	(2) GRAYSON + CO LIMITED	**Defendants/ Respondents**
	(3) MR STUART ROBERT PAGE	
	(4) PAGE CORPORATE INVESTIGATIONS LIMITED	**Defendants**

- - - - - - - - - - - - - - - - - - - -
- -

Thomas Grant QC and Gerard Rothschild (instructed by **Stokoe Partnership Solicitors**)
for the Claimant
Edward Brown (instructed by Hickman and Rose) for the Defendant (Robinson)
Jeffrey Chapman QC and Steven Barrett (instructed by BDB Pitmans LLP)
for the Defendants (Grayson and Grayson + Co Limited)

Hearing dates: 11th November 2020
- -

Approved Judgment

.....

MR JUSTICE WILLIAM DAVIS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on the 3rd December 2020.

Mr Justice William Davis:

Introduction

1. In these linked proceedings Stokoe Partnership Solicitors ("the firm") apply to cross-examine the First Defendant in each case on the content of an affidavit sworn by each of them. Both Defendants oppose the applications.

2. I heard the applications at a hearing on 11 November 2020. The hearing lasted a full day and did not conclude until approximately 17.15. Prior to the hearing I was provided with an electronic hearing bundle consisting of 516 pages, a 28 page skeleton argument on behalf of the firm and 15 page skeleton arguments on behalf of Mr Robinson and Mr Grayson/Grayson + Co Limited respectively. I also had substantial witness statements from Mr Tsiattalou, Mr Robinson and the solicitor acting on behalf of Mr Grayson. Finally, I was provided in electronic form with authorities running to just over 800 pages. I make it plain that I have read and considered the entirety of the hearing bundle, the skeleton arguments and the witness statements. I was directed to particular authorities within the bundle. Those authorities I have read fully. If I do not refer in the course of this judgment to a specific piece of evidence or to a particular argument, that does not mean that I have not considered it. Were I to engage in a rehearsal of every issue and every argument, I would not be able to provide this judgment within what I consider to be a reasonable time scale given the issues which arise.

Background

3. The firm currently acts for a man named Karam Al Sadeq. He has been detained in a prison in Ras Al Khaimah in the UAE for something over 6 years. His incarceration follows his conviction in the UAE in respect of substantial fraud said to have been committed by him. Mr Al Sadeq disputed and continues to dispute this allegation. He alleges that he came to be in the UAE only because of an act of unlawful rendition. He further alleges that he was tortured during interrogation once he had been taken to the UAE. His case is that his conviction was based on material obtained as a result of torture and duress. Mr Al Sadeq has brought proceedings in this jurisdiction against an international law firm and some of that firm's current or former partners. The proceedings were issued by the firm in January 2020. Full particulars of claim were served in April 2020. The essence of the claim in those proceedings is that the defendants were complicit or involved in Mr Al Sadeq's rendition and subsequent interrogation and torture.

4. The partner of the firm with conduct of the Al Sadeq litigation is Haralambos Tsiattalou. At the end of March 2020 Mr Tsiattalou was contacted via an intermediary by a man named Oliver Moon. Mr Moon said that he had been instructed to obtain confidential information about the firm, in particular banking information. His instructions had come from a man named Gunning but his understanding was that Gunning in turn was acting at the behest of Paul Robinson (the First Defendant in the Claim number QB-2020-002218). In order to establish that Mr Robinson was involved as suggested by Mr Moon, the firm created two documents which purported to contain confidential banking information. In fact, the documents had been created so as to remove confidential information. The firm was able electronically to track the documents and to identify any person who accessed them.

By this route the firm (with the assistance of an investigation agency) identified Mr Robinson.

The proceedings

5. On 29 June 2020 the firm issued a Part 7 claim against Mr Robinson and the company by which he operated. The proceedings were for injunctive relief to restrain Mr Robinson from actual or threatened breaches of confidence. In addition, the firm sought a disclosure order pursuant to *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133. The claim identified three categories of confidential information which Mr Robinson had obtained or attempted to obtain. In addition, the claim referred to other alleged activity relating to confidential information in the hands of third parties. The overarching allegation made was that the obtaining of or attempting to obtain confidential information was linked to the Al Sadeq litigation.

6. The firm specified the *Norwich Pharmacal* order sought. It required Mr Robinson to swear an affidavit providing full information on three issues: the identity of the person providing him with instructions; the extent of the confidential information already obtained from the firm; the identity of those to whom he had passed on the confidential information.

7. On 5 July 2020 Mr Robinson attended the offices of the firm and answered questions relating to his activity vis-à-vis the firm. Either on that day or on the day following he provided the firm with his affidavit in draft form. On 7 July 2020 the case was considered by Chamberlain J. He made an order recording that the parties had compromised the claim on terms. For my purposes the relevant term is the order set out at paragraph 1 of the judge's order, namely that Mr Robinson was to swear an affidavit by 4.30 p.m. on that day dealing with disclosure. In fact, the affidavit had already been sworn in the same terms as the draft already provided to the firm. The affidavit was required to deal with the following:

    - The identity of any person who had requested Mr Robinson or his company to obtain confidential information from the firm.
    - The manner in which the requests were made including whether they were in writing, the gist of the requests and a copy of any written request retained by Mr Robinson.
    - What confidential information was obtained from the firm.
    - To whom the confidential information was provided and the circumstances of any such provision.

8. Paragraph 7 of the judge's order recorded the nature of the compromise. All further proceedings against Mr Robinson and his company were stayed save for the purpose of enforcing the terms of the order.

9. Mr Robinson' affidavit ran to 39 paragraphs. The essential matters to which I need to refer are as follows:

    - His instructions came from Patrick Grayson who was a private investigator and by whom Mr Robinson had been instructed in the past.

- He was first instructed at a meeting at the Goring Hotel in Belgravia at some point in January 2020. He was able to produce messages dated 30 January 2020 which showed a meeting on that date.
- At the meeting Mr Grayson asked Mr Robinson whether he knew of anyone capable of obtaining bank records and other information relating to the firm in response to which Mr Robinson said that Mr Gunning would be able to do so.
- At no point did Mr Grayson identify by whom he was instructed and Mr Robinson did not ask him.
- Communication between Mr Robinson and Mr Grayson was by means of an encrypted application named Signal. Mr Robinson did not have a record of the messages sent and received via this application because Mr Grayson had configured the application to delete messages automatically after 12 hours. He did produce screenshots of the record of the voice calls carried out via the application i.e. the fact of the calls and when they were made.
- The gist of the communication between Mr Robinson and Mr Grayson after the meeting in January 2020 was following up on Mr Grayson's original request.
- Mr Robinson was paid £5,000 in cash by Mr Grayson. The total fee agreed was £10,000. The balance had not been paid.
- The confidential information obtained consisted of the two documents created by the firm following the contact from Mr Moon. Mr Robinson did not request or obtain any other confidential information.
- Mr Gunning passed information to Mr Robinson via e-mail. Mr Robinson would pass on the information to Mr Grayson.
- On one occasion thought to be in early March 2020 Mr Robinson had met Mr Grayson in Sloane Square and had given Mr Grayson a hard copy print out of the information passed by Mr Gunning together with a USB stick containing the same information in electronic form.
- On other occasions Mr Robinson sent Mr Grayson material received from Mr Gunning via an encrypted e-mail account. Mr Robinson had deleted the e-mails before being served with the claim.
- Mr Robinson had no knowledge of the purpose for which the information was required. He knew nothing about any surveillance of Mr Tsiattalou during the solicitor's visit to Dubai in February 2020.

10. Mr Robinson also made passing reference to a man named Stuart Page as being someone with whom he had worked from time to time. I infer from the terms of the questions apparently put to Mr Robinson prior to him swearing his affidavit that Mr Page was someone already regarded by the firm as a relevant party. Mr Robinson did not suggest that Mr Page was involved in the dealings he had with Mr Grayson.

11. On 16 July 2020 the firm issued a Part 7 claim (namely Claim number QB-2020-002492) against Mr Grayson and Mr Page and their respective companies. In relation to Mr Grayson (the First Defendant in that claim) the details of the claim principally

were drawn from the material set out in the affidavit of Mr Robinson. I understand that the firm were unaware of the existence of Mr Grayson prior to Mr Robinson identifying him. No matter was pleaded beyond the material provided by Mr Robinson.

12. On 17 July 2020 the firm issued applications for interim relief from Mr Grayson and Mr Page in similar terms to the application made in respect of Mr Robinson. On 24 July 2020 Tipples J made an order by consent upon the applications. In relation to Mr Grayson the consent order largely consisted of recitals of undertakings given by him. The order provided a definition of confidential information. The definition was as follows:

> *"Confidential Information" shall mean any information sourced or derived, in whole or in part, from any document, whether paper or electronic, that has been obtained from the Claimant without its authority and is either designated as confidential, or is evidently confidential by reason of its subject-matter or the manner in which it has been obtained.*
>
> *"Confidential Information" shall include, but shall not be limited to: (i) the Claimant's banking records, accounts and statements; (ii) the Claimant's telephone records, accounts and statements; and (iii) documents which have not been published and which, on their face, relate to the conduct of legal proceedings on behalf of Mr Karam Al Sadeq.*

Mr Grayson undertook to swear a disclosure affidavit dealing with the four matters set out at paragraph 7 above, namely the matters in respect of which Mr Robinson had sworn an affidavit. Mr Grayson further undertook that his affidavit would state the treatment of any Confidential Information.

13. Mr Grayson's affidavit is dated 29 July 2020. He set out the definitions of Confidential Information as recited in the consent order. He said that no-one had requested him to obtain Confidential Information from or pertaining to the firm. He had not obtained any such information. In consequence, he had not provided such information to anyone. He concluded by stating "I never asked Mr Robinson to obtain Confidential Information relating to the Claimant (firm)". Wherever he used the term "Confidential Information" in his affidavit, Mr Grayson capitalised the first letter of each word. The proper inference to be drawn from that is that he was seeking to be strict in his definition of the term i.e. by reference to the definition in the order.

14. The firm took the view that the contents of Mr Grayson's affidavit were inconsistent with the affidavit sworn by Mr Robinson. On 10 August 2020 the firm wrote to the solicitors acting for Mr Grayson and made a request for further information pursuant to Part 18 of the Civil Procedure Rules. The firm set out two separate passages from Mr Robinson's affidavit and asked inter alia the following:

> *Please state whether Mr Grayson accepts any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which.*
>
> *Please state whether Mr Grayson denies any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which.*

The solicitors acting for Mr Grayson declined to provide the further information requested. They argued that the request was wholly premature.

15. On 2 September 2020 the firm served the Particulars of Claim in the action against Mr Grayson and Mr Page. In relation to Mr Grayson the case as pleaded was based on the affidavit of Mr Robinson together with affidavit evidence previously obtained from Mr Gunning and Mr Moon. Three requests for information concerning the firm were pleaded as follows:

> *(1) On or about 2 April 2020, Mr Robinson requested Mr Gunning to obtain the banking co-ordinates of the Claimant.*
>
> *(2) On or about 9 April 2020, Mr Robinson requested Mr Gunning to access the Claimant's main bank account and to obtain transactional data for the past three months.*
>
> *(3) On or about 21 April 2020, Mr Robinson requested Mr Gunning to obtain information as to the "movements in and out of Dubai - for Feb 2020" of Mr Haralambos Tsiattalou.*

16. The requests as pleaded were termed “the Example Requests”. It was averred that these were the only requests known to the firm at the time of the pleading. The right to add other matters should they become known was reserved. The confidentiality of the Example Requests was pleaded in these terms:

> *(1) A solicitors' firm's bank details and transactional data are not generally available. A solicitors' firm would not wish such information to be generally available.*
>
> *(2) The movements of a solicitor while acting for a client engaged in litigation are not generally in the public domain. A solicitor would not wish such information to be generally available, in particular because it is likely to reveal privileged information.*
>
> *(3) Those considerations would have been obvious to the reasonable recipient. They were emphasised by the surreptitious way in which the information was gathered and conveyed.*

The provision of confidential information by Mr Robinson to Mr Grayson was pleaded as follows:

> *Mr Robinson provided the confidential information obtained from the Example Requests to the First Defendant. In particular:*
>
> > *(1) In or about early March 2020, Mr Robinson met the First Defendant in Sloane Square, London. Mr Robinson provided him with a hard copy print out of the information, and a USB stick containing the same information electronically.*
> >
> > *(2) On other occasions, Mr Robinson sent the information using a Proton Mail encrypted email account to the address clovcrdock@protomnail.com.*

17. The claim for damages was put on the basis of breach of confidence and unlawful conspiracy. At the conclusion of the pleading the claim for *Norwich Pharmacal* relief was repeated in these terms:

> *In the Claim Form, the Claimant further sought injunctions and Norwich Pharmacal disclosure orders against all Defendants. By consent orders dated 24 July 2020 made by Mrs Justice Tipples, the Defendants each gave undertakings in lieu of such orders. If and to the extent that those undertakings lapse, or prove insufficient, the Claimant maintains its claim for such relief.*

18. On behalf of Mr Grayson further information was requested of the Particulars of Claim. In respect of any request seeking clarification of the factual case as pleaded, the information provided referred Mr Grayson and his solicitors to the affidavit sworn in July by Mr Robinson. The evidence of Mr Robinson was the foundation of the firm's case against Mr Grayson. Indeed, it properly can be said that it was and is almost the entirety of the firm's case.

19. The Defence of Mr Grayson was served on 30 September 2020. It admitted that a meeting between Mr Grayson and Mr Robinson took place at the end of January 2020 at the Goring Hotel. It denied that at the meeting Mr Grayson asked Mr Robinson if he could obtain banking information relating to the firm. Mr Grayson's case was that the meeting was a social catch-up between friends. His case further was that he had not sought or obtained any information relating to the firm of the kind alleged. At the same time as the Defence Mr Grayson responded to the request for further information which had been made in August 2020 by the firm. It was said that the request had been superseded by the later pleadings, the position of Mr Grayson having been made clear in his Defence.

20. On 9 October 2020 the firm issued an application notice both in the proceedings involving Mr Grayson and the stayed proceedings to which Mr Robinson was a party. The nature of the application in each case effectively was identical. I recite the order sought against Mr Grayson:

> *An order, pursuant to s.37 of the Senior Courts Act 1981 and/or the Court's inherent jurisdiction that the First Defendant be cross-examined on his sworn affidavit dated 29 July 2020 made on behalf of the First and Second Defendants. The affidavit is inconsistent with an affidavit of Mr Paul Robinson dated 6 July 2020 in separate but related proceedings (QB-2020-002218). The Claimant needs to resolve the inconsistency in order to uncover the identity of the ultimate perpetrator of very grave wrongdoing, i.e. an apparent attempt wrongfully to interfere with litigation pending before the High Court.*

In Mr Robinson's case it was said that the order now sought was required to enforce the order made by consent on 7 July 2020. The application notices were accompanied by a draft order as follows:

> *The Respondents Mr Robinson and Mr Grayson shall attend at the Royal Courts of Justice (or as otherwise directed by the Court) ….to answer questions under oath before a High Court Judge on the content of their affidavits.*

2. The examination of Mr Robinson and Mr Grayson is to be undertaken sequentially in the following manner:

2.1. Mr Robinson shall be examined under oath first. Mr Grayson shall not be permitted to attend Mr Robinson's examination.

2.2. Mr Grayson shall be examined under oath after Mr Robinson. Mr Robinson shall not be permitted to attend Mr Grayson's examination.

2.3. The Claimant shall then be entitled to cross-examine Mr Robinson again, on matters arising out of Mr Grayson's oral evidence.

2.4. The Claimant shall then be entitled to cross-examine Mr Grayson again, on matters arising out of Mr Robinson's second oral evidence.

Neither the application notices nor the draft order included any schedule of draft questions or topics for cross-examination.

The competing submissions

21. The headline arguments put on behalf of the firm were as follows:

- The litigation underlying the claims against Mr Robinson and Mr Grayson involves very serious allegations which are of considerable public interest.
- Ever since it became apparent in early 2020 that the firm was acting in the Al Sadeq litigation, the firm, in particular Mr Tsiattalou, has been subject to increasingly worrying attempts to subvert its conduct of the litigation. Evidence served two days before the hearing on 11 November 2020 showed that there had been a concerted attempt to mount a cyber-attack on the firm.
- What has happened to the firm – which shows every sign of continuing – is of the highest order of seriousness. The firm has been attacked as has (indirectly) Mr Al Sadeq. The rule of law is under threat.
- Mr Robinson has admitted participation in efforts to obtain confidential information. He was not acting on his own behalf. He was merely doing the bidding of others. The court should take urgent action to allow the identification of the malicious actors engaging in the attacks on the firm.
- The purpose of the *Norwich Pharmacal* jurisdiction is to allow a party to identify the ultimate wrongdoer. In this case that purpose is being thwarted not only by Mr Grayson but also by Mr Robinson. In order to achieve the purpose intended by the orders made in July 2020, it is just and convenient for cross-examination of both men to be ordered.
- The cross-examination would not be anything to do with the action involving Mr Grayson which currently is moving towards trial. It would be solely designed to achieve the end meant to be achieved by disclosure i.e. identification of the ultimate wrongdoer.
- Mr Grayson in effect consented to a *Norwich Pharmacal* order when he undertook to swear a disclosure affidavit. By definition that meant that he accepted that he was mixed up in wrongdoing. The stance he took in his

affidavit was inconsistent with that position. Cross-examination was the only reasonable and effective means of resolving the matter.

22. In the course of argument on behalf of the firm it was said that the procedure as envisaged in the draft order was not something that was set in stone. Thomas Grant QC on behalf of the firm told me that he was relaxed about the precise procedure. He conceded the possibility that Mr Robinson would be represented when Mr Grayson was cross-examined with a view to those representing Mr Robinson engaging in some cross-examination with the same applying in reverse when Mr Robinson was cross-examined. Mr Grant was not in a position to set out in any detail the nature of the cross-examination which would be involved were the applications to be granted. He referred to a list of 37 questions which had been posed on 2 September 2020 in correspondence by the firm to Mr Robinson's solicitors as indicating the areas which might be addressed in cross-examination of Mr Robinson.

23. Mr Robinson's case was put as follows:

- On 6 July 2020 he swore an affidavit which was provided to the firm, this affidavit coming after the meeting the previous day during which he had been questioned at length by those representing the firm. Nothing was said then to indicate that the disclosure he had given was in any way inadequate.
- Although the terms of the order agreed on 7 July 2020 permit enforcement of the order notwithstanding the settlement of the case, this cannot reasonably be taken to encompass an attack on an affidavit, the content of which was known to the firm at the time of the order.
- It would not be just to require him to attend for cross-examination when he had provided full disclosure and the proceedings against him had been stayed. On the face of it the applications arose wholly from the fact that Mr Grayson had denied matters about which Mr Robinson had given affidavit evidence. Any suggestion that Mr Robinson had been untruthful could only be put as a bare possibility. That could not be a proper basis on which to require him to attend for cross-examination.
- The proper route for the firm to follow would be to engage in the trial process. The firm could consider whether the stance taken by Mr Grayson to the request for further information was open to attack in an application to the Master with conduct of the proceedings. In any event, the proper point at which any cross-examination should take place would be at the trial.

24. On behalf of Mr Grayson the following was submitted:

- The fact that he undertook to provide a disclosure affidavit did not mean that he accepted that the *Norwich Pharmacal* jurisdiction was in play. There are many reasons why a party will give an undertaking in order to avoid a full-blown argument on the merits.
- The matters with which Mr Grayson supposedly was involved occurred early in 2020. The recent events which gave rise to the fears expressed by Mr Grant

were not associated with Mr Grayson. He could not possibly be said to be mixed up in that wrongdoing.

- The proper forum for the resolution of the issues between the firm and Mr Grayson would be the trial of the action. Oral deposition prior to a trial is not part of English civil procedure.
- The procedure proposed in the draft order was novel and misconceived. It was not appropriate for the firm in the course of the hearing to say that the procedure could be different with the permissible route being determined by the judge who presides over the cross-examination.
- It would not be just and convenient to order cross-examination on a matter which remains in issue in the proceedings, the identity of the ultimate wrongdoer being highly relevant to the case against Mr Grayson.

Legal principles

25. The ambit of *Norwich Pharmacal* relief is well-established. Three elements are required

    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.

26. Cross-examination on an affidavit can and will be ordered in the appropriate case. Most of the jurisprudence in relation to such cross-examination relates to affidavits sworn in proceedings concerned with asset tracing. Thus, in *Gee on Commercial Injunctions* [6th edition at paragraph 23-029] the general principles are described as follows:

    (1) the statutory discretion to order cross-examination is broad and unfettered. It may be ordered whenever the court considers it just and convenient to do so;

    (2) generally cross-examination in aid of an asset disclosure order will be very much the exception rather than the rule;

    (3) it will normally only be ordered where it is likely to further the proper purpose of the order by, for example, revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment against the defendants going unsatisfied;

    (4) it must be proportionate and just in the sense that it must not be undertaken oppressively or for an ulterior purpose. Thus, it will not normally be ordered unless there are significant or serious deficiencies in the existing disclosure; and

    (5) cross-examination can in an appropriate case be ordered when assets have already been disclosed in excess of the value of the claim against the defendants.

27. There are very few examples of cross-examination being ordered on an affidavit sworn pursuant to a disclosure order in the *Norwich Pharmacal* jurisdiction. The combined researches of leading and junior counsel in this case came up with three cases of relevance. *Kensington v Republic of Congo* [2006] 2 CLC 588 concerned proceedings taken by Kensington after that company had purchased debts owed by the Republic of Congo. The Congo had gone to great lengths to avoid meeting the debts purchased by Kensington. The Congo's assets principally consisted of oil. The Congo traded in its oil in a convoluted and arcane manner in an effort to hide its interest in the oil. A person named Dr Nwobodo was said to be involved in the running of a company through which the Congo traded oil. Kensington obtained a search order against Dr Nwobodo as part of the process of enforcement of a judgment obtained against the Congo. In connection with that order he swore an affidavit. The content of the affidavit was sparse and gave little or no detail of his dealings with the Congo and its oil. The material obtained as a result of the search demonstrated that Dr Nwobodo had been closely involved with dealing in oil on behalf of the Congo and his involvement was continuing.

28. Kensington applied for an order requiring Dr Nwobodo to submit to cross-examination both on his affidavit and more generally in relation to his dealings with the Congo. Morison J granted the order. He found that Dr Nwobodo had been and continued to be involved in the efforts of the Congo to avoid execution of the judgment. At [17] he said:

> *It seems to me that there is power to make such an order section 37 of the Supreme Court Act and under the Norwich Pharmacal jurisdiction. On any view, the Norwich Pharmacal jurisdiction is apt to cover situations post judgment. Also, on any view, Dr Nwobodo has become mixed up, at the very least, in dishonest attempts to defeat execution of the judgments against Congo….*

Morison J described his order as a "blended" order. Thus, it was not an order made solely to enforce a disclosure affidavit. It is also to be noted that it was an order made after judgment against a non-party.

29. Both of the other cases to which I have been referred arose in the course of what is known as the *Ablyazov* litigation. In reality it is only in *JSC BTA Bank v Solodchenko* [2011] EWHC 843 (Ch) that the issue of cross-examination on a disclosure affidavit ordered under the *Norwich Pharmacal* jurisdiction was the subject of any detailed consideration. It is not necessary to engage in anything other than a very brief description of the nature of the *Ablyazov* litigation. It concerned attempts by a Kazakh bank to trace and to recover huge sums of money appropriated dishonestly by senior managers of the bank. The misappropriated funds were channelled through various companies, one of which was called Eastbridge. A Mr Ereschenko for a number of years was a director of Eastbridge. There came a point at which the court made freezing and disclosure orders against Mr Ereschenko. The disclosure required was in respect of bank accounts and the current whereabouts of funds, the purpose being to obtain information to assist in the tracing of misappropriated assets. Disclosure was also required as to the ownership and management of Eastbridge and other companies associated with the channelling of misappropriated assets. The disclosure order was under the *Norwich Pharmacal* jurisdiction, Mr Ereschenko at that point not being a party to the proceedings.

30. Mr Ereschenko made a witness statement which was served in the proceedings. His affidavit, sworn a few days later, repeated what was set out in his witness statement. In essence, he said that had little knowledge of the supposed involvement of Eastbridge in the misappropriated assets and that he knew nothing of the other companies. He stated that he had no access to relevant documents.

31. On the evening of the day on which the witness statement was served, Mr Ereschenko was seen to go to the premises of a firm of accountants in a white van. He took away a large number of document boxes. He delivered them to a storage unit. As a result of these events the bank obtained a search order in relation to the unit. The documents disclosed that Mr Ereschenko's involvement was significantly greater than he had disclosed in his affidavit. He subsequently swore a further affidavit seeking to explain the position. This further affidavit raised many more questions than it answered.

32. Henderson J (as he then was) made an order requiring Mr Ereschenko to attend for cross-examination. His consideration of the jurisdiction to order cross-examination on a disclosure affidavit concentrated on *House of Spring Gardens v Waite* [1985] FSR 173 and succeeding authorities i.e. the jurisprudence pursuant to Section 37 of the Senior Courts Act 1981 relating to cross-examination on affidavits sworn in relation to disclosure obligations imposed by a freezing order. Henderson J referred to *Kensington v Republic of Congo* but only in relation to the applicability of the jurisdiction to non-parties.

33. Henderson J did not engage in any detailed consideration of the principles applicable to cross-examination in relation to a disclosure affidavit made under the *Norwich Pharmacal* jurisdiction. This is unsurprising. The circumstances of Mr Ereschenko's case were very much akin to the cases concerning asset tracing. More to the point, the facts of his case were striking. Contemporaneously with swearing an affidavit in which he said that he knew little or nothing about documents, transactions or companies, Mr Ereschenko went in a white van to a firm of accountants and collected a huge tranche of documents and other material which demonstrated the opposite. Moreover, he then swore a further affidavit which patently was inadequate. If any case were a paradigm for cross-examination on an affidavit, this was it.

34. It follows that there is little guidance on whether there is any jurisdiction at all to order cross-examination on a disclosure affidavit ordered under the *Norwich Pharmacal* procedure. The defendants in these proceedings did not invite me to reject the applications purely on the basis that there is no jurisdiction to order cross-examination in the circumstances of this case. I suspect that they considered that these proceedings were not a suitable vehicle to reach such a conclusion. What does seem to me to be a proper conclusion is that cross-examination on a disclosure affidavit sworn under the *Norwich Pharmacal* procedure when the intended purpose simply is to identify the ultimate wrongdoer should be ordered only in exceptional circumstances. It is common ground that cross-examination in an asset disclosure case should be the exception rather than the rule. When cross-examination is appropriate it will tend to be in cases where documents and digital material are at odds with the affidavit and where cross-examination might reasonably be expected to assist in the tracing of assets. Similar considerations are less likely to apply in cases where the issue is the identification of a wrongdoer so as to allow proceedings to be

taken against that wrongdoer. What is "just and convenient" – that being the overarching test – will take those matters into account.

Discussion

35. The applications in respect of Mr Robinson and Mr Grayson are separate and must be considered separately. I shall deal first with Mr Robinson. His case is straightforward. His affidavit was sworn after the firm and those representing the firm had had a significant opportunity on 5 July 2020 to question him directly. It has not been suggested that the affidavit differed in any material respect from what Mr Robinson said on 5 July 2020. I infer that there was no material difference. Had there been, procedural steps would have been taken forthwith. When the order was made in his case, the firm knew precisely what Mr Robinson was going to disclose. The Part 7 claim was merely a means to an end which had been achieved by the date of the order.

36. The claim made by the firm in the proceedings against Mr Grayson is based almost entirely on the evidence set out in the affidavit. The Particulars of Claim conclude with a statement of truth. That must mean that the firm is proceeding on the basis that the affidavit of Mr Robinson is true. That position is in stark contrast to the circumstances of Dr Nwobodo and Mr Ereschenko in the authorities to which I have referred.

37. The basis upon which it is now suggested that Mr Robinson should be subjected to cross-examination is strained. In the firm's skeleton argument, it is said that "the possibility that he has not revealed everything and given a fully truthful account cannot be discounted, especially in view of Mr Grayson's inconsistent evidence". The general proposition that a person who has sworn an affidavit has not revealed everything could apply in almost every case. That can hardly be a reason for ordering cross-examination, especially when such an order is to be the exception rather than the rule. Here, the general proposition is said to be supported by the inconsistency with Mr Grayson's account. I regret that I do not follow that argument. Mr Grayson's evidence is that he did not give Mr Robinson any instructions to seek confidential information. The firm's case is that he did. The firm has pleaded its case on the basis of the truthfulness of Mr Robinson's evidence to that effect. In those circumstances the fact that Mr Grayson has given an inconsistent account is of no assistance at all in supporting a suggestion that Mr Robinson has not revealed everything.

38. It is instructive to consider what the nature of the cross-examination of Mr Robinson might be were it to be ordered. After the firm had received the affidavit of Mr Grayson, the firm on 6 August 2020 wrote to Mr Robinson. The inconsistency between the two affidavits was noted. Mr Robinson was threatened with civil proceedings for deceit and with criminal proceedings in relation to unspecified offences. To avoid that outcome the firm requested a meeting with Mr Robinson, the purpose of which was "to discuss the inconsistency between his affidavit and Mr Grayson's; to provide us with a full and completely accurate account of what happened, including details of all participants involved; and to answer any other related questions we might have." Mr Robinson via his solicitors declined this request. The firm's next step was on 2 September 2020 to provide Mr Robinson with a typewritten list of 34 questions which were wide ranging and went well beyond the

ambit of the four issues set out in the consent order of 7 July 2020. Mr Robinson's solicitors in a letter of 16 September 2020 dealt with Mr Robinson's response to some of the questions. He dealt with the matters which might sensibly be said to relate to the four issues in respect of which the affidavit was sworn. If the cross-examination were to go beyond those issues it would be impermissible. If it were not, it is difficult to see how it could achieve anything which has not already been achieved by the exchange of correspondence in September 2020. With great respect to those presenting the argument on behalf of the firm, the application in respect of Mr Robinson is a fishing expedition.

39. I turn to the application in relation to Mr Grayson. His affidavit was sworn in very different circumstances to that of Mr Robinson. Although the order in his case was made by consent, it did not follow a consensual approach of the kind applicable in Mr Robinson's case. Mr Grayson was served with a claim form setting out the confidential information said to have been sought by Mr Robinson. Thus, he was on notice of what Mr Robinson said but he did not engage in any discussion with the firm prior to swearing his affidavit. In addition, his affidavit was sworn with specific reference to the definition of Confidential Information as set out in the order. I asked Mr Chapman QC who represented Mr Grayson at the hearing before me whether he accepted that the inconsistency between the two affidavits could only be explained on the basis that either Mr Robinson or Mr Grayson was lying. I raised that question because I could see that it might be said that Mr Grayson's affidavit, in adhering to the strict definition of "Confidential Information" given in the order, was truthful in its face even though it might appear to be inconsistent with the evidence of Mr Robinson. Mr Chapman did not pursue that line of reasoning. I hope that I shall be forgiven for saying that I found his response to my question a little opaque. He referred to the possibility of mistake which seems to me to be an unlikely proposition. The safest course is to proceed on the basis that there is a clear inconsistency between the two affidavits and that Mr Robinson and Mr Grayson cannot both be giving accurate and reliable accounts. In plain English one or other of them is lying as to the part played by Mr Grayson.

40. The first difficulty with the application in relation to Mr Grayson is that he is a party to current proceedings which are moving towards a trial albeit that I cannot say when that trial might take place. The claim against him is that he sought to obtain confidential information in relation to the firm. It has been particularised by reference to the evidence of Mr Robinson. Mr Grayson denies the claim and he has served a defence of which no further particulars have been sought. The remedies sought by the firm include *Norwich Pharmacal* relief. Thus, an issue for the trial judge will be the adequacy of the affidavit sworn by Mr Grayson. Mr Grant on behalf of the firm argued strenuously that the original *Norwich Pharmacal* order was and is juridically separate from the claim to be tried. He pointed out that the Particulars of Claim on which the firm will present its case did not exist at the time of the order made by Tipples J. That is true but the proposition misses the true point. In the proceedings the cross-examination of Mr Grayson inevitably will concentrate on his assertion that he has made full disclosure. The firm's case is that he has not done so and that he has breached the firm's confidence. To permit cross-examination now on Mr Grayson's affidavit would be to pre-empt the cross-examination at trial. On the face of it that cannot be just and convenient. The fact that the case is proceeding to trial is not of Mr Grayson's making. The firm has determined that this is the appropriate course. It

is not for me to comment on that determination. However, it does have consequences as I have set out above.

41. The second difficulty is that the case against Mr Grayson is limited in scope. The pleaded case is that there were three attempts to obtain confidential information as set out at paragraph 15 above. Each of the attempts occurred in April 2020. Whether the sort code and account number of the firm's bank account was confidential information is doubtful. Many solicitors will include those details on any invoice they submit. The same lack of confidentiality could be said to apply in relation to historic information concerning Mr Tsiattalou's travel arrangements. Confusingly the pleaded case is that whatever information in fact was obtained was provided to Mr Grayson in early March 2020. For Mr Grayson now to be required to attend for cross-examination on events which occurred some seven months ago and which were of such limited ambit does not seem to me to be an obvious requirement taking into account what is just and convenient. Mr Grant argued that this approach fails to take account of the continuing depredations of the firm's business. The submission is that cross-examination is required "so that we can put a stop to what is happening". I accept that the case against Mr Grayson is not be considered in a vacuum. If he gave instructions to Mr Robinson in April 2020 in respect of information relating to the firm and he did so at the request of another (potentially the ultimate wrongdoer), it is a possible inference that the wrongdoer responsible for those events is concerned with more recent events. But it is not a clear and inevitable inference. What is just and convenient must be judged principally by reference to the wrongdoing in respect of which the *Norwich Pharmacal* relief was obtained.

42. The third difficulty is that this is not a case in which the firm can call upon the same kind of material as was available to the claimants in *Kensington* and the Ereschenko case. Those cases were different in nature since they were principally concerned with asset tracing, an exercise which is bound to give rise to documentary and digital material in relation to which effective cross-examination can be mounted. The chronology in those two cases in simple terms was that the affidavit was sworn following which significant material emerged which contradicted its contents and which demonstrated the inadequacy and untruthfulness of the affidavit. In the Ereschenko case there were two untruthful affidavits. Here Mr Grayson has given an account which is inconsistent with that of Mr Robinson. Had e-mail traffic or other documents emerged which demonstrated that Mr Grayson in fact had engaged with Mr Robinson in some kind of search for information, that might have allowed a conclusion that cross-examination would be just and convenient. Beyond the limited material which was produced by Mr Robinson at the outset, no such digital or documentary material is available.

43. The fourth matter of relevance is that, given the proceedings against Mr Grayson are continuing and the respective cases have been pleaded, there is scope for the firm to use the mechanism of Part 18 to obtain further information. The request for further information first requested in August 2020 has not yielded any useful result so far as the firm is concerned. However, the issue has yet to be considered by a Master or judge. Part 18 gives the court a wide power to order additional information in relation to any matter in dispute in the proceedings. I have not been asked to consider how that power might be exercised on the facts of this case but that it is a potential route

available to the firm cannot be disputed. This is a highly relevant consideration in respect of whether ordering cross-examination would be just and convenient.

44. Taking all of those matters into account, I am satisfied that, even assuming there is jurisdiction to order cross-examination in the circumstances of this case, such an order is not appropriate in relation to Mr Grayson. It would not be just and convenient to make such an order.

45. It follows that both applications fail. At the end of his oral submissions Mr Grant said that the *Norwich Pharmacal* orders had not succeeded in their aim for "extraordinary reasons". It does not seem to me that for two witnesses to contradict each other is extraordinary. Clearly it is frustrating for the firm given the lengths to which they have gone in pursuing this matter. However, it is not such an exceptional circumstance that either Mr Robinson or Mr Grayson should be required to attend for cross-examination.