[2018] JMSC Civ. 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 02499

IN THE MATTER OF the Estate of **HAROLD EUSTACE MELVILLE MORRISON, DECEASED**

AND

IN THE MATTER OF sections 4 and 6 of the Inheritance **(Provision for Family and Dependants) Act**

BETWEEN	**MARJORIE MORRISON**	**FIRST CLAIMANT /APPLICANT**
AND	**MARJORIE MORRISON** (Legal Guardian of **JAMES MORRISON**	**SECOND CLAIMANT/APPLICANT**
AND	**SJUAN MORRISON** (Mother and Next Friend of **ZOE MORRISON)**	**THIRD CLAIMANT**
AND	**SJUAN MORRISON** (Mother and Next Friend of **ZARA MORRISON)**	**FOURTH CLAIMANT**
AND	**LOURICE MORRISON** (Executor of the Estate of **HAROLD EUSTACE MELVILLE MORRISON,** deceased**)**	**DEFENDANT/ FIRST RESPONDENT**
AND	**HAROLD MORRISON + ROBERT WOODSTOCK ASSOCIATES LIMITED**	**SECOND RESPONDENT**

Ms. Sherry-Ann McGregor instructed by Nunes Scholefield DeLeon & Co. for Applicants.
Ms. Malacia Wong and Ms. Amanda Montaque instructed by Myers, Fletcher & Gordon for the Defendant /First Respondent.
Mr. Ransford Braham, Q.C., for the Second Respondent.

HEARD: November 19th 2017 and 2nd February, 2018

Disclosure – Specific Disclosure from a 3rd party – Norwich Pharmacal Relief – Parts 26 and 28 of the Civil Procedure Rules considered – Whether Norwich Pharmacal relief achieves fairness in a court trial –Jurisdiction of Norwich Pharmacal Principle – Mere Witness Rule – Standard of Necessity and Proportionality

PALMER HAMILTON, J. (AG.)

Background

[1] My decision was handed down on the 2nd day of February 2018. I indicated then that written reasons would follow. I now make good on that promise. For ease of reference and because I find it generally accurate, I will rely on the background provided by the First Respondent, with a few minor adjustments.

[2] On June 2, 2017, Marjorie Morrison (The Applicant) filed a Notice of Application for Court Orders. Her Affidavit in Support of that Notice was later filed on June 7, 2017. In her application, she sought orders that:

(i) The Defendant/First Respondent, Lourice Morrison, discloses receipts, invoices and or estimated figures in respect of liabilities identified in paragraph 8 of the affidavit of Lourice Morrison sworn to on May 24, 2017.

(ii) The Second Respondent shall disclose copies of its audited or draft financial statements for the years 2015 and 2016.

(iii) The Second Respondent shall disclose all documents pertaining to the income generated or derived by the firm as at 2015 and 2016.

(iv) The Second Respondent shall disclose all documents pertaining to the debts owed to the firm as at 2015 and 2016.

The Second Respondent is not a party to this claim and learned Counsel for the Applicant indicated that she had no intention of joining the Second Respondent to the substantive claim. The Second Respondent was only added to facilitate the said Application for specific disclosure.

[3] Paragraph 8 of the affidavit of Lourice Morrison sworn to on May 24, 2017 states:

"I make this affidavit in response to the Request for Information and the application for specific disclosure and in addition to the letter dated May18, 2017 (LM-5) state the following:

(i) In relation to the request for a list of liabilities of the estate, in addition to the liability of the estate for a substantial costs order against Harold Morrison in Suit No. 2015 HCV 01740, the estate has incurred and will incur costs of:

(a) Funeral expense;

(b) Uninsured debts which were left by the deceased including:

- Credit card bills from the Bank of Nova Scotia which were paid to amounting to $656,293.11. The copy of the cheque paid to Bank of Nova Scotia is exhibited hereto as LM-6;

- Credit card bills from National Commercial Bank which were paid amounting to $1,031,235.38. A

copy of statements, bills and correspondence with National Commercial Bank are exhibited hereto and marked as LM-7.

(c) Testamentary including legal fees and taxes on obtaining the grant of probate;

(d) Taxes for which the estate will be liable on transfer of the shares in the firm; and

(e) Costs of this litigation

(ii) There is one other asset being property located at Townhouse #3, Enchanted Gardens, Ocho Rios and registered at volume 1228 Folio 122 of the Register Book of Titles. This property is registered in the joint names of Harold and Marjorie and therefore I did not originally consider it to be part of Harold's net estate since the property is registered under a joint tenancy and would have devolved to Marjorie on Harold's death. The copy of the Duplicate Certificate of Title to the property is exhibited hereto and marked as LM-8. However, there was a consent order dated October 11, 2001 in Suit No. 135 of 2002 following the divorce proceedings between Harold and Marjorie which declared Harold and Marjorie to have 50% interest each in the property and therefore severed the joint tenancy. A copy of this consent order is exhibited hereto and marked as LM-9. The property was to be sold and the proceeds of sale divided equally between Harold and Marjorie. This property is therefore both an asset and liability (since taxes continue to accrue) of the estate.

(iii) In relation to the request for the audited financial statements of the firm, the current articles adopt Articles 35 to 38 from Table A, schedule 1 of the Companies Act of Jamaica, 2004, which provide

> that on Harold's death I would not automatically become a member of the firm but would first have to be elected and registered as a member. Since election and registration have not taken place, I do not have a right of access to the firm's documents including statements or accounts."

The Applicants' Submissions

[4] The Applicants state that they are relying on the provisions of the Inheritance (Provisions for Family and Dependents) Act, (hereinafter referred to as the Inheritance Act) as the basis of their Claim, with specific reference to sections 2 and 4. Learned Counsel for the Applicant submitted that the deceased net estate includes property he had the power to dispose of under his Will. The most significant property, they say, is 51% shareholding in the architectural firm of **Harold Morrison Woodstock + Associates Ltd**. Learned Counsel contends that the First Respondent made it clear that she is not a shareholder or director of the firm and cannot therefore speak to its finances. This, counsel emphasizes, is the reason for seeking orders for the Second Respondent to disclose the relevant information, even though the firm is not a party to the action and it is not intended for the firm or their representative to give evidence. In other words, counsel is seeking specific disclosure from a third party.

[5] The Applicants relied on the principles outlined in **Norwich Pharmacal Co**. v **Customs and Excise Commissioners** [1974] AC 113 in support of their application. The Court, they submit, has jurisdiction to make an order for disclosure of information or documents from a third party who has been innocently mixed up in wrongdoing.

[6] Counsel for the Applicant urged the court to consider that although the specific rules of disclosure under Parts 25 and 28 of the Civil Procedure Rules (CPR) do not mention third parties, the overriding objective of the Court to do justice between the parties to an action enables this Court to rely on its inherent equitable jurisdiction to order disclosure of relevant information or documents

from a third party. In establishing the act of wrongdoing, Learned Counsel for the Applicants made reference to the fact that the applicants had been denied benefits from the deceased's estate to which they were entitled by law.

[7] In making the nexus between the Second Respondent and the act of wrongdoing, Ms. McGregor stated that it was the facilitating of the concealment of information that is directly relevant to the Court's objective of determining the issues joined on the Claim. This is the way a Court will do justice between the parties. She further submitted that the Second Respondent is not a mere witness or bystander. This is because, the deceased's estate is entitled to a 51% shareholding in the company. Those shares were held by the deceased at the time of his death and he disposed of them under his Will. It is as a result of this large shareholding that Ms. McGregor urged upon this court that the Second Respondent must render an account to the Defendant, as Executor of the deceased's estate, of the value of that shareholding. The method of so doing was by provision of the relevant financial statements.

[8] Ms. McGregor also relied on the cases of **Ashworth Hospital Authority** v **MGN Ltd** [2002] 1 WLR 2033; **Rugby Football Union** v **Consolidated Information Services Ltd**. (formerly Viagogo Ltd.), [2012] UKSC 55; **The Cocoa Cola Company and others** v **British Telecommunications Plc**;[1999] FSR 518; and **Carlton Film Distributors Ltd** v **VCI Plc**, [2003] FSR 47.

The First Respondent's Submissions

[9] Learned Counsel for the First Respondent, Ms. Malaica Wong, contends that an order for disclosure cannot be granted against the firm, as it is not a party to the Claim. The CPR, she submits, does not allow for such an order to be made against a third party. Ms. Wong submitted that the valuation of the shares was done by Ashburn C Simon & Co., Chartered Accountants, and if the Applicants disagree with the value as reflected in their report, then they should bring an opposing valuator's report from an expert of equal weight. Further, Ms. Wong distinguished the **Norwich Pharmacal** case from the case at bar by stating that it

establishes a principle in law which enables a company to bring an action against a person identified, and that "it does not expand the principle to an existing Claim particularized past a date where evidence has been exchanged and to date there is no affidavit which approximately challenges Mr. Simon's methodology."

[10] Ms. Wong strongly suggested that it is for the judge who hears and determine the substantive matter to determine whether or not these figures will be accepted as it relates to the shares. She further contends that the Court is not expected to examine financial statements of a company and that instead the Applicant should put before the Court an expert challenging the report of Mr. Simon. Ms. Wong also sought to distinguish the case of **William Clarke v Gwenetta Clarke**, [2014] JMCA Civ. 14 by submitting that the **Norwich Pharmacal** principle was applied because it was an action against wrongdoers. This claim, she submitted, is not a case of wrongdoers. In fact, Ms. Wong was emphatic in pointing out that all the cases relied on by the Applicants were irrelevant and inapplicable because they were pertaining to the bringing of an action against wrongdoers.

The Second Respondent's Submissions

[11] Learned Queen's Counsel, Mr. Ransford Braham, though admitting that he did not file any documentation opposing the application, indicated that he adopted the submissions of the First Respondent and also relied on the case of **Mitsui & Co. Ltd**. v **Nexen Petroleum UK Limited**, [2005] EWHC 625 (Ch.) which summarized the principles in the **Norwich Pharmacal** case. Mr. Braham, further submitted that, assuming Mr. Morrison had committed some wrong by writing his will as he chose, it cannot be said that the company, Harold Morison +Robert Woodstock Associates Limited, was "in cohorts" to commit a wrong. Learned Queen's Counsel emphasized that the application was wholly misconceived because in order to pursue this application the applicants need to establish that the person from whom they seek information is mixed up in some wrongdoing, and that has not been established.

Issues

[12] The salient issues which fall for my consideration are two-fold. Firstly, whether there is an act of wrongdoing and secondly, if there is an act of wrongdoing, whether the principles in **Norwich Pharmacal** are applicable to a company in which the deceased had majority shares which are to be distributed under his Will.

Law and Analysis

The Norwich Pharmacal Principle

[13] The ground-breaking decision in the 1970's, **Norwich Pharmacal Co**. **and others** v **Customs and Excise Commissioners**, [1974) AC 133 went against the grain of what was the acceptable principle in an action for discovery. This was, that discovery (or disclosure) was an equitable remedy utilised to bring justice between party and party in order to make the proceedings a level playing field. In fact, it remained the law that no action for disclosure could be brought against a party against whom no other relief is or could be sought, that is to say, against whom the Claimant had no reasonable cause of action. (per Buckley L.J in **Norwich Pharmacal**).

[14] In this House of Lords decision, the owners of a patent for a chemical compound found that their patent was being infringed by illicit importations of the compound which had been manufactured abroad. The owners sued the Customs and Excise Commissioners for discovery of the documents which would show who were the importers. The commissioners not only disputed the plaintiffs' rights to bring such an action but also contended that public policy precluded the making of the order. The House of Lords rejected these defences, and held that the action should succeed.

[15] Roskill, L.J in his judgment (at page 149 paragraph F of the case) opined that there was in existence a basic rule that there is no independent action for discovery against a party against whom no reasonable cause of action existed or who was in the position of a mere witness.

[16] The decision in **Norwich Pharmacal** is that a person who becomes involved in the tortious acts of others, even if innocently, is under a duty to assist a person who is injured by those acts by giving him full information by way of discovery and disclosure of the identity of the tortfeasor. Such an action may be brought even though the claimant has no other cause of action and seeks no other relief, though it cannot be brought against someone who is not involved in the wrongdoing beyond being a mere witness or having some relevant document in his possession. The action is a descendant of the old bill of discovery in Chancery. Under that ancillary jurisdiction, equity was used to aid litigants in the courts of law, as well as litigants in equity, by compelling discovery; the courts of law had no means of accomplishing this. However, in addition to this process, which has now long been part of the ordinary process of litigation, there was a procedure whereby a would be claimant could bring a bill of discovery in equity in order to find out who was the proper person to bring his action against. It is this process which led to the **Norwich Pharmacal** case. (per Sir Robert Megarry, V.C. in **British Steel Corporation and Granada Television Ltd**. [1981] AC 1096, 1104)

[17] The **Norwich Pharmacal** case further highlighted that (a) as a general rule one cannot obtain discovery from a witness and, (b) that there was a duty in certain circumstances on any member of the public who has knowledge of the commission of a tort to communicate such information that he may possess to any person who has suffered damage in consequence of its commission. "If asked, he has a duty to disclose. The rules of discovery were invented by equity for the purpose of furthering the due administration of justice." (see pages 152-153, paragraphs H and A respectively).

[18] Lord Reid in his analysis of the particular circumstances of the application made for discovery in the **Norwich Pharmacal** case, concluded 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."*

Lord Reid further added that it was clear that "if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him."

[19] Learned Counsel, Ms. McGregor was at pains to point out in her submissions and application that she had no intention if proceeding against the Second Respondent but merely added their names to the application for the sole purpose of obtaining disclosure of certain information that would assist in a proper determination of the true value of the net estate by the Court

[20] Ms. McGregor contends that even though learned Queen's Counsel for the Second Respondents insist that the company is a mere witness, the Second Respondents are not mere witnesses. This is because they inadvertently facilitated a wrongdoing by the deceased which brought about the cause of action on the Fixed Date Claim Form. Viscourt Dilhorne in **Norwich Pharmacal**, while dealing with the "mere witness rule", stated that someone involved in the transaction is not a mere witness, and that "it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing."

[21] What is clear is that whether against a litigant or a third party, the original intent of disclosure remains the same, which is, as Mr. Justice Morrison, J.A (as he then was) in **William Clarke** v **Gwenetta Clarke**, [2014] JMCA Civ 14 stated:

> *"that discovery as the process was then known is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object."*

The general rule is that equitable relief is discretionary. Sir Robert Megarry, V.C in the case of **British Steel Corporation Respondents and Granada Television Ltd**. **Appellants**, [1981] AC 1096) opined that:

> *"In the **Norwich Pharmacal Case**, I think that it was recognized that the relief was discretionary, though I have not found any explicit ascription of this to the equitable nature of the remedy. Even if one says that ordinary discovery as part of the process of litigation has shed its equitable nature because it is now regulated by rules of court, that leaves untouched an action in which the substantive relief sought is or includes an order disclosing the names of certain persons. Such an action seems to me to be just as much an action for specific performance or an injunction. If that is right, then the significance is that the court is called upon to exercise the wide general jurisdiction to consider all the relevant factors of the case in deciding whether the discretion ought to be exercised in favour granting the relief."*

[22] The law is dynamic and the **Norwich Pharmacal** principle was quite novel at the time in 1974 and had far-reaching implications on "innocent" third parties. In my view, **Norwich Pharmacal** extended the reach of equity and it should be examined and applied on a case by case basis. In my judgment, the manner in which Megarry, VC analysed the **Norwich Pharmacal** principle just a few years after it emerged gave clear indications that it was still lending itself to a liberal approach to its interpretation and applicability. In fact, it was Lord Denning, MR in the **British Steel Corporation Case** who said:

> *"No doubt **Norwich Pharmacal Co.** v **Customs and Excise Commissioners** [1974] AC133 opened a new chapter in our law. It enables a person who has been injured by wrongdoing, to bring an action to discover the name of the wrongdoer......The same procedure should be available when he desires to obtain redress*

> *against the wrongdoer – or to protect himself against further wrongdoing."*

Therefore, the principle does not seem to be limiting its application to a tort or the involvement of a tortfeasor but is relevant to **any** act of wrong doing.

[23] The specific meaning of wrongdoing is abstract or even nebulous. Given the particular context, the case of **John Corbett Barnsley et al** v **Philip Noble** [2015] EWCA Civ. 875 is instructive. In that case, an interpretation of "wrongdoing" was being explored in the context of an exclusion clause contained in a Will. A possible interpretation is in contrast to fraud, "wrongdoing" does not need any conscious intent to do wrong, and there is no need for the importation of any intent to do wrong in the context of the word "wrongdoing." Hence, the dictum of Lord Denning, M.R. in **Bankers Trust Co**. v **Shapira**, [1980] 1 WLR 1274:

> *"in the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property."*

Similarly, in my view, in order for me to give effect to equity and have the applicant's equity be of some avail to her, then there should be an order for disclosure on the Respondents. The cause for action is to remedy the exclusion from the Will since no provision was made for the applicants in the deceased's Will. In excluding the applicants, pursuant to the provisions of the **Inheritance (Provision For Family and Dependants) Act**, the testator is said to have committed a wrong. It is this act of wrongdoing that is being sought to be corrected. In other words, this interlocutory application is to facilitate a statutory cause of action.

<u>Norwich Pharmacal Application seeks to Achieve Fairness in a Civil Trial</u>

[24] Every effort should be made to ensure that a fair trial is achieved on the substantive Claim. This is what is at the heart of this application. In **Doorson** v **The Netherlands** [1996] ECHR 14 (26th March, 1996) it was stated that the Court's role is to ascertain whether the proceedings as a whole were fair. (see paragraph 67 of **Doorson** Case).

[25] In any application or civil trial, every litigant has the right to a fair trial, and the effective protection of all human rights very much depends on impartial courts of law administering justice fairly. In my view, **Human Rights in The Administration of Justice**: **A Manual for Judges,** is instructive in endorsing this principle: "The right to equality of arms or the right to truly adversarial proceedings in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-a-vis his or her opponent." (see chapter 7, page 260 of Manual). In the case of **R (on the application of Mohamed vs Secretary of State for Foreign and Commonwealth Affairs**, [2009] EWHC 152 (Admin.), Thomas, LJ and Lloyd Jones, J. in distilling aspects of the principle of the rule of law and fair trial, referred to the case of **Secretary of State for the Home Department v MB**, (2007) **UK HL** 46 and stated:

> *"In MB, the importance of a fair civil trial was recognized as an absolute value, requiring disclosure of material despite national security interests where fairness required disclosure (see in particular the speech of Lord Brown where he made clear that the right to a fair trial was too important to be sacrificed on the altar of terrorism control."*

My approach is one in which a balancing exercise is to be carried out, balancing the rights of the Applicant/Claimant as against the rights of the Respondents. In so doing, I take into consideration the objective of this court which is to deal justly with this application by having it dealt with **fairly**. (See Rule 1.1(2)(d) of the CPR.

Is the Norwich Pharmacal Principle of Limited Application/Jurisdiction?

[26] Learned Queen's Counsel, Mr. Ransford Braham, submitted that there are three conditions that needed to be satisfied in order for the court to exercise its power to make a **Norwich Pharmacal** Order. Mr. Braham, cited the case of **Mitsui & Co. Ltd**., v **Nexen Petroleum UK. Ltd**., [2005] EWHC 625 (CH), which stated:

> *"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."*

[27] However, I respectfully disagree with learned Queen's Counsel's view that this instant application does not fall under the rubric of the **Norwich Pharmacal** relief. In dealing with the **Norwich Pharmacal** relief, Lightman, J in the **Mitsui Case** also stated:

> *"In subsequent cases, the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing....and is not limited to cases where the identity of the wrongdoer is unknown. Relief can be ordered where the identity of the Claimant (sic) is known, but*

> *where the Claimant requires disclosure of crucial information in order to be able to bring its claim or where the Claimant requires a missing piece of the jigsaw."*

It is clear that the **Norwich Pharmacal** rule/principle is dynamic and adaptable to various situations and should therefore be considered on a case by case basis with the objective of ensuring a fair trial.

[28] Lightman, J in the **Mitsui** Case went further to state:

> *"Norwich Pharmacal relief is a flexible remedy capable of adaptation to new circumstances. Lord Wolf, CJ noted in **Ashworth Hospital Authority v MGN Ltd**, [2002] 4 ALL ER 193 "New situations are inevitably going to arise where it will be appropriate for the [**Norwich Pharmacal**] jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy."*

[29] I have also considered whether there would be any prejudice to the respondent if this application were granted. In my judgment, the potential advantages to the applicant of seeing this part of the jigsaw and the potential disadvantages of it being denied a sight of that part outweigh any detriment or prejudice to the respondents. (per McGonigal, J in **Aoot Kalmneft** v **Denton Wilde Sapte** [2002] 1 Lloyds Rep. 417).

[30] It may also be argued that the applicants could acquire the information from a different source other than the Second Respondent. However, the applicants submitted that the First Respondent was asked on previous occasions to assist with the information as requested, but refused on the basis that she (the First Respondent) was not privy to such information. Counsel for the applicant, in an act of desperation, therefore sought the information from the deceased's architectural firm, the Second Respondent. Evidently, the exercise of this

intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information (per Lightman, J in **Mitsui**).

The Standard of Necessity and Proportionality

[31] Similarly, in the case of **Rugby Football Union** v **Consolidated Information Services Ltd**. (formerly Viagogo Ltd) (in liquidation) [2012] 1 WLR 3333, Lord Kerr of Tonaghmore JSC opined that **it was not necessary** that an applicant intended to bring legal proceedings in respect of an arguable wrong but that any form of redress such as disciplinary action or the dismissal of an employee should suffice to ground an application for the Norwich Pharmacal order.

[32] Lord Wolf, CJ in the **Ashworth** case stated:

> *"The need to order disclosure will be found to exist only if it is a **necessary** and **proportionate** response in all the circumstances. The test of necessity does not require the remedy to be one of last resort." (My emphasis)*

Although this application might have been made as a last resort it does not disqualify the relief from being granted in the particular circumstances. The crucial question at this juncture therefore is whether this **Norwich Pharmacal** relief, if granted, is a necessary and proportionate response in all the circumstances.

[33] This can easily be determined by focussing on the main purpose of such a relief which is essentially (as I have said earlier in my judgment) to do justice. My point is further underscored by the aptly put statement made by Lord Kerr in the **Rugby** Case:

> *"The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors."*

Lord Woolf CJ in the case of **Ashworth Hospital Authority** v **MGN Ltd.,** [2002] UKHL 29 also opined:

> *"It is clear that in the Norwich Pharmacal case itself, Lord Reid was contemplating situations where the intention of the Claimant, once the source had been identified, was to bring proceedings against the source. The language used by Lord Reid can be explained by the fact that in that case, it was the intention of Norwich Pharmacal to bring proceedings. It is also to be noted that the final paragraph already cited from his speech, Lord Reid was taking a common sense non-technical approach when justifying the jurisdiction. Furthermore, the other speeches do not link the jurisdiction to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings."*

[34] In the instant case, though proceedings have already commenced, in not limiting the jurisdiction of the **Norwich Pharmacal** relief, the same procedure is available to the applicant desiring to obtain redress. This application would therefore be deemed to be necessary in all the circumstances and proportionate.

The Cost Factor

[35] The mere fact that the **Norwich Pharmacal** relief, once granted, is of an intrusive nature and is granted against a third party, means that certain safeguards should be put in place. Additionally, the cost of providing this information being requested should not be borne by the Respondents but by the Claimant/Applicant requesting the information. The Second Respondents in the instant case, expressed concern that this information may be leaked into the public domain, hence the need for stipulated safeguards and directions as to how to treat with the information once disclosed.

[36] The issue of the need for safe-guards being implemented and to whom costs should be awarded is addressed in a plethora of cases dealing with the **Norwich Pharmacal** principle. In the **Bankers Trust Co case**, Lord Denning, MR directed that the plaintiff give an undertaking in damages to the bank and pay all and any expenses to which the bank is put in making the discovery. The safeguard that was implemented was an order that the documents once seen must be used solely for the purpose of following and tracing the money, and not for any other purpose. Lord Denning MR further stated "with these safeguards, I think the new jurisdiction – already exercised in the three unreported cases – should be affirmed by this court."

[37] Similarly, in the **Ashworth Hospital** case Woolf, CJ in addressing the issue of protection available to a third party in circumstances where a Norwich Pharmacal order was made, stated:

> *"There is the more general protection which derives from the fact that this is a discretionary jurisdiction which enables the court to be astute to avoid a third (3rd) party who has become involved innocently in wrongdoing by another from being subjected to a requirement to give disclosure unless this is established to be a necessary and proportionate response in all the circumstances."*

[38] Lord Woolf, C.J further opined:

> *"The fact that there is involvement enables a court to consider whether it is appropriate to make the order which is sought. In exercising its discretion the court will take into account the fact that innocent third parties can be indemnified for their costs while at the same time recognizing that this does not mean there is no inconvenience to third parties as a result of becoming embroiled in proceedings through no fault on their part."*

A concern was expressed by the Defendant in the **Ashworth Hospital** case about the court's ability to protect a Defendant against the misuse of the material which was disclosed. In seeking to allay the fears of the defendant and address this legitimate concern, Lord Woolf, CJ said:

> *"this concern will be met if an order for disclosure is not made unless a Claimant has identified clearly the wrongdoing on which he relies in general terms and identifies the purposes for which the disclosure will be used when it is made. The use of the material will then be restricted expressly or implicitly to the disclosed purposes unless and until the court permits it to be used for another purpose."*

[39] In my view, it therefore makes good sense and good law that in circumstances where an innocent third party is being ordered by the Court to make disclosure to the Claimant then the cost of that disclosure should be borne by the party requesting it. It was Lord Reid in the **Norwich Pharmacal** case who said:

> *"where a person is not a party to proceedings and discovery is required against him, he is made a respondent to the bill of discovery and entitled to his costs. The importance of this is to answer the query "why should a person be put to expense in answering proceedings of this kind? The answer is that he is not."*

[40] Lord Reid further opined that if the disclosure causes the third party some amount of expense then "the person seeking the information ought to reimburse him". In the instant case costs will therefore be borne by the Applicant.

Conclusion and Disposition

[41] It is evident that later cases have emphasized the need for flexibility and discretion in considering whether the **Norwich Pharmacal** remedy should be granted (see **Ashworth Hospital Authority** case). I also agree with Lord Woolf,

CJ in the **Ashworth Hospital** case that "new circumstances for the appropriate use of the **Norwich Pharmacal** jurisdiction will continue to arise."
This was further illustrated by the decision 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."

[42] The overarching principle is fairness. In my view therefore, the application should be granted to enable the Tribunal to determine the real and true value of the net estate in the event the Court were to find favour with the substantive Claim.

[43] The full costs of the Second Respondent in the application and any expense incurred in providing the information will have to borne by the Applicant.

[44] My orders are as follows:

(1) Order in terms of Notice of Application for Court Orders dated and filed June 2, 2017.

(2) Costs, including the costs of giving discovery to the Second Respondent to be taxed if not agreed; and costs to be costs in the claim with respect to the First Respondent.

(3) Applicant through its Attorney at law to give an undertaking that the information disclosed will be used for the sole purpose of assessing the true value of the net estate, unless and until the Court permits it to be used for another purpose.

(4) Leave to appeal is granted.

(5) Applicants Attorney-at-law to prepare, file and serve Orders made herein.