Neutral Citation Number: [2020] EWHC 3125 (Comm)

Case No: CL-2019-000313

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 19/11/2020

**Sir Michael Burton GBE**
sitting as a High Court Judge
**Between :**

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| **I.F.T. S.A.L. OFFSHORE** | **Claimant** |
| **- and -** | |
| **BARCLAYS BANK PLC** | **Defendant** |

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**Matthew McGhee** (instructed by **PCB Litigation LLP** ) for the **Claimant**
**Adam Temple** (instructed by **TLT LLP**) for the **Respondent**

Hearing dates: 13 November 2020
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# Approved Judgment

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**Covid-19 Protocol: This judgment This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is 19 November 2020 at 2pm**

## SIR MICHAEL BURTON GBE :

1. The Claimant, I.F.T. S.A.L. Offshore, is the victim of a fraud, known colloquially as an 'authorised push payment scam', whereby US$249,721.44, which they intended to pay in respect of their purchase of raw meat products to an Austrian supplier, was diverted by a fraudster to an account at Barclays Bank (the Respondent) specially set up for the purpose. The money was transferred by the Claimant's French bank to Barclays on 15 January 2019 and paid out by them directly to an account in the United Arab Emirates. After discovering the fraud the Claimant immediately caused its French bank to notify the Respondent of it at 11:16 am on 18th January, and at 1250: to request repayment of the money.

2. But it is now clear, as a result of the Norwich Pharmacal/Bankers Trust application (the "Norwich Pharmacal application") made in these proceedings by the Claimant, that the monies had been already paid straight out by Barclays in six tranches, on the 16, 17 and 18 January, the last tranche being paid out some two hours before the notification of the fraud to Barclays.

3. The Claimant made the Norwich Pharmacal application, which was granted by Order dated 14 June 2019 by Mr Christopher Hancock QC, sitting as a deputy High Court judge, ("the Hancock Order"), to discover documents from Barclays evidencing the receipt and payment out of the monies. It is well established that on a Norwich Pharmacal application it is not relevant whether the bank respondent was or was not complicit in the fraud (see per Lord Woolf LCJ in **Ashworth Hospital Authority v MGN Ltd** [2002] 1 WLR 2033 (HL) at [30], [58].

~~4.~~ In making the application the Claimant did not allege that Barclays were complicit, and expressly stated that it had no intention of bringing proceedings against Barclays. Mr McGhee, who appeared then, as he has appeared again before me, for the Claimant is quoted in the second witness statement of Mr Brown for the Respondent at paragraph 29 as follows: "…*the simple position is that, as of today, as confirmed in writing by the solicitors instructed by my client, there is no intention to bring a claim against Barclays*."

5. The Respondent does not now pursue a case that the Claimant was misleading the Court or is estopped or would be committing an abuse of process, by now pursuing the Respondent. Indeed at paragraph 24 of his skeleton Mr Temple suggests that the Claimant "*may have been able to say that it had no active intention to pursue the bank at that stage… perhaps because it did not have the evidence to support such a claim"*.

6. The Hancock Order incorporated at paragraph 3 of the Schedule an undertaking that the Claimant would not, without the permission of the Court. use any information obtained as a result of the Order for the purpose of any civil or criminal proceedings either in England and Wales or in any other jurisdiction, other than for specified purposes (which did not include bringing proceedings against the Respondent). By an Order dated 11 March 2020 by Teare J the Claimant was given permission pursuant to that paragraph "*to use documents and information obtained as a result of the Order for the purpose of reviewing that material in order to consider whether to bring proceedings against the Respondent"*.

7. The Claimant, having now carried out that review, says that it does wish to make use of the documents obtained by the Hancock Order for the purpose of bringing proceedings against the Respondent. It wishes to consider the making of an application for pre-action disclosure against the Respondent and if appropriate to bring proceedings against the Respondent thereafter, and in a lengthy draft letter of claim has set out the basis in law upon which such claims would be made.

8. The principles are in the event not in dispute, that the onus is on the Claimant to show but it has cogent and persuasive reasons to make use of the documents for such purpose:

(i) Mr Temple draws attention to **Chanel v Woolworth** [1981] 1 WLR 485, which is the seminal authority dealing with an application for discharge of a party from an undertaking, when some significant change of circumstances is necessary. However this authority does not seem to me to be helpful where the position is expressly dealt with in the context of the discharge of an undertaking/grant of permission for collateral or subsequent use of documents disclosed in proceedings, or, as in this case, disclosed pursuant to a Norwich Pharmacal order.

(ii) The basic principle arises in the general context of permission for collateral use of disclosed documents covered by CPR 31.22. Although Eder J at first instance in **Tchenguiz v Director of the Serious Fraud Office** [2014] EWHC 1315 (Comm) at [18] uses the expression "the bar is high", when referring to the need for "cogent and persuasive reasons", the former words do not feature in the Court of Appeal in **Tchenguiz** [2014] EWCA Civ 1409 at [65]-[66] where Jackson LJ said as follows:

> *"65. Upon reviewing the authorities it seems to me that the decisions reached are highly fact sensitive. The court is weighing up conflicting public interests in a variety of different circumstances….*
>
> *66. The general principles which emerge are clear:*
>
> *(i) The collateral purpose rule now contained in CPR 31.22 exists for sound and long established policy reasons. The court will only grant permission under rule 31.22 (1) (b) if there are special circumstances which constitute a cogent reason for permitting collateral use.*
>
> *…*
>
> *(iii) There is a strong public interest in facilitating the just resolution of civil litigation. Whether that public interest warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case. Those circumstances require careful examination."*

9. So the onus is upon the Claimant to persuade me that it has cogent and persuasive reasons for permission to be granted to use the documents. In only one case to which I was referred, **Mitsui v Nexen Petroleum** [2005] 3 AER 511, was the context, as here, whether documents obtained by a Norwich Pharmacal order could subsequently be used

collaterally. Mr Temple referred to that case in his skeleton at paragraph 19.3 for a proposition that if the Claimant had stated when obtaining the Norwich Pharmacal order that it did have an intention to pursue the Bank then the application would have been dismissed. He did not make that proposition orally before me, and I do not agree that it can be derived from Lightman J's decision, which was to refuse an application for a Norwich Pharmacal order when he concluded that such order should not be granted where an application for pre-action disclosure could have been sought. He does seem to have been of the view at [24] of his judgment (inconsistently with **Ashworth**) that the exercise of the Norwich Pharmacal jurisdiction against a party depended upon that party being innocent of any participation in the wrongdoing being investigated. But I am satisfied that the test for whether to grant permission for use of documents obtained by a Norwich Pharmacal order is simply whether I am persuaded that there are cogent and persuasive reasons to grant such permission. I do not see any distinction from the ordinary case where permission is sought to use disclosed documents against a third-party.

10. The reasons relied upon by the Claimant as such cogent and persuasive reasons are as follows:

(i) They had no reason to believe that they had a case against Barclays when they originally made the application. The documents now disclosed show, in their belief, that there may well be such a case, and I summarise the points made by Mr McGhee in his skeleton argument at paragraphs 13 and 34.

(a) The Barclays account was opened on 7 December 2018 by a Polish national for his newly established sole trader painting contractor business, trading from a residential address at a North London flat. The customer declared an initial investment of £2,000 and an annual turnover of £60,000 and that he did not trade overseas.

(b) Up to 14 January 2019, the largest single transaction on the account was a credit of £200.

(c) On 14 January 2019, the customer made a payment out of the account in dirhams of the small sum of AED 147.58 to an account in Dubai in the name of a buildings maintenance company.

(d) On 15 January 2019 the account was credited with the monies derived from the Claimant, in the sum of US$ 249,696.44 under cover of a reference to "*Settlement of invoice… Frozen chicken pork*".

(e) From 16 to 18 January 2019 6 payments are made out of the account in dirhams to an account with Noor Bank Dubai, totalling US$ 249,512.

(f) At some point in time, whether before or after its customer's receipt of the fraudulent payment, Barclays made a Suspicious Activity Report (SAR) and notified fraud databases of activity on accounts that the customer had with Barclays, seemingly accounts other than those which processed the fraudulent payment from the Claimant.

(g) On being notified of the fraud, the Respondent took no action whatsoever for 4 days and no steps to block the account for 5 days, and seemingly no steps to recall the payments made.

(ii) it is now clear, as it was not and could not have been clear at the time of the application for the Norwich Pharmacal, that there is no realistic prospect of recovery from the fraudster or tracing of the monies. The money had all gone out by 18 January to a bank in the United Arab Emirates, and on from there, and notwithstanding the institution of criminal proceedings in Lebanon to which the Claimant has been joined as a civil claimant, it is now clear that recovery cannot be achieved. In those circumstances it is clear that the Respondent, <u>if liable,</u> is the only solvent defendant available.

11. The Claimant relies on public interest in two respects:

(i) The interest in a just resolution of civil proceedings – per Jackson LJ cited in paragraph 8 above. In the absence of a case such as estoppel or abuse of process, the Court should not stand in the way of the fair and just resolution of the case but should facilitate it.

(ii) The interest in the prevention and detection of fraud. Banks stand in the main line of defence against fraud.

12. The Respondent relies upon the public interest in the protection of the confidentiality of the relationship between a bank and its customers, though that is plainly overridden in the event of fraud (e.g. **Bankers Trust Co v Shapira** [1980] 1WLR 1274 at 1282C). However Mr Temple contends for what he says is a significant countervailing public interest. If the application is granted, and if a precedent is set by it that if a Norwich Pharmacal application is not successful in the pursuit of a fraudster then the documents obtained on the Norwich Pharmacal order can be used against the bank, then that will facilitate the bringing of speculative cases against banks by the victims of fraud, putting banks to expense and expenditure of time. Mr Temple refers to the view expressed by the editors of **Malek and Matthews Disclosure** (2016 5th ed) at 19.06, by reference to authority, that a rationale for the undertaking not to make collateral use may be the promotion of full discovery, "*as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery*". Plainly fear of disclosure of complicity would not be a good reason for such disincentive. But Mr Temple submits that if there is the prospect of subsequent use of the documents against a bank, then the bank may be encouraged to oppose Norwich Pharmacal orders. or at any rate may be discouraged from consenting to them, as is often now the practice.

13. While the two public interests put forward by the Claimant speak for themselves, I do not find the Respondent's argument persuasive:

(i) If a Respondent chooses not to consent to a Norwich Pharmacal application, then they may resist, and such resistance may be successful, but if the order is made then that will only have caused the expenditure of additional costs.

(ii) The discouragement of speculative claims will not in my judgment come about by the refusal of permission to use documents obtained on a Norwich Pharmacal, but by the striking out of hopeless claims. If after a Norwich Pharmacal order

permission is obtained to make use of the disclosed documents, and a claim is then pleaded against a respondent bank which is only speculative, and cannot be supported, even after pre-action disclosure, then the best way to discourage the taking of such course in the future will be for a summons to strike out or an application for summary judgement under Part 24 to be successfully made by a bank. On the face of the arguments put before me there are or may be difficulties, such as Mr Temple contends, both with regard to the victim establishing even an arguable case of dishonesty, and in relation to the existence of a duty of care, or of a breach of statutory duty on the part of the bank, the need probably to take the existing authorities to the Supreme Court, but those arguments can be fully deployed and a judgment given, which will then be available to deter other victims in the same position as the Claimant. The way to discourage speculative claims in my judgment is to establish a precedent which would prevent, inhibit or discourage the making in future of such speculative claims.

14. Mr Temple effectively asked me to carry out that exercise at this stage, but the Claimant submits that it should be entitled to bring an application for pre-action disclosure, and I am at present unable to say that there may not be a claim, based on one or more of the six causes of action outlined in the detailed letter of claim by the Claimant, with or without any further documents obtained as a result of pre-action disclosure, by reference to the following matters summarised in paragraph 73 of the Claimant's skeleton and by reference to the matters I have summarised in paragraph 10 above:

(i) It is at least possible that the Respondent was on notice of potential wrongdoing by its customer prior to the fraud on the Claimant, by reference to the fact that it made an SAR and reports to fraud databases in respect of that customer.

(ii) The nature, seemingly uncommercial, of the transactions, including what may have been small test uses of the bank account between 9 and 14 January and then the substantial payments out to the UAE in the context of, and apparently wholly contrary to, the legitimate declared purpose of the account, and of its intended use.

(iii) The delay between 18 and 23 January.

(iv) The strange fact that the receiving bank in the UAE has stated in the Lebanese proceedings that it received a recall request from Barclays on February 2 in respect of AED 117,759, of which the Respondent asserts no record or memory.

15. I conclude that I should give permission for the use of all the documents in respect of which permission is sought: I can see no distinction between any of them.