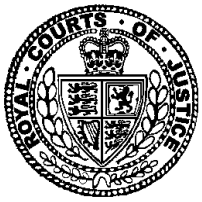

Neutral Citation Number: [2020] EWHC 1260 (QB)

Case No: QB-2018-000-099

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2020

Before:

MR JUSTICE FREEDMAN

- -

Between:

Zenith Insurance PLC	**Applicant**
- and -	
LPS Solicitors Limited	**Respondent**

- -
- -

William Irwin (instructed by **DWF Law LLP**) for the **Claimant**
Ghazan Mahmood (instructed by **LPS Solicitors**) for the **Defendant**

Hearing date: 1 May 2020

- -

JUDGMENT

Mr Justice Freedman:

I Contents

II Introduction

1. This is an application for further disclosure pursuant to CPR 31.16 (pre-action disclosure) and/or in the nature of *Norwich Pharmacal* relief (as preserved by CPR 31.18). An order has been made in this action by Cockerill J on 17 July 2019 ("the Cockerill J Order"), and that elicited almost 500 pages of documents. The Applicant ("Zenith") says that that disclosure was incomplete. It has now reformulated the disclosure sought into about 10 categories of documents. Its primary case is that the documents sought go no further than the Cockerill J Order, and the Court ought to

make the order sought because it is in effect compelling the Respondent ("LPS") to comply with that which has been already ordered. Its secondary case is that to the extent that it goes beyond that which has been sought, it comes within CPR 31.16 or *Norwich Pharmacal,* and that the Court ought to make the orders sought.

2. The Cockerill J Order provided for disclosure of all documents held by the Respondent in respect of claims brought by three people in whose names claims for damages were brought in 2014. Their claims were that they were passengers in a motor vehicle and they had suffered minor personal injuries in a road traffic accident. The accident had occurred in June 2014. They used the services of an agency called Bancroft who referred their matter to LPS, a firm of solicitors. Within 4 months, their cases were settled one for the sum of £3,000 and costs and two for £3,150 each and costs.

3. The three persons named in the claims have confirmed in additional witness statements that the identification documents provided by LPS are not theirs. In those statements they say that they were not involved in the motor accident and did not receive the compensation. Zenith submits that there has been a fraud practised on it since it was represented fraudulently that these persons had suffered personal injuries and they had not, and that therefore the insurance claims were fraudulent. It does not know who imitated the identity of the three people.

III Background facts

4. The background to these applications is set out in the second witness statement of Elizabeth Fergus in support of this application, as well as her first witness statement in support of the application made to Cockerill J. Zenith is seeking to recover the damages and costs paid out in satisfaction of what it says has been fraudulent claims. Zenith suggests that it has potential claims in deceit against anyone who knowingly participated in a fraudulent claim for damages brought against it including any person who knowingly facilitated such a claim. The core questions for Zenith in seeking to

construct its case is to establish who was responsible for defrauding it, how it was done and what was the state of mind of the various people involved in bringing and facilitating the claims against Zenith.

5. LPS does not accept that the statements of the three persons can be correct and believes that there must be a cover up on their part about their claims. As a result, in a statement of Mr Khan of 23 April 2020 at paragraphs 87 and following, LPS does not accept that the case of a fraudulent recovery of money hangs together and so it is said that Zenith has failed to establish a good arguable case. According to LPS, it is not credible that there were attendances on a doctor who confirmed that he had seen the passengers' identification evidence, and that the reports had been undertaken and then three years later, it is alleged to have been a fraud, without an explanation as to how the fraud was perpetrated. In my judgment, that does cast some doubt and raises questions to be answered. However, at this stage, I shall assume for the purpose of this application only that a good arguable case has been raised to the effect that a fraud was committed on Zenith in the making of the claims. Otherwise, this would involve finding that it was more likely than not that each of the additional statements of the three claimants comprised a series of lies to cover up the claims which they had made. I do not intend to conduct at this stage a mini-trial to seek to unravel what did occur. I also do not intend to preclude the arguability of a fraud being investigated by another court

6. There are a number of possible defendants in the claim of the tort of deceit. It includes the claims management company – Bancroft & Co Ltd ("Bancroft"). The three passenger claims are said to have been referred to LPS by Bancroft. Medical reports for the claim were provided or sourced by a company called Acquire Medicals Ltd ("Acquire Medicals") which was controlled by the same individuals as controlled Bancroft, and so there is the possibility that they may have participated in any deceit. There is also the possibility that the three claimants themselves or any people who may have committed an identity fraud by using their identities were liable in deceit. Zenith puts the case at present in the terms *"if these three passengers were indeed knowingly participating in fraudulent claims, actions in the tort of deceit would lie against them."*

7. As regards LPS, Zenith's skeleton argument at paragraph 12 is as follows: *"If a court were convinced that the Respondent knowingly facilitated a fraud then the Respondent would be liable to the Applicant in the tort of deceit."* It is difficult to understand what this means since it begs the question as to whether fraud is alleged against LPS. The Court was told that in fact it was written in careful terms so as not to make the allegation of deceit. On that basis, there then must be added to it that there is not material from which the Applicant regards itself as able professionally to make an allegation of deceit against the Respondent. This is notwithstanding the Cockerill J Order and the documents produced pursuant to it.

8. As regards LPS, it is said that there is a possible claim in negligence against it. The thrust of an action in negligence is said to be its negligent failure to satisfy itself of the true identity of the claimants in whose name it brought a claim. It is said that it owed a duty of care to the Applicant to take basic steps to ensure that the persons for whom it acted were clients acting in good faith. It is conceded by Zenith that there is no directly analogous case to the instant one and the case would involve a *"new factual matrix"*. As a general rule, a solicitor acting for a party in adversarial litigation does not owe a duty of care to that party's opponent: see [1988] Q.B. 665. The case of *White v Jones* [1995] A.C. 207 was an exception to that principle where if there was no duty owed to a disappointed beneficiary in respect of a negligently drafted will, there would be no duty at all. Zenith relies upon a Scottish case of *Frank Houlgate Investment Company v Biggart Baillie LLP* [2014] CSIH 79 where a solicitor became aware, after the fraud, of a fraud perpetrated by a client but failed to take any action in order to warn the victim of a fraud, the counterparty to a transaction. The Inner House of the Court of Session held that the solicitors did – in those circumstances – owe a duty to the victim, relying in part upon the House of Lords analysis in *Caparo v Dickman* (see e.g. *Frank Houlgate* at para 81 per Lord Malcolm).

9. In my judgment, whilst not ruling out at this stage that a sustainable claim in negligence may be formulated against LPS (it is too early to say whether it would survive a strike out application since it has not yet been formulated), there are some serious obstacles to the same. The first is to be able to formulate an innovative claim and to depart from the general starting point that a solicitor does not generally owe a

duty of care to the other party in adversarial litigation. The second is that there is no evidence in the instant case which has been put before the Court by Zenith to show that LPS was or may have been aware of a fraud in respect of the claims such as to bring the case close to the *Frank Houlgate* case. Thirdly, at this stage, there is no evidence as to the respects, if any, in which LPS fell below any standards reasonably expected of them in order to check the identity of their clients.

10. There is no other cause of action advanced by Zenith at this stage other than fraud or negligence, and so only those causes of action arise for the Court's consideration. The foregoing analysis leads to the conclusion that fraud will not be pursued without more because Zenith is of the view that there is no evidence currently available to it on which it feels able professionally to advance a claim of fraud against LPS. A claim has been formulated in negligence, but there are serious obstacles to such a claim.

IV Nature of the application

11. Before setting out the legal framework, and applying the law to the facts, it is necessary to make various observations which make this application unusual. First, it is that an order has been made by Mrs Justice Cockerill, and therefore there has to be a clear and distinct reason for a second order. The reason given is that there has not been compliance with the first order. In terms of evidence, this is entirely based on paragraph 35 of the second statement of Ms Elizabeth Fergus which reads as follows:

"The responses provided so far by the Respondent in purported compliance with the order of Mrs Justice Cockerill must be incomplete. In particular, they have provided very limited communications between the Respondent and employees of Bancroft & Co Ltd. If Bancroft was acting as the point of communication between the alleged passengers and the Respondent further communications must exist between the Respondent and agents or employees of Bancroft."

12. The rest of the statement is introductory [1-4], sets out the legal framework of the application [5-8], the history of the settlement of the claims [9-19] and the discovery that the claims were fraudulent [20-22]. Thus far, this is a repetition of the first statement of Ms Fergus which was before Cockerill J. The second statement of Ms

Fergus then set out how the Cockerill J Order was made, and how documents were supplied in relation to each of the claims comprising hundreds of pages which were exhibited (exhibits EF/3, EF/4 and EF/5). It is then said that the documents relied on by LPS to establish the alleged passenger identities were fake [25]. There is then set out the involvement of Bancroft and Acquire Medicals. Mr Raja Hussain is identified as one of the directors and the sole shareholder in Bancroft and also as a director and shareholder of Acquire Medicals [26-28]. It is then stated that Mr Hussain is serving a sentence of 15 years for manslaughter and other offences arising out of setting up a motor vehicle accident with a view to making an insurance claim in the course of which an elderly lady in another vehicle was killed. LPS represented Mr Sabbir Hussain and Mr Sharaer Islam Miah in those criminal proceedings [29-33]. There is no inference which Ms Fergus invites the Court to derive from the history of Mr Hussain and the involvement of LPS both in the making of the claims alleged to be fraudulent and their representation of defendants other than Mr Raja Hussain in the criminal case.

13. In my judgment, the second statement of Ms Fergus contains very little to show why additional documents are required. It makes a bald assertion that the disclosure was incomplete without saying how it was incomplete. It refers to the fact that LPS acted in the three claims where Mr Raja Hussain's company Bancroft was the claims manager, and that three years later, it represented Sabbir Hussain and Mr Sharaer Islam Miah in the above mentioned criminal case arising out of an attempted fraud on road traffic insurers. However, the significance of this is not developed in the statement. Both frauds or attempted frauds appear to have taken place in 2014.

14. Even if this were capable of being significant, there has been evidence served in response. On 23 April 2020, Mr Khan of LPS made a long witness statement comprising 27 pages. A part of it included a statement that researches indicated that there were two separate people called Raja Hussain. The director of Bancroft is registered at Companies House as Raja Jonaade Auranzeb Hussain and is stated as having been born in February 1990. He was therefore 26 or 27 in 2017 at the time of the criminal trial of Raja Hussain. In the criminal trial, according to the judgment of Mr Justice Goss (wrongly referred to as Mr Justice Gross by Mr Khan), the defendant Mr Raja Hussain in the Crown Court was 31 years of age. LPS says that this indicates

that the Raja Hussain of Bancroft appears to be a different person from the Raja Hussain in the criminal trial and/or they cannot be the same person: see Khan paragraphs 133-137.

15. Despite Mr Khan's witness statement, which was served on or about 23 April 2020, that is a week before the hearing, it appears that no work has been done by Zenith to answer this evidence. There is no evidence in reply. There is no indication that any enquiries were undertaken to show that in fact they were or might have been the same person. Thus, all that is now submitted is that this is not necessarily the case because records at Companies House might be wrong. This court cannot decide whether it is the same Raja Hussain. However, it is for Zenith to prove its case, and the failure of Zenith even to research this point is such that Zenith has been unable to demonstrate that it is or may be the same Raja Hussain. It is for the Applicant to justify the second application here. There has been a failure in my judgment either to prove on the balance of probabilities that it is the same Raja Hussain (by reason of not following up the response of Mr Khan) or (if it is the same Raja Hussain) to identify the significance of the fact that the same firm acted for the same Raja Hussain.

16. Further, the detailed statement of Mr Khan states at paragraph 56 that *"by 8.7.2019 the Respondent has complied fully with Mrs Justice Cockerill's Order and disclosed all documents in its possession relating to the passengers' claims."* There was correspondence between the parties subsequently as follows. On 18 July 2019, the solicitors for the Applicant noted that no witness statement had been provided and that all the documents required under the Cockerill J Order had been provided. Further, there were also sought screenshots of the case management system of LPS. On 26 July 2019, LPS provided an attendance note of a conversation with Mr Ubaid Ur Rehman. In respect of the request for a screenshot, it said that this went well beyond the terms of the Cockerill J Order, with which LPS had complied fully. It said that there were oblique insinuations and asked if it was suggested that they had not complied with that order and, if so, asked Zenith *"to confirm in open correspondence, exactly what your allegations and the basis upon which such allegations are made."* The statement of Mr Khan at paragraph 59 states that Zenith's solicitor failed to provide any justification and that the next communication was the present application dated 20 December 2019.

17. In the early afternoon of 30 April 2020, a note was sent asking if there were to be skeleton arguments from the parties. Towards the conclusion of the working day on 30 April 2020, a skeleton argument was filed on behalf of LPS. At the start of the working day on 1 May 2020, a skeleton argument was served on behalf of the Applicant. LPS chose not to apply for an adjournment, believing that it would be able to deal with it, albeit without the usual thinking time which it would have had if it had been received earlier. The skeleton argument for Zenith was unsatisfactory not only in its lateness. It sought to introduce matters which ought to have been advanced by way of evidence. However, they were in very short compass and it was not much more detailed than the unsatisfactory second statement of Ms Fergus.

18. At paragraph 28(b) of the skeleton argument, there was some comment for the first time on the documents which had been provided by LPS pursuant to the Cockerill J Order. In particular, it was stated that LPS had provided only *"very limited communications between its employees and Bancroft with respect to these claims, despite the assertion that Bancroft was to be sent all documents in the claim"*. There was reference to such communications as was provided in respect of the claim of Mr Butt as a specimen. In my judgment, this is completely unsatisfactory. First, if it were really the case that there were specific documents which had not been provided, this ought to have been set out (a) in responsive communications to the letter of LPS of 26 July 2019, (b) in correspondence with a full opportunity to respond in advance of the issue of the instant application, (c) in evidence and not in a skeleton argument, (d) at the outset of the application, particularly so where the Cockerill J Order had been made, and Zenith's case is that despite receiving hundreds of pages of documents, LPS had not complied with it, (e) if, contrary to all of the above, it could be set out at a later stage, well before the morning of the hearing. The absence of this particularisation appears to evidence a lack of consideration as to what, if any, shortcomings there were, and makes the written and oral submissions on the day seem like an ex post facto rationalisation of an application which was not properly thought out any earlier.

19. Even the material set out at paragraph 28(b) of Zenith's skeleton argument does not indicate that there must have been documents which have been withheld. There is a suggestion that there might have been some further documents. However, there have been hundreds of pages supplied, and there is a witness statement of Mr Khan with a statement of truth that that there has been full compliance with the Cockerill J Order.

20. There were other indicators in the course of the hearing as to the limited inquiries undertaken by Zenith for the application. The Court asked what had become of Bancroft and Acquire Medicals. This was not known about, but in the course of the hearing, it subsequently emerged that they had been dissolved in 2017. If the application had been properly founded, one would have expected that the involvement of Mr Raja Hussain with these companies would have been set out explaining over what period it took place and when it came to an end.

21. A remarkable feature has been the fact that this second application follows the disclosure of hundreds of pages of documents on the first application. The application identifies 10 categories of documents sought (a)-(j). In the second statement, they are faithfully copied out at paragraph 36. However, Zenith has failed both in the application form and in the second statement of Ms Fergus to give any statement of belief in respect of each of these categories (a) why they were within the order made by the Cockerill J Order, (b) the extent to which they have not been produced by LPS, (c) why the Court ought to make an order in these terms, and in respect of each category how the criteria of (i) CPR 31.16, and (ii) *Norwich Pharmacal* respectively are satisfied.

22. In my judgment, the above picture is one of an applicant that has launched this application and conducted itself until the day of the hearing without any real attempt to explain why a second application was required following the apparent compliance with the Cockerill J Order. The history of what occurred following the disclosure of hundreds of pages of documents has been unsatisfactory and does not provide a secure foundation for the application of the legal framework to the facts, to which this judgment now turns.

V The Legal Framework

23. The applications are made on the basis of pre-action disclosure under CPR 31.16 or on the *Norwich Pharmacal* basis. It is necessary to show the ingredients to be satisfied under both.

(a) Application under CPR 31.16

24. The Applicant's application is based on CPR 31.16. This provides as follows:

> *"The court may make an order under this rule only where—*
>
> *(a) the respondent is likely to be a party to subsequent proceedings;*
> *(b) the applicant is also likely to be a party to those proceedings;*
> *(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and*
> *(d) disclosure before proceedings have started is desirable in order to—*
> *(i) dispose fairly of the anticipated proceedings;*
> *(ii) assist the dispute to be resolved without proceedings; or*
> *(iii) save costs.*

25. The commentary in the White Book (2020) provides useful guidance at p.1031. For the purposes of CPR 31.16(3)(a) and (b) the respondent/applicant is *"likely to be a party to subsequent proceedings"* where it is established that they may well be a party if subsequent proceedings are issued.

26. Guidance as to the interpretation of the rule is to be found in the judgment of Rix LJ in *Black and others v. Sumitomo Corpn and Others [2001] EWCA Civ 1819; [2003] 3 All E.R. 643; [2002] 1 W.L.R. 1562.* A number of points are to be noted:

    (1) The Court can only make an order if each of the matters set out in subparagraphs (a) – (d) are satisfied. If any of them are not satisfied there is no jurisdiction to make an order.

    (2) Whether disclosure is "desirable" within CPR 31.16(3)(d) involves a two-stage process comprising a jurisdictional and a discretionary aspect. Each such aspect

must be addressed though the former may often merge into the latter. In *Black v Sumitomo* (ibid.) Rix LJ stated at [81]:

> "*... for jurisdictional purposes the court is only permitted to consider the granting of pre- action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail*."

(3) Rix LJ described the jurisdictional threshold as being a low one. Thus, the fact that it has been passed may throw little light on the manner on which the discretion should be exercised.

(4) The order can only be made in respect of documents that "would" be within the documents disclosable under standard disclosure. It is not sufficient that they might be so disclosable.

(5) The Court has warned against ordering pre−action disclosure *"to encourage fishing expeditions to enable a prospective plaintiff to discover whether he has in fact got a case at all"*: see para.92; see also *Shaw v Vauxhall Motors (supra) per Buckley LJ at p.1040E.* In *Black v Sumitomo Corporation* Rix LJ emphasised that the broader and more diffuse the issues the less likely it will be that an order should be made. The claim in that case was described as *"speculative in the extreme"*.

(6) It accordingly falls to the applicant to identify his cause of action with care and demonstrate that he has real prospects. If the Court is unable to decipher from the application a verifiable 'cause of action' it would be wrong to order disclosure merely for the purposes of enabling the applicant to 'fish' around for a case.

27. Subsequent cases have elaborated these principles:

    (1) Attempting to obtain pre-action disclosure of documents that would not in due course be subject to standard disclosure by simply calling for classes or categories of documents in which some documents would be disclosable is not permissible: *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm).

    (2) An applicant must show that it is more probable than not that the documents are within the scope of standard disclosure should an action commence: *Hutchison 3G UK Ltd v O2 (UK) Ltd* above.

    (3) For pre-action disclosure to come within limb (d) (desirable to dispose fairly of the anticipated proceedings), something more than refinement of the pleadings was required, such that if the applicant already has sufficient information to plead a case that could not be struck out as disclosing no reasonable cause of action, then this requirement may not be met: *First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm); *Attheraces Ltd v Ladbrokes Betting and Gaming Ltd* [2017] EWHC 431 (Ch); *Graffica Ltd v University of Birmingham* [2018] EWHC 2683 (IPEC).

28. Where it is unclear that the Applicant has any cause of action, his application ought to be refused: see *Gwelhayl Limited v Midas Construction Limited* [2008] EWHC 2316 (TCC). As Christopher Clarke J pointed out in *First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm), a pre-action disclosure order, even if not exceptional, is unusual [24].

(b) *Norwich Pharmacal* Application

29. The *Norwich Pharmacal* jurisdiction provides that a person frequently innocently caught up in the wrongdoing of another so that they are more than a mere witness can be compelled to disclose the identity of the wrongdoer so that proceedings may be brought against the proper defendant.

30. The conditions for making a *Norwich Pharmacal* order were summarised in *Mitsui v Nexen Petroleum* [2005] EWHC 625 (Ch); [2005] 3 All ER 511 at [21] by Lightman J as follows:

    (1) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

    (2) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

    (3) the person against whom the order is sought must (i) be mixed up in so as to have facilitated the wrongdoing and (ii) be able or likely to provide the information necessary to enable the ultimate wrongdoer to be sued.

31. As to those requirements, the requirement at sub-limb (2) means it must be necessary for an order to enable a party to assert rights against the ultimate wrongdoer, such relief being a remedy of last resort (Civil Procedure 2020 paragraph 31.18.5). It should not be available where the information required could be obtained in some other way, for instance under CPR 31.16. Hence if the applicant already knows the identity of the wrongdoer and has sufficient information to commence an action, a *Norwich Pharmacal* order may be unnecessary, and so refused: *Nikitin v Richards Butler LLP* [2007] EWHC 173 (QB). The *Norwich Pharmacal* jurisdiction is described as an exceptional jurisdiction and careful scrutiny will be given both to the need for an order and to the scope of the order which is sought. In principle it should be no wider than is strictly necessary to enable the applicant to pursue its proposed claims.

32. In *Ashworth Hospital Authority v MGN Limited* [2002] 1 WLR 2033 per Lord Woolf CJ at paragraph [57]. *"The Norwich Pharmacal jurisdiction is an exceptional one and one that is only exercised by the courts when they are satisfied it is necessary that it should be exercised. New situations are inevitably going to arise where it would be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which apply to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new*

circumstances for its appropriate use will continue to arise as illustrated by the decision of Sir Richard Scott V-C 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."

33. In *Ramilos Trading Limited v Buyanovsky* (2016) EWHC 3175, it was noted by Flaux J (as he then was) at [62] that *"the Norwich Pharmacal jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide-ranging disclosure or gathering of evidence, as opposed to focused disclosure of necessary information…it is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not…"* whether against the defendant or persons other than the defendant. In reaching this conclusion, Flaux J was citing language of earlier cases including *Norwich Pharmacal* itself per Lord Cross and Ashworth per Lord Woolf CJ.

34. The requirement at sub-limb (3) means that the person against whom the order is sought must be mixed up in the wrongdoing. Such relief cannot be granted against a "mere witness" or "bystander". A claim solely for disclosure and production does not lie against a defendant who has neither committed nor facilitated nor been involved in the committal of the wrongdoing (*Norwich Pharmacal* [1974] A.C. 133, HL at 175, 188, 197, 203 and 204, *Ricci v Chow* [1987] 1 W.L.R. 1658; [1987] 3 All E.R. 534, CA, *Various Claimants v News Group Newspapers Ltd (No.2)* [2013] EWHC 2119 (Ch); [2014] 2 W.L.R. 756 at [52]–[53], explaining the nature of "involvement". See further *Orb arl v Fiddler* [2016] EWHC 361 (Comm) at [88]). This might not be so difficult in a case where a solicitor acts in a fraudulent claim, even though the solicitor may have been innocent at all times and have had no reason to know about or even suspect a fraud.

VI The ten categories of documents.

35. In the application, there were set out 10 categories of documents as follows[1]:

"(a) All communications whether by letter, email, text message, or otherwise between current or former directors, agents or employees of the Respondent and any former directors, agents or employees of Bancroft & Co Ltd relating to the claims made by the alleged passengers against the Applicant.

(b) Notes of any telephone or other oral communications between current or former directors, agents or employees of the Respondent and former directors, agents or employees of Bancroft & Co Ltd relating to the claims made by the alleged passengers against the Applicant.

(c) All communications whether by letter, email, text message, or otherwise between current or former directors, agents or employees of the Respondent and former directors, agents or employees of Acquire Medicals Ltd relating to the claims made by the alleged passengers against the Applicant.

(d) Notes of any telephone or other oral communications between current or former directors, agents or employees of the Respondent and former directors, agents and employees of Acquire Medicals Ltd relating to the claims made by the alleged passengers against the Applicant.

(e) All communications whether by letter, email, text message or otherwise between directors, agents or employees of the Respondent and former directors, agents or employees of Bancroft & Co Ltd relating to this Applicant's applications for disclosure and discovery.

[1] The references to the Respondent are to LPS.

(f) Copies of the Respondent's electronic case management system insofar as it contains entries relating to the three alleged passengers' claims. Such to be provided either in an accessible electronic format or in the form of screenshots.

(g) Copies of the electronic metadata in respect of all documents disclosed and discovered so far in compliance with Mrs Justice Cockerill's order and in respect of all further documents which are disclosed and discovered in compliance with any further order of the court.

(h) Copy of the Respondent's file relating to the claim brought by Sabir Hussain arising from an accident on 21 October 2014. The documents provided are to include the Respondent's file including communications with the claimant in that claim and all communications whether by letter, email, text message, or otherwise between directors, agents and employees of the Respondent and former directors, agents and employees of Bancroft & Co Ltd relating to the matter. (The second statement of Ms Fergus at paragraph 36(g) says that this claim is mentioned in the judgment of Goss J in the criminal trial against Raja Hussain and others and is relevant as it is a further fraudulent claim referred to the Respondent by Bancroft & Co Ltd and so is probative of Bancroft's *modus operandi* and of the relationship between Bancroft and the Respondent).

(i) Copy of the Respondent's file relating to the claim brought by Shahreah Islam Miah relating to an accident on 23 October 2013. (The second statement of Ms Fergus at paragraph 36(h) says that this claim is referred to in the above-mentioned judgment of Goss J.) The documents provided are to include the Respondent's file including communications with the claimant in the claim and all communications whether by letter, email, text message, or otherwise between directors, agents or employees of the Respondent and former directors, agents or employees of Bancroft & Co Ltd relating to the matter.

(j) Copy of any investigations or research carried out by the Respondent into Bancroft & Co Ltd, Acquire Medicals Ltd, Raja Hussain or any other director, agent or employee of Bancroft & Co Ltd or Acquire Medicals Ltd. Copy of any communications between directors, agents or employees of the Respondent whether by email, text

message or otherwise relating to Bancroft & Co Ltd, Acquire Medicals Ltd, Raja Hussain or any other director, agent or employee of Bancroft & Co Ltd and Acquire Medicals Ltd."

VII The documents at categories (a) - (d)

36. The documents at categories (a) – (d) concern communications between the Respondent and Bancroft at the time the claims were being brought. There is a failure to establish a case to the effect that the disclosure of these documents pursuant to the Cockerill J Order was deficient. Given the primary case of the Applicant that this comes within the Cockerill J Order, there has been a failure by the Applicant prior to the skeleton argument on the morning to identify the deficiency in the disclosure provided. The second witness statement of Ms Fergus does not identify the deficiency other than to say that the disclosure was 'incomplete', and the skeleton argument served just before the hearing does not take this forward significantly. The criticisms of the Applicant's case in the section about the nature of the application at paragraphs 11-22 above all apply.

37. In any event, as regards CPR 31.16, Zenith has failed to show that the Respondent is likely to be a defendant in subsequent proceedings. The reason for this is that it recognises that it does not have evidence on which to plead deceit. The potential negligence claim is accepted to be novel, and whilst it is possible that Zenith will pursue such a claim even with those sums at stake, it has not been shown that it is likely. Further, it has not been shown that in addition to the documents provided that disclosure is desirable in order to dispose fairly of the anticipated proceedings and/or to assist the dispute to be resolved without proceedings and/or to save costs ("the desirability criterion"). Further, moving on to the discretionary element, it is unclear whether there is a cause of action against LPS, LPS has cooperated significantly thus far by producing hundreds of pages of documents pursuant to the Cockerill J Order and the evidence of Mr Khan contains a statement of compliance with the same. Further, the criticisms at paragraphs 11-22 above are reasons why the discretion ought not to be exercised in favour of the Applicant. In these circumstances, there is no reason to make this Order.

38. As regards *Norwich Pharmacal*, the critical element is the second of three elements, namely it must be necessary for an order to enable a party to assert rights against the ultimate wrongdoer, such relief being a remedy of last resort. Zenith may contend that it does not have sufficient information to proceed against LPS currently, but that does not mean that the second limb for this application is satisfied. There is no reason established for believing that there will be any further documents provided in respect of categories (a)-(d) since these categories do come within the Cockerill J Order, there has not been identified any breach of these orders in the pre-application correspondence, nor was there anything about breach other than the unparticularised and wholly inadequate assertion that the documents supplied were incomplete.

39. Whilst there was a limited attempt to suggest that there might be more documents in the possession of LPS in the skeleton argument supplied on the day of the hearing on 1 May 2020, this did not prove that there had been any breach. There were comments that the communications between LPS and Bancroft were limited, and examples were given (paragraph 28(b) of the Applicant's skeleton argument of 1 May 2020). The documents were likely to be limited in any event due to the early compromise of the claims. The fact is that hundreds of pages of documents have been provided: 168 pages in relation to Mr Butt's claim, 133 pages in relation to Mr Ur-Rehman's claim and 187 pages in relation to Mr Mir's claim. If there were a question as to whether all the documents had been provided, then one would expect that it would have been further in correspondence at the time of receipt of the documents or before the application had been issued, and the responses could have been evaluated. In response to the bare allegation that the disclosure was *"incomplete"*, Mr Khan in his witness statement referred to the disclosure under the Cockerill J Order. He said at paragraph 68 that all documents had been provided. At paragraphs 73-75, he said that the allegation that the Respondent would have disobeyed an explicit order of the Court was *"wholly unfounded"*, and that the documents sought in categories (a)-(d) *"have already been disclosed in their entirety."* The evidence of Mr Khan for LPS is with an extensive statement of truth. There is no reason for the Court to treat that as false.

40. For all these reasons, the application for disclosure of the documents in categories (a)-(d) under CPR 31.16 and *Norwich Pharmacal* must fail.

VIII The documents at category (e)

41. With respect to category (e) and all communications between the Respondent and Bancroft regarding the Applicant's applications for disclosure/discovery, this does not come within the first application. It would appear to be the subject of legal professional privilege because it is in connection with the steps to gather evidence to deploy. It is also not explained how such document, other than by way of denial, how such documents would not be covered by legal professional privilege. Further and in any event, Zenith has not explained what the relevance of such documents is, or indeed what is the scope of this category using the very broad words *"relating to the Applicant's applications"*. It has not identified what kind of documents there might be, bearing in mind that Bancroft was dissolved in 2017 and on the Applicant's case (only), Mr Raja Hussain is in prison. For the same reason, the application under CPR 31.16 has the difficulty that LPS is not likely to be a defendant. Further, it has not been explained how such documents would be subject to standard disclosure if an action had been brought. Further still, neither is the desirability criterion satisfied nor would it be ordered applying the discretionary criteria in view of the above circumstances. As regards *Norwich Pharmacal*, Zenith has failed to show how it is necessary for an order to enable a party to assert rights against the ultimate wrongdoer other than to say that they are likely to shed light on the state of mind and of knowledge of the Bancroft employees. This is stated in the most general of terms. In my judgment, this appears to be a fishing exercise and there is no attempt to engage with the exceptional nature of the *Norwich Pharmacal* jurisdiction.

IX The documents at categories (f) and (g)

42. Regarding categories (f) and (g) of the disclosure sought, the information sought was the electronic case management system and copies of the electronic documents in respect of all documents discovered. It emerged in the hearing that there had been no consideration on the part of Zenith prior to the hearing of how this fit into the Civil Procedure Rules. At first, it was submitted that this was required in respect of any documents provided.

Then, following discussion, this was qualified rightly by reference to Practice Direction 31B. That Practice Direction at paragraph 28 states *"Where copies of disclosed documents are provided in Native Format in accordance with paragraph 33 below, some metadata will be disclosed with each document. A party requesting disclosure of additional metadata or forensic image copies of disclosed documents (for example in relation to a dispute concerning authenticity) must demonstrate that the relevance and materiality of the requested metadata justify the cost and burden of producing that metadata."* Zenith said that this was justified here because the information sought is likely to give rise to considerably more information about the state of knowledge of Bancroft, the Respondent, and the passengers than is available from the documents themselves. LPS submitted that even without expert evidence, the costs and time were likely to be very considerable. In my judgment, this is another instance where Zenith has failed to discharge the burden which is on it. This appears to be a scattergun application of a fishing nature, perhaps because at present Zenith has not identified what is the object of its search.

43. In any event, insofar as this was an application under CPR 31.16, it met with the same problems about proving that LPS is a likely defendant in subsequent proceedings. It has not been shown how such documents would be subject to standard disclosure if an action had been brought. Having regard to all of the shortcomings contained in the above paragraph, the desirability criterion has not been established and/or the discretion should not be exercised in favour of making an order in respect of these categories having regard especially to the matters set out in the preceding paragraph. As regards *Norwich Pharmacal*, Zenith has failed to show how such an order is necessary to enable a party to assert rights against the ultimate wrongdoer. It has the hallmarks of a fishing exercise and there is no attempt to have regard to the exceptional nature of the jurisdiction or to identify why it is necessary in the interests of justice to have such a wide ranging and time consuming order.

X The documents at categories (h) and (i)

44. Regarding categories (h) and (i) of the disclosure sought, Zenith says that information contained in files relating to claims brought in respect of a road traffic collision of Mr Sabbir Hussain of 21 October 2014 and of Mr Miah of 23 October 2013, both fraudulent claims, both represented by the Respondent, is likely to give invaluable information about the *modus operandi* of frauds involving Bancroft. It is not said that these were claims made on Zenith. Further, if it were the case that it is not the same Raja Hussain in the manslaughter case and the person who was the director of Bancroft, that would present another problem of connection between the two cases. Whether or not it was the same Raja Hussain is, as has been noted, not something which appears to have been considered by Zenith following this being put in issue by LPS. Further, Zenith has not shown how such documents in respect of different fraudulent claims would adversely affect LPS's case or take forward the case of Zenith against LPS. Even if it is the case that Bancroft were involved in those claims, it does not follow that different insurance frauds will, or are likely to, take forward any intended claim of Zenith.

45. As regards a claim in respect of CPR 31.16, this fails because it has not been shown that it is likely that LPS will be a party to subsequent proceedings. Further, it has not been shown that if proceedings had been started that an order for standard disclosure would extend to these documents. Bearing in mind all the features described in the preceding paragraph of this judgment, the desirability criterion has not been satisfied, nor should the Court exercise its discretion in favour of making an order in respect of these categories. As regards *Norwich Pharmacal*, Zenith has failed to show how such an order is necessary to enable a party to assert rights against the ultimate wrongdoer. Here too, this category appears to be a fishing exercise without any attempt to engage in the exceptional nature of the jurisdiction or to identify why it is necessary in the interests of justice to have such a wide ranging and time consuming order. As with almost every aspect of this second application, the Applicant has failed to address adequately in the application and the supporting evidence the requirements of making an application whether under CPR 31.16 or *Norwich Pharmacal*.

XI The documents at category (j)

46. Regarding category (j) of the disclosure sought, this is said to fall primarily within CPR 31.16, that is not *Norwich Pharmacal*. It is said that any investigations carried out of

communications within LPS relating to Bancroft or to its directors is likely to fall within the scope of standard disclosure in the course of an action where the question is the state of knowledge of LPS regarding the activities of Bancroft. It will be relevant to whether LPS's agents or employees knew about the fraudulent activities of Bancroft before the knowledge became public at the time of their convictions. This is remarkably wide. It is not confined by time. It does not identify the time and context of such investigations or inquiries, or state how and why it is believed that the same would have been undertaken.

47. The application fails on most of the limbs of CPR 31.16. First, the likelihood of an action against LPS is not made out for the reasons set out above. Secondly, it has not been shown that this would be part of standard disclosure. Thirdly, the desirability criterion has not been made out. Fourthly, it is so wide that the Court should not exercise its discretion in favour of making an order in respect of these categories. In my judgment, this is part of a fishing exercise in circumstances where it has not been shown that there is any reason why LPS or its agent or employees might know of fraud on the part of Bancroft. Thus, it is not shown whether and why or in what context LPS would have undertaken such investigations or inquiries in respect of Mr Raja Hussain or Bancroft. This is even assuming, which is challenged, that the Raja Hussain of the criminal trial in the manslaughter case is the same person as the director of Bancroft.

XII The need for an originating application?

48. It is accepted by LPS that an application notice under CPR 23 was the appropriate way of making an application against it: see Civil Procedure para. 31.16.2. However, LPS submits that a Part 8 application was the appropriate way of making an application under *Norwich Pharmacal*: see *Towergate Underwriting Group Limited v Albaco Insurance Brokers Limited* [2015] EWHC 2874 (Master Matthews). Since that case, the Chancery Guide was amended to state that "the better practice is to make the application by Part 8 claim form. An application under Part 23 is likely to be rejected." (paragraph 7.4). In one sense, this becomes academic since the Court is rejecting the *Norwich Pharmacal* application, but it begs the question as to whether the Court should insist nonetheless that an application is brought under CPR Part 8

claim and then dismissed so that Zenith does not escape the higher court fees incurred in making a *Norwich Pharmacal* case.

49. However, for the purpose of this application, this will not be done for the following reasons. First, there still may be scope for an argument raised by Zenith to the effect that a court might dispense with the need for a Part 8 form in a mixed application of CPR 31.16 and *Norwich Pharmacal*, rather than require two forms of application. This argument is not determined by this judgment. Secondly, in the first application which was brought without a Part 8 claim form, this point was not taken by LPS who acceded to the relief sought, and so rightly or wrongly Zenith may have assumed that this would be the case here. Thirdly, having regard to the rejection of the applications, it is wasteful of court time and expense to make a ruling on the particular facts of this case, but parties in future might find that the Court might refuse to hear a *Norwich Pharmacal* matter without a Part 8 claim form and/or may insist that a Part 8 claim form is issued even when dismissing the application.

XIII Conclusion and disposal

50. It follows from the foregoing that this is a case where Zenith has failed to explain adequately or justify why it is making a second application. It has failed to explain why the hundreds of pages of documents produced pursuant to the Cockerill J Order were not adequate or why a second application was appropriate. Zenith has failed to tie the second application to the basic requirements under CPR 31.16 and/or under *Norwich Pharmacal*. Further, the criticisms of the Applicant's position at paragraphs 11-22 above go to the heart of the application and form the background against which the discretion is to be considered which is an essential part of each CPR 31.16 application.

51. Despite the categorisation of documents in the application, Zenith has failed at each stage to justify its position. It was not done in the period between LPS's letter of 26 July 2019 and the issue of the application on 20 December 2019. It was not done by

the witness statement in support of the application which was very limited in its scope. The attempts to seek to justify each of the 10 categories or to set out the basis of the application by reference to CPR 31.16 and/or *Norwich Pharmacal* were very limited and inadequate. When there was detailed evidence by Mr Khan on 23 April 2020, the Applicant failed to engage with this, and there was no evidence in response to the evidence of Mr Khan. The skeleton argument of Zenith was a very belated, and quite limited, attempt to engage with the problems, which could not put right the deficiencies of the Applicant's case.

52. For all the above reasons, the application is dismissed.

Judgment Approved by the court for handing down
(subject to editorial corrections)