Neutral Citation Number: [2021] EWCA Civ 1771

Case No: A2/2021/0251

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
HH Judge Sephton QC sitting as a deputy High Court judge
G90MA339

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2021

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
MR JUSTICE FRANCIS

- -

Between :

EUI LIMITED	**Appellant**
- and -	
UK VODAPHONE LIMITED	**Respondent**

- -
- -

Paul Higgins (instructed by **Horwich Farrelly**) for the **Appellant**
The Respondent was not present nor represented at the hearing of the appeal

Hearing date : 24 November 2021

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Approved Judgment

LORD JUSTICE BAKER :

1. This is an appeal against a judge's refusal to order disclosure of information under the principle in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

2. The principle was summarised by Lord Reid at page 173:

> "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

3. In *Mitsui & Co Ld. v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 2 All ER 511, Lightman J at paragraph 21 summarised the components of the principle in these terms:

> "The three conditions to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief are:
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> i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
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> ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
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> 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."

4. The power to order disclosure in such circumstances does not extend, however, to "mere witnesses". This limit on the jurisdiction was recognised by Lord Reid in *Norwich Pharmacal* at page 174:

> "But that does not mean, as the appellants contend, that discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order discovery in order

> that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that."

5. The crucial question, therefore, is whether the defendant to the claim for information is more than a "mere witness" or "bystander". In *Various Claimants v News Group Newspapers Ltd (No.2)* [2013] EWHC 2119 (Ch), [2014] Ch 400, Mann J observed (at paragraph 52) that participation or facilitation was not the sole test. He continued:

> "It is true that the traditional formulation of the test is in such terms, but that is because those are the usual circumstances in which someone becomes something beyond a mere witness. On the facts of the cases where orders were made, the respondent was usually in that position. In my view the answer to the question lies in recognising that what the cases are doing is contrasting two things – the mere witness on the one hand, and the person who is not a mere witness on the other. On the cases the latter class is generally described in terms of participation/facilitation, as though that were the opposite of being a mere witness. But the real analysis lies in appreciating that the courts are holding not that those factors are indeed the other side of a dichotomy, but that those factors prevent the respondent from being a mere witness. Once that is recognised then it becomes relevant to consider whether there are other facts, short of participation/facilitation, which could prevent a person from being a mere witness."

The question (paragraph 54) was therefore whether the defendant

> "is a mere witness (or metaphorical bystander) or whether its engagement with the wrong is such as to make it more than a mere witness and therefore susceptible to the court's jurisdiction to order *Norwich Pharmacal* disclosure."

6. The distinction can be illustrated by the decision in *Norwich Pharmacal* itself. An order for disclosure was made against the Commissioners of Customs and Excise to obtain the names and addresses of importers of a chemical compound which, it was thought, was being brought into this country in breach of patents. Lord Reid explained why an order for disclosure was justified in law in these terms (at page 174):

> "From the moment when they enter the port until the time when the consignee obtains clearance and removes the goods, they are under the control of the Customs in the sense that the Customs authorities can prevent their movement or specify the places where they are to be put, and in the event of their having any suspicions they have full powers to examine or test the goods. When they are satisfied and the appropriate duty has been paid the consignee or his agent is authorised to remove the goods. No doubt the respondents are never in possession of the goods, but they do have considerable control of them during the period from entry into the port until removal by the consignee. And the goods

> cannot get into the hands of the consignee until the respondents have taken a number of steps and have released them."

Similarly in *Various Claimants v News Group Newspapers Ltd (No.2)*, in which the claimants were seeking to bring proceedings against the proprietor of a national newspaper for phone hacking, an order was made against the Metropolitan Police for disclosure of information relating to the hacking which they had acquired in the course of an investigation.

7. The background to the present appeal can be summarised very briefly. The claimant insurance company issued a policy of home insurance to a policy holder relating to an address in London. In August 2019, the policy holder reported to the insurers that there had been an escape of water at the insured property and that he wanted to make a claim on the policy. He stated that he, his wife and children were staying with his parents. The policy covered displacement costs, that is to say the cost of alternative accommodation in the event that the policy holder was required to move out of the property. Where the policy holder was staying with relatives, there was a ceiling on what the insurers would pay, amounting to £1,000 per month. The insurers duly paid that sum for several months during the Autumn of 2019.

8. Towards the end of the year, the policy holder told the insurers that he and his family were intending to take a tenancy of a house in the same street as the insured property which he said belonged to another relative. A document headed "Assured Shorthold Tenancy Agreement" was sent to the insurers dated 1 December 2019 signed by the policy holder and his wife as tenants and by another person bearing the same surname as the landlord. The rent was said to be £1,850 per month. The insurers duly made payments covering this sum for several months from December 2019 to May 2020.

9. Further enquiries revealed that the rented property was owned by the policy holder's parents. The insurers became concerned as to the genuineness of the tenancy agreement or whether it had been concocted to circumvent their ceiling on displacement costs where the policy holder was staying with relatives.

10. On 30 April 2020, the policy holder was interviewed by an enquiry agent instructed by the insurers. According to a draft statement prepared by the agent following the interview, the policy holder said that his parents had gone to India at the start of December 2019, that he had therefore agreed to rent their property, that his parents normally go to India for three to six months during the winter, and that they had now returned to this country. When he returned the signed statement, however, the policy holder deleted some of those passages in the draft and attached an addendum giving a different account. He said that on 2 December his parents had moved out of their house and gone to stay with relatives in Milton Keynes, that they had intended to go to India for three months but in the event returned to their house on 8 December because the policy holder's mother was feeling unwell. It had been their intention to travel to India later after the mother had undergone a surgical procedure, but in the event, she did not feel well enough to travel so they abandoned the plan and remained at their property. In addition, as part of the investigation, a statement was obtained from the policy holder's mother in which she gave her account about the circumstances in which her son and his family had occupied her home. She asserted that she and her husband had gone to Milton Keynes on 2 December 2019 to stay with her nephew to help him prepare for his wedding.

11. Under the policy general condition 9 provides:

> "Fraud – We will not pay a claim which is in any part fraudulent, false, exaggerated or if you or anyone acting for you makes a claim in a fraudulent or false way; or where we have been given a false statement; or any documents which are false or stolen. Your policy and all other policies to which you are connected through EUI Limited will be cancelled or voided. We will seek to recover any costs that have been incurred and will not return any premium."

12. It is the insurers' case that, as the policy holder's parents did not travel to India, the question arises whether they vacated their home at all. Given the inconsistencies in the policy holder's statements, the insurers are not content to rely on his account. They believe that there may be grounds for a claim against the policy holder and his mother in deceit and conspiracy. For that reason, before taking proceedings, they wish to obtain information which may clarify whether or not the policy holder's parents were staying in Milton Keynes between 2 and 8 December 2019 as asserted by the policy holder in his signed statement.

13. The defendant is the service provider for the mobile telephone and data account held by the policy holder's mother. On 3 November 2020, the insurers issued a claim against the defendant under the ***Norwich Pharmacal*** jurisdiction on the ground that they intended to launch proceedings in the tort of deceit or conspiracy to recover excess payments made under the policy. In particular, they sought information relating to the call records for the mobile phone and the cell site data showing the location of the phone during the period in question. The application was listed on 27 November 2020 before HHJ Sephton QC sitting as a deputy High Court judge at a hearing at which only the claimant was represented, the defendant having indicated that it did not oppose the application. In support of the application, the claimant relied on two witness statements from the solicitor with conduct of the claim exhibiting the relevant documents including the tenancy agreement, the draft statement taken by the enquiry agent, and the version signed by the policy holder. In the second statement, the solicitor sought to expand the categories of documents to be disclosed to include SMS/MMS data and mobile data usage details for the relevant period.

14. At the hearing before the judge, the claimant was represented by Mr Higgins who has also appeared before us on the appeal. His argument before the judge was that, in contrast to land lines, mobile phones have enabled people to lie about their whereabouts, that the defendant had therefore facilitated the ability of a person to pretend they were living at an address, so that

> "where, as in our case, someone asserts that they lived at address B so as to facilitate a fraudulent insurance claim that proceeds on the footing that they have now vacated address A, the ability to use a telephone that is not fixed facilitates that process. So it is wrongdoing and elevates Vodaphone from being a mere witness to being a party that is capable, legitimately, of being targeted in this jurisdiction, something which Vodaphone appear not to contest."

15. The judge was not persuaded by this argument. His reasons for refusing the application are set out at paragraphs 9 to 12 of his judgment.

> "9. I find that an ingenious argument but I am afraid I am not persuaded by it. The difficulty with it is that the provision of "mobile telephony" is not something that is exclusive to UK Vodaphone Limited or indeed to telephone providers generally. It is a joint effort between providers of telephone equipment and the people who provide the infrastructure for that equipment. The same argument as Mr Higgins uses could be applied to any ISP on the internet because using the internet it is quite possible to purport to be making a request for a delivery, for example, at one place where in fact you are at a different place. We are talking here about a means of communication and to suggest that somebody who provides the means of communication is so wrapped up in the matter as to have gone beyond the role of mere witness, in my judgment, is to strain language.
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> 10. For that reason I am not persuaded that this is an application which can succeed.
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> 11. I emphasise that my concern is the greater because one is dealing here with [the policy holder's mother's] Article 8 rights and, although there is a strong argument to be had that her Article 8 rights should not be suborned to the claimant's rights to avoid fraud, this is a case in which the bootstraps, as it were, have to be used. The claimant says that it can only prove fraud if they have the telephone details and yet the telephone details may prove to be entirely benign. However, they may contain, as I discussed in argument earlier on, matters which are private to [the policy holder's mother] which may be embarrassing to her.
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> 12. I do not decide the case on the basis of a refusal to exercise my discretion under Article 8. The basis for my decision is that I do not have jurisdiction on the basis that Vodaphone in this case, in my judgment, are mere witnesses and they cannot be distinguished in the way that is suggested by Mann J in the *News Group* case."

16. On 21 December 2020, the claimant filed notice of appeal. Permission to appeal was granted on 8 June 2021. The defendant, which continues to maintain a neutral position on the issue, has not participated in the appeal so the only party represented before us has been the claimant.

17. In his submissions to this Court, Mr Higgins repeated and developed the argument that he had advanced before the judge. Mobile phones have enabled people to live in one place and conduct their affairs as if they are living somewhere else. Service providers such as Vodaphone have enabled this activity. Their businesses are not mere witnesses to such conduct. The latest generation of mobile phones have apps which facilitate the location of the phone. That is an incident of modern life. Any argument about Article 8 rights goes not to jurisdiction but to the exercise of the jurisdiction. In any event, there

are a number of ways in which rights to privacy could be protected, for example by anonymisation or redaction.

18. In my judgment, Mr Higgins' principal argument is misconceived. If the claimant is right in thinking that the policy holder has fraudulently asserted that his parents moved out of their home for a period to allow him and his family to occupy the house exclusively, it is arguable that his parents were involved in the wrongdoing. But I can see no basis on which it could be said that his mother's mobile phone service provider was more than a mere witness or, in Mann J's phrase, engaged with the wrong. The fact that the phone account holder would have been able to pretend she was somewhere she was not does not draw the phone company into her wrongdoing. It is true that the phone records may assist in establishing the truth of the parents' whereabouts. But in that regard the phone company is manifestly a mere witness. Its position is no different from anyone else who may be able to provide evidence about that issue – for example, the nephew living in Milton Keynes, or the neighbours to the parents' property, or, as Lewis LJ helpfully suggested in the course of the hearing, the milkman. The phone company's position seems to me to be analogous to that of a security company which installs CCTV cameras at a property. Such cameras are also a feature of modern life. The purpose of the cameras is to detect or deter burglars who have no right to be at the property, but they may also incidentally detect the presence of the householders who have every right to be there. The security company would therefore be a witness to any unlawful activity engaged in by the householders but it would not be drawn into that activity in any way.

19. Mr Higgins advanced two further arguments in support of his interpretation. First, he said that it would be difficult for the insurers' legal representatives to advise on the merits of litigation against the policy holder and his mother with the confidence required of a proposed claim in deceit without clearer evidence of wrongdoing. On the facts of this case, however, the insurers have the evidence of the enquiry agent as to the policy holder's statements, the inconsistencies between that evidence and the signed version of the statement provided by the policy holder, and the fact that on the policy holder's case he has received and retained the higher level of compensation for several months notwithstanding the fact that his parents had returned to the property. In those circumstances, I am unconvinced that the insurers require any additional information before deciding whether to commence proceedings. In any event, this argument does not alter the phone company's position as a mere witness.

20. Secondly, Mr Higgins voiced concerns on behalf of the insurers that the policy holder and his mother would be able to concoct an explanation for the continued presence of the mother's mobile phone in her property were they to have notice of any application for disclosure after the start of proceedings. I am unconvinced that the insurers would in fact gain such a tactical advantage and in any event that argument again does not address the clear limits of the *Norwich Pharmacal* jurisdiction.

21. I agree that the question of the policy holder's parents' Article 8 rights goes to the exercise of the jurisdiction rather than the jurisdiction itself, but as I read the judgment that was also the approach taken by the judge.

22. It is possible that, if the insurers bring a claim against the policy holder, they may be able to obtain an order against Vodaphone for disclosure of the records under CPR 31.17, provided the court was persuaded that disclosure was necessary in order to

dispose fairly of the claim. But there is no justification in law for pre-proceedings disclosure under the *Norwich Pharmacal* principle.

23. I would therefore dismiss the appeal.

LORD JUSTICE LEWIS

24. I agree.

MR JUSTICE FRANCIS

25. I also agree.