

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
San Fernando**

Claim No. CV 2018-04012

BETWEEN

**BANKERS INSURANCE COMPANY TRINIDAD AND TOBAGO LIMITED
Claimant/Applicant**

AND

**AVANT GARDE INSURANCE SERVICES LIMITED
Defendant/Respondent**

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: May 24, 2019

APPEARANCES:

Mr. Roger Kawalsingh and Mr. Javed Mohammed Attorneys at law for
the Claimant

RULING

1. The claimant seeks an order requiring the defendant to disclose documents and records relating to the payment of commissions by the defendant to the claimant's former Chief Executive Officer. The order is sought pursuant to the principles established in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.
2. The claimant alleges that the commission payments were fraudulently obtained by the former CEO in breach of his fiduciary duty and were unauthorised by the claimant's board of directors.

3. The claimant wishes to recover the commission payments from the former CEO and seeks the disclosure of documents so that the quantum of the payments could be established.

FACTUAL BACKGROUND

4. The claimant is licensed by the Central Bank of Trinidad and Tobago to carry on insurance business. A number of insurance agents, also licensed by the Central Bank, provide services exclusively to the claimant. Included among them was the defendant, until the arrangements were terminated by the defendant in or around November 2017.
5. The manner in which the claimant conducts business is relevant to the proceedings. Where the claimant receives business from a client upon referral by an agent the business is assigned a code which identifies it with the agent in question. The agent services the general needs of the client and acts as an intermediary between the claimant and the client. The agent transmits to the claimant the insurance premiums received from the client and receives a commission of 20% of the gross monthly premiums so transmitted as remuneration for its services. Where the claimant receives business directly from a client without the involvement of an intermediary the business is assigned a code which identifies it as "direct business." No commissions are payable in respect of business that comes to the claimant in this manner.
6. The defendant provided services as an agent to the claimant and was one of the claimant's high-value producers of business, generating more than \$1,750,000.00 in net premiums per month at its peak.
7. In August 2016, a former employee of the claimant made allegations regarding the defendant's payment of commissions to the former CEO

in respect of “direct business.” The former employee had recently left the claimant’s employment to start her own business as an agent of the claimant. The claimant subsequently refused to grant approval for the payment of commissions to her on the basis that the premiums in respect of which commissions were sought related to the claimant’s “direct business” and not the business of the former employee.

8. The former employee contended that she had received permission from the claimant’s Chief Financial Officer to transfer some of the claimant’s clients to her own business and that similar practices were widespread among the claimant’s employees, including the former CEO, for whom she had served as technical assistant for a number of years before her departure.
9. The allegations made by the former employee were investigated by the claimant’s Internal Audit Team and the findings of the investigation were set out in a report to the Audit Committee of the claimant’s Board of Directors (the Audit Report). In the course of investigations the allegations of wrongdoing were put to the claimant’s former CEO (who held the position of CEO at the time) for his response. The CEO asserted that the payment of commissions to him was an “open secret” and formed part of his initial employment agreement when he joined the claimant in 2008 as Operations Manager. The CEO stated that his 2008 employment agreement was signed by the then General Manager and that he subsequently became aware that the General Manager did not receive the prior approval of the claimant’s board of directors to pay the proposed commission payments to him. As a result, the General Manager gave verbal instructions that the commission payments would be facilitated through the claimant’s approved agents.
10. The Audit Report stated that the CEO admitted to an arrangement with the defendant under which the CEO booked business to the defendant

and received commissions as payment for the business. The CEO stated that he had disclosed the arrangement to the claimant's chairman and its majority shareholder before the allegations in question were made by the former employee. However, both the chairman and the majority shareholder disclaimed knowledge of such disclosure by the CEO.

11. The Audit Report identified the risks arising from the allegations made by the former employee and made a single recommendation to address them – namely, that the Board of Directors should “explore further legal options” on the matter.
12. Having considered the findings of the Audit Report, the claimant's board of directors terminated the appointment of the CEO. The letter of termination set out a number of concerns with the CEO's conduct including his admitted receipt of approximately \$500,000.00 in commission payments by the defendant. The CEO was given a copy of the Audit Report prior to his termination.
13. Shortly thereafter, the defendant terminated its relationship as the claimant's insurance agent. The defendant's Managing Director personally delivered the letter of termination to the claimant's Acting CEO and explained that the commission payments to the former CEO were made as a result of instructions given by the claimant's former General Manager. The defendant's Managing Director explained that he was of the impression that the commission payments formed part of an approved remuneration package to the claimant's executives as compensation for business generated by them.

THE CLAIMANT'S CLAIM

14. On 2 November 2018 the claimant instituted the present proceedings against the defendant. The claimant seeks *Norwich Pharmacal* relief in

order to take action against the former CEO to recover the commission payments that are alleged to have been paid to him by the defendant and to determine the quantum of the commissions paid. The proceedings were brought ex parte as the claimant perceives that if notice were given there is a risk that the defendant may destroy or conceal the information sought in order to conceal any possible involvement in the fraudulent transactions.

15. Among other things, the claimant seeks the following order:

1. That the Defendant/Respondent shall within 14 days of the service of this Order made herein, carry out a reasonable search to locate all the documents in the categories listed below and to depose to and serve on the Claimant/Applicant an affidavit stating whether the following documents are now in its control and/or, to the extent that such documents were once in its control but are no longer in its control, what has happened to them and where the applicant may reasonably conduct a further search to obtain said documents. The said documents/class of documents include but are not limited to:

a. Any internal memoranda, note, correspondence, minutes or transcript relating to actual payments made directly to (the former CEO) by the defendant/respondent.

b. As relates to Scotiabank (Chaguanas Branch) Account No. 605252405819: Account opening forms and associated records, account mandate, bank statements for the account for the period 24th May 2010 to 31st December 2017 (hereinafter referred to

as the relevant period), debit or credit vouchers and other payment records in respect of all transactions, transfers or withdrawals from the account during the relevant period, cheques drawn on the account during the relevant period for sums TT\$1000.00 or more and/or instructions in respect of transfers of more than TT\$1000.00 from the account for the relevant period.

c. Names and addresses of any bank and account numbers through which payments were made to (the former CEO) by the defendant/respondent.

d. Any other information necessary to trace or to commence tracing of commission payments (hereinafter referred to as "payments") made by the defendant/respondent to (the former CEO) during the relevant period.

16. The scope of the *Norwich Pharmacal* jurisdiction was described by Lord Reid in *Norwich Pharmacal (supra)* at p. 175 as follows:

"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."

17. The requirements for the grant of *Norwich Pharmacal* relief were summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 at [21] as follows:

“(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.”

18. In so far as the requirement of wrongdoing is concerned an applicant must demonstrate a “good arguable case” of wrongdoing. The test, as formulated, is that the case should be “more than barely capable of serious argument and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success:” *The Niedersachsen* [1983] 2 Lloyd’s Rep 600 at p. 615; *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at [14].

19. As regards the need for an order to enable action to be brought against the wrongdoer, the following guidance was given by the United Kingdom Supreme Court in *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55 at [15] to [16]:

“(i) It is not necessary that an applicant intends to bring legal proceedings against the wrongdoer; any form of redress (for example the bringing of disciplinary action or dismissal of an employee) will suffice; and

(ii) The pre-condition of necessity does not require the remedy to be one of last resort, but the need to order disclosure will be found to exist only if it is a “necessary and proportionate response in all the circumstances.”

20. Where the threshold conditions for the grant of relief are satisfied, the court retains a discretion whether to make an order. In *Rugby Football Union* at [17] the following factors were identified as relevant to the exercise of the court’s discretion:

a) The strength of the possible cause of action;

b) The strong public interest in allowing an applicant to vindicate his legal rights;

c) Whether the making of the order will deter similar wrongdoing in the future;

d) Whether the information could be obtained from another source;

e) Whether the respondent to the application knew or ought to have known that it was facilitating arguable wrongdoing;

f) Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;

g) The degree of confidentiality in the information sought;

h) The privacy rights under article 8 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms of the individuals whose identity is to be disclosed; and

i) The rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed.

21. The question for determination is whether the claimant has satisfied the requirements for the grant of a *Norwich Pharmacal* order and, if so, whether the court should exercise its discretion to grant relief.
22. It is clearly arguable that the receipt of commissions by the former CEO constituted wrongdoing and that the wrongdoing was facilitated by the defendant. However, the question whether a *Norwich Pharmacal* order is necessary to enable the institution of proceedings for the recovery of the commission payments requires closer elaboration.
23. The claimant's evidence is that the former CEO admitted receiving the commissions in question and the defendant has, similarly, admitted paying them. The quantum of the payments that are alleged to have been made was stated by the former CEO to be approximately \$500,000.00.
24. The allegations regarding the commission payments were investigated by the claimant's Internal Audit Team and the findings set out in an Audit Report. The former CEO participated in the investigations and gave his account of the circumstances in which the commissions were paid. The claimant acted on the findings of the Audit Report in terminating the employment of the former CEO. In so doing, the former CEO was made aware of the findings of the Audit Report and was given a copy of the Report.

25. When the above matters are taken into account, the claimant's assertion that an order is required to bring proceedings against the former CEO for the recovery of the commission payments appears tenuous in the extreme. Whereas the documents and information sought by the claimant may demonstrably *support* a case for the recovery of the commission payments, they cannot, in my view, be considered as *necessary* for the institution of such proceedings in the particular circumstances of this case.
26. The authorities make it clear that the *Norwich Pharmacal* jurisdiction is a discretionary remedy that is exercisable where disclosure is shown to be a necessary and proportionate response. Such orders are not granted as a matter of course even where prima facie evidence of wrongdoing is shown to exist: *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, at [57]; *Muwema v Facebook Ireland Ltd* [2018] IECA 104 at [30-31].
27. In *Muwema v Facebook Ireland Ltd* [2018] IECA 104, the Irish Court of Appeal refused to grant *Norwich Pharmacal* relief where, on a balancing exercise, it was considered that the countervailing facts and circumstances warranted a refusal of the order. Peart J made the following observations:

“That jurisdiction exists to make the type of order sought is not in doubt. But it is a discretionary jurisdiction to be exercised in the light of the facts and circumstances of any particular case. It is not an order made as of right, even where there is prima facie evidence of wrongdoing shown to exist on the part of the person whose identity is sought to be disclosed. There may in any particular case be countervailing facts and circumstances which would warrant a refusal of an order. ...”

As with the exercise of any discretion by a court, that exercise involves a balancing exercise. The rights of one party must be balanced against the rights of the other party when considering where the correct balance of justice lies. The courts are familiar with this exercise, most frequently perhaps when considering the balance of convenience/justice in granting or refusing an interlocutory injunction.”

28. In *FCFM Group Ltd v Hargreaves Lansdown Asset Management Ltd* [2018] EWHC 3075, at [27 -28], the High Court of England and Wales refused to grant relief where it was determined that “the first port of call for the documents sought should be by way of disclosure in civil proceedings.” The application was dismissed as “an ambitious attempt by a private company, in litigation elsewhere with two private individuals, to obtain their private records from third parties” [para. 35].
29. In *Nikitin and others v Richards Butler LLP and others* [2007] EWHC 173 (QB) an application for *Norwich Pharmacal* relief was refused where it was believed that the applicant had sufficient information to commence an action.
30. In my view, the claimant cannot reasonably assert that the information sought in these proceedings is necessary to take action against the former CEO to recover commission payments that are alleged to have been fraudulently received by him in circumstances where, on the claimant’s evidence:
 - i. The former CEO has admitted to receiving approximately \$500,000.00 as commission payments

through the course of his employment with the claimant;

- ii. The defendant has admitted to paying commissions to the former CEO;
 - iii. The allegations regarding the payment of commissions were investigated by the claimant's Internal Audit Team in the course of which the admissions stated in (i) above were alleged to have been made by the former CEO; and
 - iv. The former CEO was terminated on the basis of the very concerns regarding the commission payments and received a copy of the Audit Report incriminating him prior to his termination.
31. The jurisdiction to grant *Norwich Pharmacal* relief remains an exceptional one. It is exercisable 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:" *Mitsui* at para [19]. It is not intended to enable a victim of unlawful conduct to fine tune a pleading:" *Nikitin* at [29].
32. In my view, the claimant has failed to establish the relevant need for a *Norwich Pharmacal* order or that the grant of an order in the terms sought is a necessary and proportionate response in all the circumstances. In this regard, the claimant has failed to satisfy the threshold requirements for the grant of *Norwich Pharmacal* relief.
33. The claim is therefore dismissed.

Jacqueline Wilson
Judge