THE COURT OF APPEAL

Neutral Citation [2023] IECA 255

Record Number: 2019/435

High Court Record Number: 2019/6893P

Murray J.

Collins J.

Ní Raifeartaigh J

BETWEEN

KEITH BLYTHE

Plaintiff/Respondent

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

Defendant/Appellant

JUDGMENT of Mr. Justice Maurice Collins delivered on 23 October 2023

THE APPEAL

Introductory

1. In what circumstances and within what limits may a court order a party against whom no claim of wrongdoing is made to make disclosure to a plaintiff for the purpose of enabling that plaintiff to pursue some form of legal action against a third party? That, at the level of principle, is the issue raised by this appeal.[1]

2. That the courts – or at least the superior courts – have jurisdiction to make such orders (commonly referred to as *Norwich Pharmacal* orders, after the decision of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) is clear. That such a jurisdiction exists as a matter of Irish law was confirmed by the Supreme Court in *Megaleasing UK Ltd v Barrett* [1993] ILRM 497 and again in *Doyle v Commissioner of An Garda Síochána* [1999] 1 IR 249.

3. Culleton, "*The Law Relating to Norwich Pharmacal Orders*"[2] offers a useful overview of the *Norwich Pharmacal* jurisdiction, as follows:

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[1] While at times Mr Blythe has suggested that the Commissioner may also have been a wrongdoer, the application for disclosure was not advanced on that basis. As will be seen, there is a conflict in the authorities as to the test applicable where an order for disclosure is sought against an alleged wrongdoer for the purpose of identifying other concurrent wrongdoers.

[2] [2021] *Irish Judicial Studies Journal* Vol 5(1)

> *"A Norwich Pharmacal Order is a particular type of disclosure order where the only cause of action is discovery. Essentially, the order compels a defendant, who has become mixed up in the alleged wrongdoing of a third party in some manner, either knowingly or innocently, to disclose information that would assist to identify this third party wrongdoer to the plaintiff. The purpose of the order is therefore to place a plaintiff in a position to identify and seek redress against a previously unknown wrongdoer.*
>
> *The authority to grant Norwich Pharmacal relief is founded on the court's equitable jurisdiction, derived from a 'contemporary incarnation of the equitable bill of discovery'.*
>
> *Therefore, it is a versatile remedy, granted at the discretion of the court, when deemed to be a proportionate and necessary response in all of the circumstances of a matter."* (at 20-21; footnotes omitted)

4. Even so, as the author goes on to discuss, there remains significant uncertainty as to the scope and purpose of the disclosure jurisdiction, the threshold conditions for its exercise and the factors to be considered in assessing whether or not to make a disclosure order in any given case. As in many other areas of the law, significant tensions arise between the desire for flexibility and the values of certainty and predictability – the age-old struggle between equity and law. The parameters of the disclosure jurisdiction have expanded significantly in England and Wales but it is not clear whether developments there can or should be followed here. Many of those areas of uncertainty are highlighted by this appeal.

The Background to these Proceedings

5. The Appellant is the Commissioner of An Garda Síochána (hereafter "*the Commissioner*"). He appeals from an Order made by the High Court (Humphreys J) on 18 September 2019 directing him to disclose certain information to the Plaintiff. It will be necessary to consider the precise form of the Order in due course but at this stage it is sufficient to note that the Order was made in proceedings brought against the Commissioner for the sole purpose of obtaining that relief – as it is sometimes referred to, an action for "*sole discovery*."

6. The plaintiff ("*the Plaintiff*" or "*Mr Blythe*") was, until July 2019, a member of An Garda Síochána ("*AGS*"), holding the rank of garda. In 2017, he applied for promotion to sergeant as part of a large competition involving a number of promotions from garda to sergeant and from sergeant to inspector. He was interviewed but was subsequently informed that he had not qualified for the second round of interviews. He sought an administrative review of that decision. He says that nothing happened by way of review and, in September 2018. in circumstances where the competition was about to conclude and the successful candidates announced, he brought proceedings against the Commissioner in the High Court. It appears that there were concerns within AGS that the proceedings would put all promotions arising from the competition on hold and there appear to have been some suggestions to that effect in the media.

7. Mr Blythe says that, around the time that he instituted those proceedings against the Commissioner, but before the proceedings had reached the public domain (a point emphasised by him as indicating that the fact that he had brought proceedings was

inappropriately "*leaked*" within AGS), he became aware that "*grossly defamatory and scandalous comments and photographs"* relating to him were circulating on WhatsApp and Facebook. It appears that these objectionable messages (some consisting of images) circulated on WhatsApp groups comprised of members of AGS and were brought to Mr Blythe's attention by friends within AGS who had received or seen them. Screenshots of such messages and posts were sent to the Plaintiff.

8. In turn, Mr Blythe provided that material to AGS (redacted so as to avoid disclosing the identity of the persons who had sent it to him). The material, or at least some of it, was subsequently exhibited by him in the affidavit grounding his application to the High Court in these proceedings. The material also includes a number of public Facebook posts which he says refer to him. The persons posting those posts were named but I shall refer to them simply as AB and CD.

9. Mr Blythe was distressed by this material, which he says not only contained false innuendoes about aspects of his private life but also impugned the character and good name of his wife. In his view, the material was seriously defamatory of him. For the purposes of this appeal, it is unnecessary to describe this material in any greater detail.

10. Mr Blythe was invited to make a formal complaint and to provide a statement to AGS and he did so in October 2018. The capacity in which he made that complaint (whether *qua* member of the public or member of AGS) is not entirely clear (though the Commissioner's position appears to be that the complaint was made *qua* member of the public). Insofar as the complaint may have been one of alleged *criminal* conduct, it is not at all clear what that

alleged conduct was said to be. In his statement, Mr Blythe explained that he did not wish to identify the Garda colleagues who had brought the WhatsApp material to his attention because he feared that doing so would have adverse consequences for them professionally or personally. He also says that his friends did not, in any event, know the identities of the authors of the material. He declined to allow AGS to forensically examine his mobile phone as part of their investigation. In argument, it was suggested that Mr Blythe's refusal to co-operate (as the Commissioner characterised it) had hampered the Garda investigation.

11. On several occasions between November 2018 and May 2019 Mr Blythe's solicitors wrote to AGS seeking information about the progress of the investigation. At least one of these letters was addressed to the Commissioner personally. However, Mr Blythe did not receive a substantive reply to any of this correspondence.

12. Mr Blythe resigned as a garda on 10 July 2019. He says that the events of September 2018 and the failure of AGS to keep him informed of the progress of its investigation made it impossible for him to remain in the force.

13. On 20 August 2019 his solicitors wrote once again to the Commissioner. It is evident from that letter that the Plaintiff was aware that the AGS investigation had concluded. The letter referred to the material posted "*by your members*" concerning Mr Blythe and suggested that it was "*reasonable to assume that the identities of any wrongdoers are known to you or to your delegated officers given the lengthy investigation undertaken*." The letter sought the identities of "*the person(s) who created, shared, distributed, published or forwarded the defamatory material about our client*" and stated that, if that information was not

provided, Mr Blythe would have "*little alternative*" but to apply for a *Norwich Pharmacal* order. The letter also referred to the possibility that Mr Blythe would apply to the High Court for an order extending the time for bring a defamation action and indicated that he was also considering the pursuit of other options to protect his interests.

14. That letter was followed by a further letter from his solicitors of 22 August. That letter referred to the possibility of civil proceedings against the Commissioner, AGS and the Minister for Justice for depriving Mr Blythe of a cause of action in the event that the Commissioner did not provide the identities of the individuals who had allegedly defamed him. It sought a response by close of business on the following day, 23 August. However, no response was received to this correspondence by 23 August or at time prior to the commencement of these proceedings on 4 September 2019. Mr Blythe's stated assumption that "*the identities of any wrongdoers*" were known to AGS – the basis for which was unexplained – thus went uncontradicted.

The Proceedings

15. A Plenary Summons then issued in Mr Blythe's name on 4 September 2019 which sought as the sole substantive relief an order as follows:

> *"An Order directing the Defendant to provide the Plaintiff in writing with any and all information in its possession that identifies or may assist in identifying persons who have participated in its publication and dissemination of defamatory material concerning the Plaintiff from the 20 September 2018 to the present date, including*

but not limited to any information obtained from an internal investigation into the aforesaid matter conducted by Superintendent Angela Willis and Detective Sergeant Brian Quirke which commenced on or about 17 October 2018."

16. On the same day, a notice of motion issued seeking an order in the same terms, grounded on a detailed affidavit sworn by Mr Blythe on 3 September 2019. Exhibited to that affidavit were the WhatsApp and Facebook material, his statement to AGS and the correspondence between his solicitors and AGS. At the conclusion of that affidavit, Mr Blythe explained that the (1 year) time-limit for bringing defamation proceedings against the persons responsible for the publication of the material was about to expire. He expressed his understanding that the Garda investigation had concluded and that it had recommended that disciplinary measures be pursued against certain gardaí for their role in the circulation of material about him on WhatsApp. He also exhibited correspondence between his solicitors and Facebook.

17. A lengthy replying affidavit was filed on behalf of the Commissioner by Superintendent Helen Deely. It is not clear what involvement (if any) Superintendent Deely had had in the investigation of the Plaintiff's complaint. In any event, she took issue with virtually every aspect of the application and articulated a broad array of objections to the order sought. According to Superintendent Deely, the Plaintiff's refusal to disclose the identities of the persons who had communicated the WhatsApp messages to him and his refusal to consent to a forensic examination of his mobile phone had "*limited the avenues for further investigation*." She confirmed that the criminal investigation had concluded and that no criminal prosecution would take place but said that an internal disciplinary investigation

had been commenced against a garda.[3] She could not provide any further information in relation to that investigation as to do so "*would prejudice the individual concerned and the operations of An Garda Síochána* ".

18. Superintendent Deely neither confirmed nor denied that the disciplinary investigation referenced by her related to the circulation of material about Mr Blythe on WhatsApp. She gave no indication that – as would later emerge – AGS did not know who had circulated that material and thus that the Commissioner could not provide that information to Mr Blythe whatever order might be made by the High Court.

19. A further affidavit was then sworn by Mr Blythe, as well as an affidavit from his solicitor, averring to the fact that the solicitor's office had received a number of calls from journalists on 25 September 2018 enquiring about intimate aspects of Mr Blythe's private life.

20. Without any further pleadings, Mr Blythe's motion came on for hearing in the High Court on 18 September 2019. There was, from his perspective, a pressing urgency about the application because of the fact that section 11(2)(c) of the Statute of Limitations 1957 (as amended by section 38(1) of the Defamation Act 2009) provides for a 1 year basic limitation period for defamation actions. While that is subject to the power of the court to direct "*a longer period ... not exceeding 2 years*", any extension is a matter for the court's discretion, having regard to the considerations identified in section 11(3A), and is not

[3] As already mentioned, it is not evident from the papers what potential criminal offence(s) was the subject of Garda investigation.

available as of right. In these circumstances, it was agreed that the hearing of the motion would be treated as the trial of the action. No doubt that was a practically sensible course. It is nonetheless unfortunate that the High Court, and this Court on appeal, did not have the benefit of full pleadings which might have helped to define the precise issues between the parties.

21. The application was strenuously contested by the Commissioner. After a lengthy hearing extending late into the evening, the Judge gave a detailed *ex tempore* ruling in which he engaged with and rejected the objections advanced on behalf of the Commissioner and made the Order the subject-matter of this appeal. As perfected, the Order directed the Commissioner to disclose:

> *"the names and addresses of any persons in relation to whom the Defendant considers that there is prima facie evidence of involvement in publication of allegations against the Plaintiff of the general nature described in the Affidavit of the Plaintiff filed on the 4th day of September 2019 and in each case to specify the particular defamatory material in relation to which there is evidence they are concerned in publication said information to be provided by letter rather than affidavit not later than 1 o'clock in the afternoon of the 19th September 2019".*

As will be apparent, the Order as made differed somewhat from that sought by the Plaintiff. Quite apart from his fundamental objection that no order should have been made at all, the Commissioner takes issue with the form of the order on the basis that it required him to

make a subjective assessment as to what material was allegedly defamatory of the Plaintiff and potentially encompassed material beyond that identified by the Plaintiff.

22. The Judge was asked by the Commissioner to stay the Order pending appeal but he declined to do so. In his view, the balance of justice was "*compellingly in favour of refusing a stay*" in circumstances where the basic limitation period fixed by section 11(2)(c) was about to expire and where there could be no certainty either that an extension to that period would be permitted or that the Commissioner's appeal would be determined within the period of any extension in any event. In such circumstances, in the Judge's view, the Plaintiff had "*infinitely more to lose*" than the Commissioner, albeit that there was a risk that, in the absence of a stay, any appeal brought by the Commissioner might be said to be a moot. The Judge awarded the Plaintiff his costs of the motion and declined to allow the Commissioner his costs of making the directed disclosure.

The High Court Judgment

23. The Judge subsequently issued an edited and approved version of his judgment ([2019] IEHC 854). He identified the origins of the court's jurisdiction to direct disclosure or discovery, whether against a party or non-party, as, firstly, the inherent judicial power to require interested parties to assist the doing of justice and, secondly, the constitutional right of access to the courts and the related EU and ECHR right to an effective remedy (§6). In his view, the court's jurisdiction to direct disclosure was not limited to directing disclosure of the identity of the wrongdoer. Any such limitation would be "*arbitrary*" (§11). The relevant distinction was between information needed to launch an action and information

needed to prosecute or advance it. At the pre-action stage all that the plaintiff needs is the information necessary to launch the action (§11) and that was all that was sought here (§12). The Judge then addressed the Commissioner's contention that a threshold requirement for the exercise of the jurisdiction was clear and unambiguous evidence of wrongdoing by the intended defendant(s) which, the Commissioner argued, was missing here. In the Judge's view, the alleged requirement for clear and unambiguous evidence of wrongdoing was "*ultimately an arbitrary test and to some extent a Catch-22*" (§16). Although in *O'Brien v Red Flag* [2015] IEHC 867 Mac Eochaidh J had referred to the need to establish wrongdoing "*to a high degree of certainty*", the Judge said that too much ought not to be read into that comment which was made in a context where there was an utter lack of evidence on behalf of the plaintiff. Certainty, or a high degree of certainty, was not required; what was required was "*prima facie demonstration of wrongful activity*" (citing Kelly J in *EMI Records (Ireland) Limited v Eircom Limited* [2005] IEHC 233, [2005] 4 IR 148) or (citing Ryan P in *O'Brien v Red Flag Consulting Ltd* [2017] IECA 258, at para 41(x)) "*a strong case*" (§16). Here, in the Judge's view, such a "*strong case*" had been shown that unknown persons had defamed the Plaintiff and given that the Commissioner had information that could identify those persons – information which was necessary to enable the intended defamation proceedings to be instituted – that was sufficient to warrant the making of an order for disclosure (§17).

24. The Judge then addressed the various other objections made by the Commissioner. He considered that the objection that any order could only require disclosure of names and addresses or identifying information had been dealt with by the proposed limitation on the terms of the order (§18). The Commissioner's objection that any order could prejudice the

member the subject of disciplinary investigation and the operations of An Garda Síochána was "*unconvincing*" and had "*all the appearance of a puff of smoke dreamed up by lawyers on behalf of [the Commissioner]*" (§19). Any objection based on prejudice to that other garda was a "*ius tertii*" but, in any event, disclosure of that member's identity would not prejudice that person in a legal sense in the disciplinary inquiry (§20). Overall, there were strong considerations favouring the making of the order given the prejudice that the Plaintiff would suffer if the order was refused and the countervailing factors relied on by the Commissioner were "*very weak*" (§§19-21).

25. The Judge was also unimpressed by the Commissioner's argument that the Plaintiff had failed to take appropriate steps to obtain the information by means other than compelled disclosure from the Commissioner. In the Judge's view, the Commissioner had not identified any clear, simple and effective step that could have been taken by the Plaintiff which might have obviated the need for the application. Any attempt to pursue Facebook (the owners of WhatsApp) would be "*immensely complex*" (§§22-23).

26. As for the Commissioner's objection that he was not responsible for the publication of the messages, that was not in the Judge's opinion a valid objection as the court's jurisdiction was not limited to making orders against persons with responsibility for the defamatory publication. The Commissioner was "*involved beyond the mere bystander role*". He was the principal of the potential defendants, even if not strictly their employer as a matter of law. He was also the person responsible for the investigation of the publications for disciplinary purposes and had responsibility for exercising discipline over members of An Garda Síochána who commit acts amounting to a breach of discipline. This, the Judge said,

had a "*a significant evidential overlap with the behaviour complained of here*." (§24). The Judge then continued:

> *"25 The court's jurisdiction doesn't depend on a condition that the extent to which the respondent in the motion has got mixed up in the matter complained of being such as 'to facilitate their wrongdoing', per Lord Reid in* Norwich Pharmacal *[1975] AC 133 at para 12. That is certainly included but is not definitional of the court's jurisdiction. Logically, neither the judicial power nor the right to an effective remedy can be subject to such an arbitrary limitation."*

These observations should be read with the observations of the Judge at §10 to the effect that "*there may well be limits*" to orders against persons who were not parties to the alleged wrong, particularly in relation to "*mere witnesses"* but that in his view the Commissioner could not be regarded as a "*mere witness*."

27. The Judge went on to reject the suggestion that the application was speculative and a "*fishing expedition*." The disclosure sought was, he said, strictly limited to the absolute minimum information required to enable the plaintiff to have access to the courts (§26). The Judge went on to query why the Commissioner had opposed the application "*so vigorously or indeed at all*." While not questioning the Commissioner's "*strictly legal right*" to object to the order sought, it did not seem to the Judge to be "*most well-judged position to have adopted*." Any confidentiality attaching to the information sought under section 62 of the Garda Síochána Act 2005 was qualified and so confidentiality was not in and of itself an absolute answer to the application. The Commissioner had relied on

"*legalistic points*" such as *"whether the appropriate test was met*" but the Judge considered that a better approach would have been to court asking "*how can we help the court do justice*?". In his view, the facts of the present case were relatively unusual and the making of the order was unlikely to open a huge floodgate (§§27-29).

28. Finally, the Judge referred with approval to a passage from the Plaintiff's written submissions which queried what marked the proceedings out from other potential proceedings in which similar information might be sought. The Plaintiff asked rhetorically whether it was being contended by the Commissioner that, in the event of a serious assault on a member of the public, or other serious criminal offence, he would refuse to disclose the identity of the perpetrator to the victim. In the Judge's view, one only had to ask that question to recognise the appropriate answer, which in the present proceedings took the form of an order for disclosure in the terms already set out (§30).

29. As will be apparent from this discussion, the application for disclosure was advanced, and the High Court Order was made, on the basis that the Commissioner, while not a wrongdoer, was sufficiently connected to the wrongdoing of others (the Gardaí who had circulated the WhatsApp messages alleged to be defamatory of the Plaintiff) – or, to use the language used in the authorities, he was sufficiently "*involved in*" or "*mixed-up in*" that wrongdoing – to warrant an order of disclosure against him. Thus, in the language of the authorities, the Commissioner fell to be characterised as an "*innocent*" party. In that sense, the application here fell squarely within the *Norwich Pharmacal* paradigm. But disclosure may also be sought in circumstances where the party from whom disclosure is sought is alleged to have been guilty of actionable wrongdoing and where the purpose of the

disclosure is to identify other concurrent wrongdoers so that they may also be sued. There is a sharp conflict in the authorities as to the proper approach to such applications for disclosure: contrast the decision of the High Court (Mac Eochaidh J) in *O'Brien v Red Flag Consulting* [2015] IEHC 867 with the decision of that court (Hyland J) in *Grace v Hendrick* [2021] IEHC 320.

Post-Judgment Developments

30. As already noted, the Order required compliance by 1 pm on the following day (19 September 2019). On 19 September the CSSO wrote to the Plaintiff's solicitors in the following terms:

> *"We refer to the Order of the High Court made on 18th September 2019. We are instructed that the only relevant further information in the possession of the defendant concerning the Order, other than what has been exhibited by your client on affidavit, is the home address of a serving member of An Garda Síochána , namely Garda [AB] . The Garda authorities are in the process of confirming his home address. Separately, there are five serving members of An Garda Síochána named [CD]. It has not been possible to establish the correct identity of that member."*[4]

[4] *AB* and *CD* were the names displayed in the series of Facebook posts referred to above.

Later on the 19 September the CSSO sent a further letter giving the home address of Garda AB.

31. Mr Blythe and his advisors expressed considerable surprise at this correspondence, and they suggested in response that the Commissioner had not properly complied with the Order. That was strongly disputed by the Commissioner. Ultimately, Mr Blythe appears to have accepted that the Commissioner had complied with the Order, though he remained very critical of the adequacy of the investigation carried out by AGS and of its failure to identify the senders of the WhatsApp messages. He was also critical of the approach taken by the Commissioner to the application in the High Court. Mr Blythe said that the Commissioner should have disclosed that he was not in a position to provide any material assistance to him regardless of what order might be made. His failure to do so resulted in Mr Blythe pursuing a futile application. Given that the only additional information that the Commissioner had was the home address of Garda AB, Mr Blythe questioned why the Commissioner opposed the application so strenuously and also questioned how the Commissioner could have properly advanced certain of the grounds of objection on which he relied, such as the suggestion that the making of the order sought would prejudice the operations of AGS and/or the disciplinary process that followed from the AGS investigation. In my view, there is real force in these criticisms. Mr Blythe also argued that, in light of the Commissioner's disclosure, the appeal was moot. That is an issue which it will be necessary to consider further in due course.

32. One further development that occurred subsequent to the High Court hearing should also be noted. At the outset of his submissions to this Court, Counsel for the Commissioner

informed the Court that Garda AB had been found guilty of a breach of discipline and had been subject to a temporary reduction in pay by way of penalty. On inquiry by it, the Court was told that the breach of discipline involved was that of "*disreputable conduct*". The Schedule to the Garda Síochána (Discipline) Regulations 2007 (SI 214 of 2007) (as amended) sets out the acts or conduct which constitute breaches of discipline under the Regulations. It does not refer to "*disreputable conduct*" but does refer to "*discreditable conduct*" which is defined as a member "*conducting himself or herself in a manner which the member knows, or ought to know, would be prejudicial to discipline or reasonably likely to bring discredit on the Garda Síochána.*" That may have been what was intended. In any event – as Counsel for Mr Blythe noted in his submissions – the particular conduct of Garda AB that resulted in the finding of a breach of discipline, whether characterised as "*disreputable*" or "*discreditable*", is wholly unclear.

The Commissioner's Attack on the High Court Judgment

33. In his Notice of Appeal and written and oral submissions the Commissioner advanced a broad attack on the Judgment and Order of the High Court. The following were the principal threads:

- It was said that clear evidence of wrongdoing was a "*necessary proof*" for the grant of *Norwich Pharmacal* relief in this jurisdiction and that such evidence was absent here, particularly as regards the issue of identification of the Plaintiff in the WhatsApp and Facebook material (the "*Wrongdoing Ground*").

- It was next said that the Judge erred in finding that the Commissioner was sufficiently "*mixed-up*" in the wrongdoing to permit the making of an order. That was "*a necessary element*" in the granting of relief and it was said that the Judge applied an inappropriately low threshold test and had failed to have appropriate regard to the authorities which, it was said, required that it be shown that the Commissioner had "*facilitated the wrongdoing*" before an order could be made (the "*Involvement in the Wrongdoing Ground*")

- The Judge was said to have wrongly balanced the competing rights and interests involved and, in particular, he had failed to give appropriate weight to the fact that the information sought was confidential information gathered in the course of an investigation by AGS into the possible commission of a criminal offence and the fact that the Plaintiff had other avenues by which to obtain that information (the "*Proportionality Ground*")

- The Judge was said to have erred in making an Order extending beyond the provision of the names and addresses of the alleged wrongdoers and in terms which were uncertain and/or required the exercise of subjective judgment by the Commissioners (the "*Scope of the Order Ground*")

34. All of these grounds were contested by the Plaintiff. They were the subject of detailed written and oral submissions. As a preliminary matter, however, the Plaintiff objected that the appeal was moot and/or that it would be contrary to justice for this Court to hear and

determine it. I will address that objection first and explain why I consider it is appropriate that the Court should proceed to determine the Commissioner's appeal on its merits. I will then consider the authorities on *Norwich Pharmacal* orders and address the grounds of appeal summarised above.

THE PLAINTIFF'S PRELIMINARY OBJECTION

35. In his Notice, the Respondent advanced a preliminary objection to the Commissioner's appeal based on the fact that it appeared from the information ultimately provided by the Commissioner in response to the High Court's Order that the Commissioner was never in a position to provide any meaningful assistance to the Plaintiff. The Plaintiff had not been aware of that position, because of the Commissioner's failure to disclose it, and as a result the High Court hearing was effectively a moot, involving hypothetical arguments and issues, the resolution of which could not result in any effective relief for the Plaintiff. The Plaintiff was now at the hazard of "*severe costs*" in the appeal.

36. Rather surprisingly, this objection was not addressed by the Commissioner in his written submissions to this Court. In his written submissions, the Plaintiff maintained that, while it was difficult to understand how AGS's investigation could have yielded no relevant information whatsoever, if it was the case that the Commissioner had no useful information to provide, he ought to have told the Plaintiff that prior to the commencement of the proceedings. If he had (so it was said), the Plaintiff would not have proceeded with his action. Instead, the Commissioner had resisted the Plaintiff's application on what the Plaintiff characterised as "*hypothetical grounds*" which had "*no basis in reality*", in circumstances where, as a matter of fact, the Commissioner had nothing to disclose. For the Court to hear and determine the appeal would effectively involve it giving an advisory opinion and there were no exceptional circumstances which could justify doing so. In this context, the Plaintiff prayed in aid the well-known authorities of *O'Brien v Personal*

Injuries Assessment Board (No 2) [2007] 1 IR 328, *G. v C.* [2004] IESC 38, *Irwin v Deasy* [2010] IESC 35 and *Lofinmakin v Minister for Justice* [2013] 4 IR 274.

37. In oral argument, Counsel for the Commissioner acknowledged that it was "*unfortunate*" that the High Court had been allowed to engage in what was, in practical terms, an entirely empty exercise. That is certainly so. In my view, the complaints made by the Plaintiff as to the approach adopted by the Commissioner have not been satisfactorily answered. Whatever the breadth of the earlier requests made by the Plaintiff, as of 20 August 2019 he was seeking only the identities of the persons who had published the material which he considered to be defamatory of him – in essence, the WhatsApp material. In their letter of 20 August, the Plaintiff's solicitors had expressed the view that it was "*reasonable to assume*" that their identities were known to the Commissioner, given the lengthy investigation that had taken place. Although the Commissioner was aware that such an assumption was not well-founded in fact, he did nothing to disabuse the Plaintiff and his solicitors of it. When the proceedings subsequently issued, the Commissioner failed to disclose that the proceedings were pointless and that, even if Mr Blythe succeeded in obtaining the relief sought by him, that apparent success would be entirely hollow.

38. I accept what Counsel for the Commissioner said to the effect that he was not aware of the actual position at the time of the hearing in the High Court. But the fact remains that, as a result of the approach taken by the Commissioner, Mr Blythe was allowed to undertake the burden of issuing proceedings and pursuing an application to the High Court on a fundamentally mistaken premise. It is also surprising that the application should have been resisted on the basis *inter alia* that the making of the order sought would prejudice the

workings of AGS and/or could impact adversely on the pending disciplinary investigation and, more generally, would be "*disproportionate*". In the circumstances, these grounds of objection were wholly theoretical and lacked any concrete foundation and also had the potential to misdirect the High Court. That was indeed unfortunate, as Counsel for the Commissioner fairly acknowledged.

39. As unsatisfactory as this was, I am not persuaded that the Commissioner's appeal should be dismissed as a moot or, more generally, that, in the interests of justice, this Court should decline to engage with the appeal on its merits.

40. As to the issue of mootness, the jurisprudence has recently been described as "*something of the wilderness of single instances decried by Tennyson*" (per O'Donnell CJ (*nem diss*) in *Odum v Minister for Justice Equality and Law Reform* [2023] IESC 3, §10. Nevertheless, the Chief Justice observed, it was possible to discern a "*rough consistency between the cases, suggesting that courts are able to recognise those cases which should not proceed and those which should be heard and determined*" even if they "*sometimes struggle to identify a bright line rule*" (*ibid*). *Odum* indicates that the need to distinguish between different situations in which issues of standing/mootness may arise. *Odum* was concerned with events occurring after a decision of the High Court which were said to render an appeal from that decision moot (the appeal in *Odum* was a direct appeal to the Supreme Court pursuant to Article 34.5.4 of the Constitution).

41. As O'Donnell CJ noted (§12), the more advanced a case is, the more each party stands to lose by way of costs if the case is halted by reason of mootness. Furthermore – and perhaps

more significantly – if an appellate court refuses to proceed with an appeal on the basis of mootness, a legal precedent will stand without ever having been subject to appellate review (or, in the case of an appeal from the Court of Appeal to the Supreme Court, without being subject to Supreme Court review). Once a case is decided and is the subject of an appeal, "*there will be a decision (which in some cases may be capable of being a precedent controlling other cases and decisions) and an order for costs, which in some cases can be substantial*" (§33). It may therefore be undesirable to refuse to decide the appeal leaving that decision unreviewed and (where wrong) undisturbed. O'Donnell CJ cited *Kozinceva v Minister for Social Protection* [2020] IECA 7 in that context where, at para 63, Haughton J observed that "*in a case before an appellate court, where (whether because the lower court determined that the case was not moot, or because the case becomes moot after that decision) it may in some cases be undesirable to refuse to decide the appeal leaving that decision unreviewed and therefore (where wrong) undisturbed, even though the decision may function as a precedent in other cases*". The Chief Justice also stated that the existence of an extant order for costs may also be an "*important factor*" in this context (§41) and is "*itself a powerful factor leaning towards hearing … an appeal*" (§42).

42. These considerations apply with special force to appeals before the Supreme Court having regard to the jurisdiction conferred on that court by the Thirty-third Amendment, involving as it does a threshold requirement that an appeal must involve an issue of general public importance and/or that the interests of justice require an appeal to be permitted to that court (§35). Nevertheless, the same considerations are also relevant to appeals before this Court, as is clear from *Kozinceva v Minister for Social Protection*. Furthermore, appeals to this

Court can – and frequently do – involve issues of public importance, even if that is not (at least generally) a threshold condition for bringing such an appeal.

43. Here, the Order made by the High Court is, in a practical sense, spent. The very limited information held by the Commissioner has been provided to Mr Blythe. That cannot be undone by any order this Court may make in this appeal. It was for that very reason that in *Megaleasing UK Ltd v Barrett* [1992] 1 IR 219, the Supreme Court (per McCarthy J) considered it appropriate to stay the disclosure order made by Costello J in the High Court pending the determination of the appeal. Of course, the Judge here declined to stay his Order and no application was made to this Court for such a stay. But the undoubted fact that the Order is spent does not necessarily mean that the appeal is moot or, even if it is, that the Court should not proceed to deal with it on its merits. Equally, the fact that the Commissioner was not in a position to provide the information sought by the Plaintiff, and that as a consequence the proceedings were effectively futile from the start – a state of affairs not apparent to the Plaintiff or to the Judge at the time of the High Court hearing – does not necessarily mean that the appeal should not now be determined on its merits. The High Court has made an Order and the Commissioner says that that Order was wrongly made. *Prima facie*, he is entitled to have that contention adjudicated on by this Court, to which he has an appeal as of right, entrenched in the terms of the Constitution itself. That is particularly so in circumstances where the Commissioner has a real and legitimate concern as to the implications of the Judgment for applications for disclosure that may be made against him in the future. While the immediate *practical* consequences of the Order may be spent, it continues to have potential *legal* consequences for the Commissioner. That, in my view, is a powerful factor weighing in favour of addressing the merits of the

appeal. The issues are of importance not just to the parties but more generally – the proper parameters of the *Norwich Pharmacal* jurisdiction is clearly a matter of considerable general significance, and this is all the more so in a context in which the logic of the Judge's decision is likely to have implications not merely for AGS, but also for other investigative agencies in the State. The appeal has been fully argued and there has been no "*lack of full adversarial context*" (*Odum*, §40). The fact that there is a live dispute as to the costs order made by the High Court is a further material factor.

44. In these circumstances, I would be slow to characterise the Commissioner's appeal as moot. But, as was the case in *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 IR 751, it makes no difference here whether the appeal is considered not to be moot because of the interest of the Commissioner in pursuing it or moot as between the parties but nonetheless one of those appeals which it is appropriate to determine on its merits (§29, per O'Donnell J, as he then was) It appears to me that this Court's undoubted discretion to decide to hear an appeal that has become moot could properly be exercised in only one way here. That would be the position even without reference to *Odum*. Having regard to the considerations identified above, the interests of justice clearly weigh in favour of determining this appeal on its merits. The position is *a fortiori* having regard to *Odum*.

45. As for the more general point taken by Mr Blythe to the effect that the Court should effectively decline to hear the Commissioner's appeal to mark its displeasure at the manner in which he met the application in the High Court, that would, in my view, be disproportionate. To the extent that it may appear just to impose any sanction on the Commissioner, the Court has ample scope to do so in the exercise of its jurisdiction as to

costs. In the same way, the Court can address the Plaintiff's understandable concern at being at the hazard of an order for costs being made against him in respect of an appeal in the outcome of which the Plaintiff has little or no practical interest. For the Court to go further, and to decline to address the Commissioner's appeal on its merits would, in my view, go beyond what the interests of justice require.

46. With the preliminary objections out of the way, I turn to the substantive issues in the appeal.

THE SUBSTANTIVE APPEAL

Standard of review

47. The general approach to be taken by this Court in an appeal such as this – an appeal from a final order, following a hearing on affidavit – is as set out by the Court (Murray J, Haughton and Barniville JJ agreeing) in *AK v US* [2022] IECA 65. As Murray J explained (at para 53), the Court begins its analysis "*from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect.*" However, the Court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. While the decision here involved a greater degree of judgment/discretion than the decision at issue in *AK v US*, even so, although great weight must be given to the Judge's assessment, even in the absence of any error of principle this Court is nonetheless entitled to reach its own view as to where the balance of justice lies.

The Decision in Norwich Pharmacal

48. The House of Lords' decision in *Norwich Pharmacal* was a landmark. Although the ultimate decision of the Judicial Committee was unanimous, it appears that the Committee

was initially split on whether there the law recognised an action for discovery.[5] Given the uncertainties in the authorities, that is unsurprising. As the authors of *Disclosure of Information: Norwich Pharmacal and Related Principles* observe, there were significant issues as to what the prior authorities "*disinterred"* in *Norwich Pharmacal* – principally the decisions in *Orr v Diaper* and *Upmann v Elkan* – actually decided, as well as the extent to which they had been superseded "*by what seemed to be many years of silence*."[6] The "*sheet anchor*" of the plaintiffs' case was the decision in *Orr v Diaper,* dating from 1876. What precisely it decided was a matter of real uncertainty given the significant differences between the decision as reported in the Law Reports and the (more detailed) report in the Weekly Reporter and in other series, with the latter indicating that there had been a cause of action against the shippers. *Upmann v Elkan* was not strictly concerned with any issue of discovery but with the costs of injunction proceedings brought against Messrs Elkan to restrain them from moving boxes of cigars bearing a *"spurious imitation of the Plaintiff's brand or trade-mark*".[7] The decision of the Supreme Court of Massachusetts in *Post v Toledo, Cincinnati and St Louis Railroad Co* – which appears to have had a significant influence on at least two of the Law Lords – arguably did not provide any real support for the plaintiffs' case either.[8]

[5] See the interesting account given by Robin Jacob, who appeared as junior counsel for the plaintiffs, which is reproduced as part of his foreword to Bushell et al, *Disclosure of Information: Norwich Pharmacal and Related Principles* (2nd ed; 2019).

[6] At page 9.

[7] Per Lord Romilly MR at (1871) 12 LR Eq 140, at 145.

[8] As Robin Jacob noted (*loc cit*) the decision had been identified by his side but was not cited in argument by them because it was seen as distinguishable on the basis that the defendant was effectively a wrongdoer. However, he

49. But, however slight (and contestable) may be its foundation in authority, the existence of the jurisdiction identified in *Norwich Pharmacal* is by now too deeply entrenched to be doubted. However, there continues to be a significant debate (and attendant uncertainty) as to the proper parameters of that jurisdiction.

50. In *Norwich Pharmacal,* the plaintiffs were concerned that large quantities of a particular chemical compound, F, were being imported into the UK in breach of their rights as patentee/licensee. The goods were subject to customs duty and thus had to be declared to the commissioners of customs and excise who accordingly had records of the identity of the importers and the quantities imported by them. That information was not published and was considered by the commissioners to be confidential. The plaintiffs brought proceedings against the commissioners seeking an order that they disclose details of each consignment of the goods imported, including the names of consignor and consignee as well as an order for the discovery of all documents in their possession relating to all such consignments. However, those were not the only reliefs sought by the plaintiffs. They also sought declarations that the commissioners had infringed, and had caused, enabled or assisted others to infringe, the relevant patents and that it was the commissioners' duty to forfeit all offending F in their possession, custody or control (see the judgment of Graham J in the Chancery Division, reported in [1972] 1 Ch 566, at 572D-E).

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explained that when the decision was found by Lord Cross, the plaintiffs "*were not so purist as to say that it did not help*".

51. Graham J was not persuaded that the plaintiffs had any substantive claim for infringement against the commissioners (575D-576D). Accordingly, that asserted basis for directing disclosure fell away. Both the Court of Appeal and the House of Lords agreed with that conclusion. However, the Judge was persuaded that, in the particular circumstances of the case before, the court had jurisdiction to make an order for discovery and he made an order against the commissioners limited to the disclosure of the names and addresses of the importers (584A-585A).

52. The Court of Appeal unanimously reversed that decision but, on further appeal, the House of Lords were unanimously of the view that the order made by Graham J should be restored.

53. All five members of the Panel delivered separate speeches. All are of considerable interest but, for present purposes, I shall focus on their respective articulations of the circumstances in which an order for discovery/disclosure may properly be made for the purpose of enabling the applicant for such an order to pursue a claim against a third person and the proper scope of such an order.

54. According to Lord Reid, "*discovery to find the identify of a wrongdoer*" was available against anyone against whom the plaintiff has a cause of action in relation to the same wrong but not against "*a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession*." The commissioners were, however, in an "*intermediate position*"; while their conduct was innocent, "*without certain action on their part the infringements could never have been committed*" (at 174F). In his view, the authorities pointed to "*a very reasonable principle 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." It did not matter whether he became mixed up in the wrongdoing by voluntary action or as a result of some duty: "*justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration*" (at 175B-C). Confidentiality was not a bar to directing disclosure as there was nothing secret or confidential in the information sought (at 175G). As for potential prejudice to those whose identity would be disclosed, if the court could be sure that those whose names were sought were all tortfeasors, they would not "*deserve any protection*". In the present case, the possibility that any were not tortfeasors was so remote that it could be neglected. In more doubtful cases, the matter could be submitted to court and the court would "*only order discovery if satisfied that there is no substantial chance of injustice being done*." (at 175B-D).

55. In his speech, Lord Morris accepted that as "*a broad and general rule*" a court would not order discovery against a mere witness and noted that it was not suggested that *"in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information*" (at 178F-H). However, he was of the view that the interests of justice justified the making of the "*very limited*" order being sought in the "*special circumstances*" of the case (at 182B-D).

56. Viscount Dilhorne thought that the decision in *Orr v Diaper* (1876) 4 Ch D 92 (also reported at 25 WR 23 and 46 LJ Ch 41) established that discovery could be granted against a person "*who is not a mere witness to discover, the fact of some wrongdoing being established, who was responsible for it*" (at 188A-B). Someone "*involved in the transaction*" was not a *"mere witness."* In his view, the commissioners were to be regarded as "*involved*" in that the goods were in the charge of customs until cleared and the commissioners could control their movement until clear and thus it could not be said that they were not involved in the importation (188D). That was sufficient to permit an order to be made requiring the commissioners to disclose the names of the importers.

57. Lord Cross rejected as "*quite irrational*" the suggestion that the right to disclosure depended on whether the person seeking it could obtain some other relief against the defendant. Rather, it depended on the nature of the relation between the defendant to the action for discovery and the wrongdoers sought to be identified (at 197B). That analysis was drawn from a decision of the Supreme Court of Massachusetts in *Post v Toledo, Cincinnati and St Louis Railroad Co* (1887) 11 NE Rep 540. In his view, no sensible distinction could be drawn between the position of the commissioners on the one hand and the position of the defendant shipping agents and dock companies in *Upmann v Elkan* (1871) LR 12 Eq 140 and *Orr v Diaper*. The goods had passed through the hands of the commissioners and he could see no reason why the commissioners should not be under the same duty to disclose the names as the dock company that owned the transit shed in which the imports were stored under the surveillance of customs officers. The commissioners had "*effective control of the goods*" (197B-G). As regards the fears expressed that the making

of the order sought would open the door to fishing requests, such fears were "*groundless*". In the first place, there was a clear distinction between simply asking for the name of the person sought to be sued and asking for evidence. Secondly, in cases of doubt, the person to whom the request was directed would be justified in requiring an order of the court. The court would then decide in all the circumstances it was right to make an order and would no doubt consider "*such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble that could not be compensated by the payment of all expenses by the applicant"* (at 199F-G).

58. Finally, Lord Kilbrandon appeared to suggest that the "*mere witness*" rule had no application, on the basis that, unless the commissioners disclosed what they knew, there would no litigation in which in which they might be required to give evidence and, in the event of disclosure, they might well not be needed as a witness in any event (at 203B-C). The plaintiffs were demanding access to a court of law, in order to establish that third parties had unlawfully caused them damage. Making the order sought would not cause them any material loss. Their position was not easily distinguishable from that of a witness compelled to give evidence by service of a subpoena in order to assist a private citizen to justify a claim in law. "*The policy of the administration of justice demands this service from him*" (at 203D-E). However, it was not necessary to go so far. The commissioners were not "*mere bystanders*." Their relation to the goods was such as oblige them to disclose the names of the importers. The goods were "*at the order of the commissioners*" from the time they entered port until released from charge and were "*under their control*" (at 204B-

D). Accordingly, the commissioners could properly be ordered to disclose *"the names of persons whom the appellants bona fide believe to be infringing*" their property rights, *"this being their only practicable source of information as to whom they should sue."* (at 205H). Lord Kilbrandon also regarded the decision of the Supreme Court of Massachusetts in *Post v Toledo, Cincinnati and St Louis Railroad Co* as helpful, appearing to him to provide "*an apt, and by no means too wide, classification of those against whom discovery may in such circumstances be obtained*" (at 204A).

59. In the period since the landmark decision in *Norwich Pharmacal*, the jurisdiction that it revived (or, arguably, created) has been the subject of significant development and expansion in England and Wales. These developments are discussed in detail by the authors of *Disclosure of Information: Norwich Pharmacal and Related Principles*. They are also analysed in the illuminating article by David Culleton, "The Law Relating to Norwich Pharmacal Orders", to which I have earlier referred. His scholarly analysis has been of considerable assistance in considering the issues presented by this appeal.

60. While the precise *ratio* of *Norwich Pharmacal* is difficult to identify with confidence – not least because of the differing rationales and emphasis in the five speeches delivered by the Law Lords – the essential elements of the decision (whether or not they are properly to be regarded as definitional) can be confidently stated. *First*, it was very clear that the plaintiffs were the victims of tortious wrongdoing. Unless the consignments of F recorded by the commissioners had been bought in the UK, exported and re-imported (a scenario dismissed by Lord Reid as "*most unlikely*"), their importation involved a clear infringement of the intellectual property rights of the plaintiffs. *Second*, the involvement of the commissioners

was significant. According to Lord Reid, they had "*unwittingly facilitated*" the infringements, which "*could never have been committed*" without their involvement. They were, as all the Law Lords emphasised, *"in control*" of the infringing goods, to the extent that they could properly be said to have been involved in their importation. *Third*, by the time that the matter came before the Judicial Committee, all that was being sought was the names and addresses of the importers. No wider disclosure was at issue. *Fourth*, the purpose of seeking such disclosure was limited and specific, namely the commencement of infringement proceedings against the importers. The fact that, absent the disclosure sought from the commissioners, the plaintiffs would not be in position to vindicate their property rights by action against the infringers was a factor emphasised by all the Law Lords. Thus, as I have already noted, Lord Kilbrandon attached great weight to the fact that the plaintiff was "*demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage*."

Subsequent Development of the Norwich Pharmacal Jurisdiction in England and Wales

61. Subsequent decisions from England and Wales have emphasised the flexibility of the *Norwich Pharmacal* remedy. Giving the principal speech in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033, Lord Woolf CJ observed that the jurisdiction was an "*exceptional one ... which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised"* and noted that new situations would inevitably arise where it would be appropriate to exercise the jurisdiction where it had not been exercised previously. In his view, 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" (para 57).

62. There is at this stage a large volume of case law from England and Wales, a detailed survey of which is beyond the scope of this judgment. However, it is evident from that case law that there is a broad consensus that certain threshold conditions must be satisfied before any disclosure order may be made but that, even where such threshold conditions are satisfied, the order is not available as of right and instead is a matter for judicial judgment/ discretion. Saini J provides a useful synopsis in *Collier v Bennett* [2020] EWHC 1884 (QB), [2020] 4 WLR 116.

> *"35 Based principally upon the above case-law (and specifically upon the way in which more recent cases have refined and explained the original tests), I suggested to the parties, and they accepted, a broad formulation of a workable and practical test under CPR r 31.18*[9] *as follows:*
>
> *(i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person ("the Arguable Wrong Condition").*

[9] CPR 31 deals with disclosure and inspection of documents generally and makes specific provision for pre-action disclosure (CPR 31.16) and for orders of disclosure against a non-party (CPR 31.17). CPR 31.18 then provides that those rules do not limit any other power which the court may have to order "*(a) disclosure before proceedings have started; and (b) disclosure against a person who is not a party to proceedings*."

(ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing ("the Mixed Up In Condition").

(iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued ("the Possession Condition").

(iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction ("the Overall Justice Condition").

36 The Arguable Wrong, Mixed Up In, and Possession, Conditions each raise threshold hurdles and one does not get to the Overall Justice Condition unless the applicant overcomes those three hurdles. However, certain matters which arise in relation to the Arguable Wrong Condition, such as the strength of what has been established as a good arguable case, will feed into the court's assessment when considering the Overall Justice Condition."[10]

63. As for the "*Overall Justice Condition",* the factors to be considered include those set out by Lord Kerr (speaking for the UK Supreme Court) in *Rugby Football Union v*

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[10] Saini J's formulation of the four conditions for making a disclosure order was recently approved by the Judicial Committee of the Privy Council in *Stanford Asset Holdings Ltd v AfAsia Bank Ltd* [2023] UKPC 35, para 36 (per Sir Nicholas Underhill).

Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation) [2012] UKSC 55, [2012] 1 WLR 3333. In his judgment, Lord Kerr also emphasised the need for flexibility and discretion in considering whether the remedy should be granted. The need to order disclosure would be found to exist only where it is a "*necessary and proportionate response in all the circumstances*", though the test of necessity did not require the remedy to be *"one of last resort"* (para 16). The essential purpose of the remedy is to do justice and that involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors had (Lord Kerr went on) been identified as relevant in the authorities, including:

> *"(i) the strength of the possible cause of action contemplated by the applicant for the order ... (ii) the strong public interest in allowing an applicant to vindicate his legal rights ... (iii) whether the making of the order will deter similar wrongdoing in the future ... (iv) whether the information could be obtained from another source ... (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing ... or was himself a joint tortfeasor ... (vi) 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 ... (vii) the degree of confidentiality of the information sought ... (viii) 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 ... (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclose ... (x) the public interest in*

maintaining the confidentiality of journalistic sources, as recognised in section 10 of the Contempt of Court Act 1981 and article 10 ECHR." (para 17).

64. Some features of the case law from England and Wales are, perhaps, worthy of particular note:

- The jurisdiction to order disclosure is equitable in nature. An order is not made as of right: "*it is an equitable remedy, and a court has a discretion as to whether it should be granted*.": Matthews & Malek, *Disclosure* (5th ed; 2016). Its equitable origins are apparent from *Norwich Pharmacal* itself and the authorities and textbook material cited in the various speeches.

- The jurisdiction extends to all forms of legally cognisable wrongs, including tortious conduct,[11] breach of contract, breach of confidence and criminal conduct: *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033,

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[11] Including defamation. The first reported case in which a disclosure order was made in England and Wales in aid of intended defamation proceedings appears to have been *P v T Ltd* [1997] 1 WLR 1309. In making the order, Sir Richard Scott VC did not accept that the jurisdiction was limited to tortious conduct which had a criminal aspect (such as infringement of IP rights) although he emphasised that, procedurally, defamation actions (and action for malicious falsehood) were often dealt with differently to "*ordinary torts*", such as by the continued use of juries. There are many subsequent instances of disclosure orders being made in aid of defamation proceedings, both in England and Wales and in this jurisdiction and it is now proposed here to confer a statutory jurisdiction to make an "*identification order*" for that purpose on both the Circuit Court and the High Court: see Head 33 of the Draft General Scheme Defamation (Amendment) Bill. That proposed jurisdiction is intended to operate without prejudice to the *Norwich Pharmacal*

Per Lord Slynn (para 1) and Lord Woolf CJ (para 34).

- The jurisdiction is available whenever disclosure is necessary in the interests of justice for the purposes of obtaining redress or vindicating a right, whether or not in a court of law. It thus encompasses disclosure sought for the purpose of bringing disciplinary proceedings against an employee and also encompasses the making of a criminal complaint, or the bringing of a private prosecution, where the applicant for disclosure is the victim of a crime: *Ashworth Hospital Authority v MGN Ltd* per Lord Woolf (paras 43 and following); Matthews & Malek, *Disclosure* (5th ed; 2016), para 3.05.[12]

- The jurisdiction may also extend to directing disclosure for the purpose of *defending* proceedings: see *R (Mohamed) v Foreign Secretary (No 1)* [2008] IEHC 2408 (Admin) [2009] 1 WLR 2579, where the Divisional Court directed the

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jurisdiction of the High Court (Head 33(6)). If enacted in its current form (and the language is obviously subject to change during the parliamentary process, Head 33 would enable the court to make an identification order against an intermediate service provider (such as Facebook or Google) requiring it to identify an anonymous publisher of an alleged defamatory statement where the applicant establishes "*on the balance of probabilities that there is a prima facie case that the statement published by the anonymous publisher by means of the service concerned, is defamatory*" (Head 33(3). Interestingly, Head 33(5) would enable the court to direct the service provider to put the anonymous published on notice of the application in order to allow them to appear and make submissions.

[12] In *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo) (in liquidation)* the Supreme Court re-iterated that "*any form of redress ... will suffice to ground an application*" (per Lord Kerr at para 15). See also (to the same effect) *Cartier International AG v British Sky Broadcasting* [2018] UKSC 28, [2018] 1 WLR 3259, per Lord Sumption JSC at para 10.

Foreign Secretary to disclose exculpatory material relating to the claimant for the purpose of assisting his defence of terrorist charges he was facing before a military commission in Guantanamo Bay. [13]

- The threshold of a "*good arguable case of wrongdoing*" is the same as applies in applications for a freezing (*mareva*) order, namely that the case is "*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*": *Ramilos Trading Limited v Buyanovsky* [2016] EWHC 3175 (Comm) (Flaux J) at para 14. It requires "*more than 'an honest and reasonable belief that there has been wrongdoing'*": *Collier v Bennett* at para 38. It is "*more than just capable of serious argument, but is not necessarily a case the court considers to be well-founded, more probably than not … once over that threshold, the stronger the case appears to be on the merits the more compelling the case may be for the court to grant relief*": *Burford Capital Ltd v London Stock Exchange Group plc* [2020] EWHC 1183 (Comm), [2021] 2 All ER 377, (Baker J) at para 33.

- However, the authorities suggest that the requirement to demonstrate a "*good arguable case of wrongdoing*" is not absolute. "*Relief can be ordered where the identity of the [wrongdoer] is known, but where the claimant requires disclosure*

[13] *R (Mohamed) v Foreign Secretary (No 1)* was subsequently disapproved by the Court of Appeal for England and Wales in *R (Omar) v Foreign Secretary* [2014] QB 112 on the basis that, as regards foreign criminal proceedings, the *Norwich Pharmacal* jurisdiction was subject to statutory preclusion. However, the Court of Appeal did not suggest that the order was otherwise inappropriate.

of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw": *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511 (Lightman J), at para 19, citing (*inter alia*) *Axa Equity and Law Life Assurance Plc v National Westminster Bank* [1998] CLC 1177 and *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616 (Ch), [2003] FSR 47. *P v T Ltd* [1997] 1 WLR 1309 is an example of an order being made where the plaintiff was missing a piece(s) of the jigsaw – there the identity of the persons who had made allegations about the plaintiff's conduct which had led to his dismissal from employment *and* details as what the allegations were. The plaintiff could not say with any certainty that he had a cause of action against the informant, but Sir Richard Scott VC nonetheless considered that the *Norwich Pharmacal* principles could be applied as "*justice demands that the plaintiff should be placed in a position to clear his name if the allegations made against him are without foundation"* (at 1318D-E).

- A similarly expansive approach was taken by Jacob J in *Carlton Film Distributors Ltd v VCI Plc*. There the intended claimant suspected that the intended defendant had breached a licence agreement allowing it to manufacture copies of the films owned by the intended claimant by making more than the permitted number of copies. The actual manufacturing was done by a third party. Carlton sought an order against the third party for the disclosure of its manufacturing records. No issue as to the identity of the purported wrongdoer arose – the only issue was whether in fact there had been any wrongdoing. Over the objections of the third party, Jacob J made the order sought. On the basis of *P v T Ltd*, he was satisfied that "*Norwich*

Pharmacal is not limited simply to the case of finding out the name of a wrongdoer. It also extends to cases where there is a good indication of wrongdoing, but not every piece of what the claimant needs to plead a case is fully in position" (at para 11). Jacob J saw "*considerable force*" in the suggestion (*obiter*) of Morritt LJ in *Axa Equity and Law Life Assurance Plc v National Westminster Bank plc* that "*the principle of Norwich Pharmacal would be applicable in any case where, for whatever reason, the action for which the document or information was required could not in its absence proceed to trial and would not be confined to cases in which the reason why the action could not so proceed was ignorance as to the identity of the proper defendant*."

- However, there are also authorities which emphasise the narrow limits of the jurisdiction and stress that 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*" (*Ramilos Trading Limited v Buyanovsky*, per Flaux J at para 62; see also the observations of Lord Mance JSC to the same effect in *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36, [2015] AC 1675, at paras 139-140). This line of authority emphasises the exceptional nature of the "*jigsaw*" cases and reads them as limited to circumstances where a specific piece of information is missing which the claimant needs in order to confirm that a (reasonably) suspected cause of action or complaint is in fact well-founded.

- As will be apparent from the above, the jurisdiction is not confined to the disclosure of the identity of an alleged wrongdoer but extends to the disclosure of other information and documentary material.

- As to the requirement for the defendant to have some connection to the alleged wrongdoing – expressed variously in *Norwich Pharmacal* in terms of "*involvement*" or "*participation*" in, being "*mixed-up*" in and "*facilitating*" the wrongdoing – that also has undergone something of an evolution. While there are significant differences of approach and of emphasis within the post-*Norwich Pharmacal* jurisprudence, the trend has been to expand the concept of "*involvement*" in this context. Notwithstanding the reference in *Collier v Bennett* to the respondent having *facilitated* the wrongdoing, *facilitation* of the wrongdoing, or indeed any actual *involvement* in the wrongdoing itself (as opposed to involvement in the wider circumstances) has not always been regarded as a strict pre-requisite. Thus, for instance, the involvement of the defendant in *Ashworth Hospital Authority* was subsequent to the wrongdoing (the unauthorised taking and disclosure of confidential medical records). The publication of that information by the defendant was nevertheless regarded as sufficient involvement or participation (per Lord Woolf CJ at para 34). In *R (Omar) v Foreign Secretary* [2013] EWCA Civ 118, [2014] QB 112, the Court of Appeal (per Maurice Kay LJ) went so far as to suggest – *albeit obiter* – that any requirement for proof of *facilitation* went beyond *Norwich Pharmacal* and was inappropriate (paras 36-40).

- As against that, in *NML Capital Limited v Chapman Freeborn Holdings Ltd* [2013] EWCA Civ 589, the Court of Appeal of England and Wales (per Tomlinson LJ) considered that, if the *Norwich Pharmacal* jurisdiction was "*not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing*", citing with approval an earlier judicial observation to the effect that the third party "*has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered*" (at para 25). The Supreme Court in *Cartier International AG v British Sky Broadcasting* (per Lord Sumption) also appeared to emphasise actual involvement in the wrongdoing. According to Lord Sumption, "*the true basis of the court's intervention is that once the intermediary has been given notice of the infringement of the plaintiff's rights, his duty is to stop placing his facilities at the disposal of the wrongdoer. This is why it is critical that the intermediary should have been 'mixed up in the tortious acts of others'*" (at para 10). *Cartier International AG* concerned an application for website blocking injunctions and Lord Sumption's observations must be understood in that particular context but they nevertheless suggest that the requirement for involvement in the wrongdoing is a real one which ought not to be unduly attenuated or diluted.

- The concept of "*involvement*" in this context was considered at some length in *Various Claimants v News Group Newspapers Ltd (No 2)* [2013] EWHC 2119 (Ch), [2014] 2 WLR 756. Given that it involved a claim for disclosure against the Metropolitan Police Service (MPS), the decision of Mann J was, understandably, referred to extensively at the hearing of this appeal, as was the decision of Slade J

on another application for disclosure against the MPS, *Countess of Caledon v Commissioner of Metropolitan Police* [2016] EWHC 2214 (QB). I will refer to both decisions in greater detail below. For present purposes, it is enough to note that Mann J considered that the critical question was not whether the defendant had facilitated or participated in the alleged wrongdoing but, rather, whether or not he or she was a "*mere witness or bystander*." That is, of course, essentially the approach adopted by the Judge here.

- What Saini J in *Collier v Bennett* refers to as the "*Possession Condition*" is often described as the test of necessity. Disclosure should be ordered only if is a *"necessary and proportionate response in all the circumstances"* (per Lord Kerr in *Rugby Football Union*, at para 16, citing Lord Woolf CJ in *Ashworth Hospital Authority*). However, the test of necessity does not require that the remedy is one of "*last resort*" (*ibid*). The court must consider whether there are other "*practicable*" means available to the applicant to obtain the information (*R (Mohamed) v Foreign Secretary (No 1)* [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579. The authors of *Disclosure of Information: Norwich Pharmacal and Related Principles* suggest that the test of necessity has been "*softened*", at least since *Ashworth Hospital Authority*, such that it is now often formulated as a test of whether the relief is "*necessary in the interests of justice*" which, they observe, involves an exercise that is inevitably very closely related to "*broader questions of discretion and whether the relief is appropriate once the competing interests have all been weighed against one another*" (at page 131).

- Even if these "*threshold*" conditions are satisfied (and there is also some debate in the authorities as to the extent to which these are really threshold conditions or not), the court is not bound to make the order sought and must consider whether it would be proportionate to do so. That will in all cases be a matter of judgment.

- Proportionality involves an exercise of balancing the interests favouring disclosure against the interests weighing against it. The factors to be considered include (but are not limited to) the factors identified by Lord Kerr at para 18 of *Rugby Football Union* (though not all of those will apply, or apply with the same force, in all cases).

- A wide variety of factors may be relied upon to oppose relief. The party against whom disclosure is sought may have its own reasons for resisting disclosure, such as commercial sensitivity. There may be a public interest argument against disclosure, such as that the order would involve the identification of a journalistic source (as in *Ashworth Hospital Authority v MGN Ltd*) or a whistle-blower. Such an argument arises here – namely the public interest in the confidentiality of information obtained by the Gardaí in the course of investigations carried out by them – and will be addressed later in this judgment. Privacy and data protection interests may also be relevant, particularly if innocent parties are liable to be identified if disclosure is ordered (this factor was referred to by Lord Kerr in *Rugby Football Union* and was the basis on which disclosure was refused in *Arab Satellite Communications Organisation v Al Faqih* [2008] EWHC 2568 (QB)).

- Of course, an obvious issue arises as to how the interests of the alleged wrongdoer can be identified and considered where the application usually proceeds in his or

her absence. However, the authors of *Disclosure of Information: Norwich Pharmacal and Related Principles* note, they may be able to channel their arguments via the respondent or by other means to preserve their anonymity (assuming that they have been made aware of the application in the first place): at page 160. In "*missing piece of the jigsaw*" applications – where the identity of the suspected wrongdoer will ordinarily be already known to the applicant – the intended defendant may intervene directly and be heard (*ibid*). In other cases, the courts have taken steps to enable argument to be made on behalf of (if not by) the alleged wrongdoers. Thus, in *Golden Eye v Telefonica UK* [2012] EWHC 723 (Ch), an application to obtain the names and addresses of customers of the defendant telecommunications provider alleged to have committed copyright infringement through use of peer-to-peer file sharing, the court directed service of the application on a consumer body and then allowed that body to intervene to represent the interests of the customers concerned.

- Surprisingly, it appears that in England and Wales there is no general obligation of full and frank disclosure in seeking a *Norwich Pharmacal* order: *Disclosure of Information: Norwich Pharmacal and Related Principles,* pages 192-194.

- An important practical aspect of the *Norwich Pharmacal* jurisdiction is that any disclosed material can only be used for the purpose for which its disclosure was directed. Documentary disclosure is subject to express restrictions on use contained in CPR 31.32. As for the position prior to the adoption of that rule, the authors of *Disclosure of Information: Norwich Pharmacal and Related Principles* point to the speech of Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* as putting

"*beyond doubt*" the existence of an implied undertaking (page 198).[14] Disclosure other than documentary disclosure is, they suggest, still subject to such an implied undertaking (page 199). However, it appears that in Canada and in Hong Kong the courts have held that no implied undertaking arises (page 198, fn 85).

- Finally, as regards costs, in *Totalise plc v Motley Fool Ltd* [2001] EWCA Civ 1897, [2003] 2 All ER 872, the Court of Appeal explained that *Norwich Pharmacal* applications were not ordinary adversarial applications where, as a general rule, costs followed the event. They were, in the court's view, more akin to proceedings for pre-action disclosure where (under CPR 48.1) the general rule was that the party against whom the order was sought should have the costs of the application and the costs of complying with any order made.[15] When considering the question of costs after a successful *Norwich Pharmacal* application, the court should consider all the circumstances but, in a "*normal case*", the applicant should be ordered to pay the costs of the party making the disclosure, including the costs of making disclosure.[16]

[14] In *Ashworth Hospital Authority v MGN Ltd*, Lord Woolf CJ emphasised that an applicant for disclosure was required to identify the purposes for which disclosure would be used and the use of the disclosed material would then be restricted expressly or implicitly to those stated purposes unless the court otherwise permitted (paras 59-60).

[15] CPR 48.1 also applies to applications for non-party discovery. In this jurisdiction, an applicant for non-party discovery is required by the provisions of Order 31, Rules 29 to indemnify the person making discovery in respect of all costs reasonably incurred by them. Order 31, Rule 30 allows the High Court to direct the provision of information by a non-party and it makes similar provision in relation to the costs of the non-party.

[16] While the Court of Appeal noted that there may be cases where the circumstances would require a different order, such circumstances did <u>not</u> include cases where: *"(a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal obligation not*

Totalise plc v Motley Fool Ltd was approved by the UK Supreme Court in *Cartier International* (para 12).

The Police Cases

65. *Various Claimants* involved an application for disclosure against the Metropolitan Police Service (MPS). The claimants had either brought or were considering bringing proceedings against News Group Newspapers ("*NGN*") and a named NGN journalist arising from alleged hacking of their mobile phones.[17] They had been made aware of the hacking by the MPS and given some information about it but sought fuller information in order to make a full claim or assess its strength (para 8). The MPS neither consented to nor opposed the order sought but NGN opposed it. Thus, it was NGN, and not the MPS, that raised an issue as whether the MPS was sufficiently involved in the alleged wrongdoing to permit the order to be made.

66. Having examined the authorities (many of them replete with references to the *facilitation* of the wrongdoing by the defendant) Mann J allowed that the "*traditional formulation*" of the test was in terms of participation or facilitation. However, in his view, that was simply

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to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntarily giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another." (para 30).

[17] Insofar as some the claimants had already issued proceedings, they would, in this jurisdiction, have been able to seek non-party discovery from the Gardaí pursuant to Order 31, Rule 29 RSC.

because those were the usual circumstances in which someone became something "*beyond a mere witness*" and "*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*" (para 52). The "*real question*" was the scope of the mere witness rule (*ibid*). In his view, that analysis was "*not heretical*" and was consistent with the frequently recognised need for flexibility.

67. In Mann J's view, the MPS' "*engagement with the wrong*" was such as to make the force more than a mere witness. The MPS was not like someone who happens to witness an offending act and thereby required relevant information. It was "*someone whose duty it is to acquire information about the offending act, albeit not for the benefit of victims*" (para 55). While that might not be sufficient by itself – Mann J did not need to decide that – there were other significant factors. One was the fact that the MPS had actually provided information which, if a mere witness, it would not have had to have volunteered (this was a reference to the fact that the MSP had already informed the claimants that they were the victims of hacking and disclosing a limited amount of information about it). The MPS also indicated that it did so as a result of "*some sort of unspecified obligation (or feeling that it ought to) and then agreeing, in principle, that it would not resist a formal claim for the information to a greater extent and in a more durable (and reliable) form.*"

68. Mann J proceeded to make the order sought. He did so even though not all of the material sought to be disclosed went to the identity of the alleged wrongdoers (though some of it did go to that point in terms of the individuals involved) and also included material going to the existence and extent of the wrong and its proof (para 51). The latter category of

material was presumably seen as being the most important, given that NGN was in any event available as a defendant.

69. *Countess of Caledon v Commissioner of Metropolitan Police* [2016] EWHC 2214 (QB) also involved an application for disclosure against the MPS. The applicant was convinced that AC, who had provided counselling to the applicant's adult daughter A, had poisoned A's mind against her. The MPS had become involved when A made a complaint of harassment against her mother. AC was interviewed in the course of the police investigation. The applicant then sought disclosure of the investigation file, including the interviews with AC, in aid of intended proceedings against AC. AC was a notice party to the application and she and the MPS made common cause in successfully resisting the application for disclosure. Slade J. held that the applicant had not shown that she had a cause of action against AC (para 40). She nonetheless proceeded to consider whether the MPS were "*sufficiently engaged*" with the alleged wrongdoing to render it liable to make disclosure. She distinguished *Various Claimants* on its facts. The MPS had not been acting under a duty to acquire information about the acts complained of by the applicant but were rather acting pursuant to a duty to inquire into the safety of A and other young women (para 53). Furthermore, in contrast with *Various Claimants,* the MPS did not consider itself under any actual or perceived obligation to provide information to the applicant (para 55).

70. One further aspect of *Countess of Caledon v Commissioner of Metropolitan Police* warrants notice. Counsel for the MPS had argued that, even if the pre-conditions for making a disclosure order were satisfied, there were powerful policy reasons why disclosure should be refused, given that the information that had been obtained by the MPS

in the course of its investigation had been provided to the force in the expectation that it would be kept in confidence and only used for the purpose of which it was gathered, the criminal investigation. *Taylor v Serious Fraud Office* [1999] 2 AC 177 and *Frankson v Home Office* [2003] EWCA Civ 655; [2003] 1 WLR 1952 were cited in support of that argument. The judge accepted that the public policy considerations in maintaining confidentiality in statements and material obtained in the police investigation "*overwhelmingly*" outweighed the arguments in favour of disclosure (para 62).

The reception of Norwich Pharmacal in Ireland – Megaleasing and Doyle

71. It was not until the early 1990s, and the decisions of the High Court and Supreme Court in *Megaleasing UK Ltd v Barrett,* that the House of Lords' decision in *Norwich Pharmacal* was judicially considered here.[18]

72. In *Megaleasing*, the plaintiffs sought an interlocutory order in the High Court directing the defendants to disclose "*full details of all facts and matters or information within their knowledge*" relating to certain specified invoices which had previously been raised by the defendants and discharged by the plaintiffs. It was alleged by the plaintiffs that no satisfactory explanation for the invoices had been provided by the defendants, and it was said that the defendants had become involved in the tortious acts of others and were

[18] The decision of the Court of Appeal was referred to by the High Court (Kenny J) in *International Trading Ltd v Dublin Corporation* [1974] IR 373, with Kenny J citing observations of Lord Denning MR as support for the proposition that a plaintiff could not join a party as a defendant solely for the purpose of seeking discovery against that party.

therefore under a duty to assist the plaintiffs by giving full information about the transactions so as to enable them to proceed against the wrongdoers. Costello J in the High granted the relief sought (the judgment of the High Court was given *ex tempore* and no record of it appears to survive other than the extracts set out in the judgment of Finlay CJ on appeal). In his view, once a *prima facie* case of wrongdoing was established, the defendants were under the same duty as in *Norwich Pharmacal* to assist the court by making available documents in their power or procurement (though the court was not confined to making an order for the production of documents and the High Court order in fact required the disclosure of information in addition to the discovery of documents).

73. The defendants appealed to the Supreme Court and sought a stay on the High Court order pending their appeal. A stay was refused by the High Court but granted by the Supreme Court on appeal: [1992] 1 IR 219. Subsequent to the High Court hearing, the plaintiffs settled with a number of former employees who had been involved in the impugned transactions. The defendants' substantive appeal was successful. Giving the principal judgment, Finlay CJ (Hederman and Egan JJ agreeing) referred to a number of the speeches in *Norwich Pharmacal,* from which he concluded that the granting of an order for discovery in an action for sole discovery "*is a power which for good reasons must be sparingly used, though, where appropriate it may be of very considerable value towards the attainment of justice*" (at 503). It seemed clear to him that in *Norwich Pharmacal* "*considerable stress was laid upon the very clear and unambiguous establishment of a wrongdoing*" (*ibid*). That was also the position in *Orr v Diaper*. Finlay CJ noted that counsel had been unable to identify any case in which "*upon a claim of prima facie proof as to the probability of the commission of a wrong, relief by way of discovery was granted*"

(at 504). *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, which had been cited by the High Court as authority for the form for order made by it, was distinguishable, on the basis that it involved "*clearly established forged cheques*" and in any event was not an action for sole discovery, the order for discovery in that case having been made against a bank that was a defendant in the substantive claim.[19] Finlay CJ was therefore:

> *"driven to the conclusion that the existing authorities upon which the judgment of the High Court are largely based, which are authorities of the English courts, do in fact confine the remedy to cases where a very clear proof of a wrongdoing exists, and possibly, so far as applies to an action for discovery alone prior to the institution of any other proceedings, to cases where what is really sought are the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong."* (my emphasis)

74. Finlay CJ went on to refer to the fact that the order made by the High Court required "*a most wide-ranging inquiry of all the facts and circumstances surrounding the transactions which are involved in the invoices*". Having regard to the fact that the case made by the plaintiffs fell "*very far short indeed of the clear establishment of a wrongdoing... which seems to be the basis of the jurisdiction in such cases as the Norwich Pharmacal case*" and

[19] *Bankers Trust Co v Shapira* [1980] 1 WLR 1274 has given its name to the *Banker's Trust order,* which is an order made in exercise of the court's equitable jurisdiction to assist the tracing of misappropriated assets. The jurisdiction has some similarities to, but is distinct from, the Norwich Pharmacal jurisdiction: see the discussion in *Disclosure of Information: Norwich Pharmacal and Related Principles,* chapter 5.

having regard to the breadth and scope of the plaintiff's inquiries, he was not satisfied that it was "*an appropriate development of this discretion, which I am satisfied does exist in the courts, to apply it to the facts of this particular case*", (at 504-505).

75. McCarthy J agreed with Finlay CJ but also delivered a brief judgment of his own. He noted that the rules scheduled to the Supreme Court of Judicature Act (Ireland) 1877 had made express provision for actions for "*discovery only*". While such a provision was no longer in the rules, he had no doubt but that the jurisdiction of the High Court extended to granting such relief "*where appropriate*" but such jurisdiction was to be "*sparingly exercised*" and the court had to be alert to prevent abuse of the procedure. The requirements of justice and the requirements of privacy had to be balanced. In circumstances where the plaintiffs had seen fit to settle their differences with their former employees without requiring them to make disclosure in relation to the disputed transactions, McCarthy J considered that "*the plaintiffs should not be given the assistance of the court*" (at 506).

76. O'Flaherty J also wrote separately, while also agreeing with the judgment of Finlay CJ. In his judgment, he noted that the action for discovery had historically been confined to ascertaining the names of wrongdoers in circumstances where wrongdoing had been established. *Orr v Diaper* was such a case. The action for discovery was of "*ancient origin*" and there was no doubt that it may prove "*a valuable instrument in the search for justice*" but he would "*for the present*" confine it to a requirement to disclose names where wrongdoing was established (at 507) The "*roving inquiry*" authorised by the High Court went far beyond anything permitted in the past and the case afforded no grounds for extending the remedy to any degree. If the scope of the action was ever to be widened, it

would require full disclosure on the part of the applicants, with details of the alleged wrongdoing being put before the court "*with a degree of precision*" and it should be made clear how it was suggested that the defendants might be "*able to help"* (*ibid*).

77. *Norwich Pharmacal* was again considered in *Doyle v Commissioner of An Garda Síochána*. The plaintiff was the father or grandfather of three victims of a car bomb explosion in Parnell Street on 17 May 1974. No-one had been prosecuted for that atrocity or for the car bombs that had exploded elsewhere in Dublin and in Monaghan on the same day. The plaintiff lodged a complaint against the United Kingdom with the European Commission of Human Rights alleging that the RUC had acted in breach of Article 2 ECHR in failing to investigate the events leading to the bombing and failing to identify and prosecute the perpetrators. As part of his case, the plaintiff alleged that the RUC had failed to follow up information, including information concerning possible suspects, supplied to it by the Gardaí.

78. Mr Doyle then issued plenary proceedings in the High Court seeking access to the Garda investigation files for the purpose of his ECHR complaint. He had previously sought information from the Gardaí regarding their investigations and access to those files on a voluntary basis but that had been refused on the grounds that it was of paramount importance for the effectiveness of An Garda Síochána that information gathered in the course of a criminal or other investigation should remain confidential.

79. The action proceeded to hearing before Laffoy J. The plaintiff relied on *Megaleasing UK Ltd v Barrett* as authority for the proposition that the High Court had jurisdiction to hear

an action for discovery and argued that such jurisdiction was not dependent on the court being satisfied as to the strength of his case. The only issue, he submitted, was whether such jurisdiction could be invoked in aid of a complaint under the ECHR rather than for the purposes of litigation, or intended litigation, before the High Court. The Commissioner resisted the application on a number of grounds, including that the jurisdiction recognised in *Megaleasing UK v Barrett* was a limited one and had no application to a claim before the Commission to which the State was not a party and which would involve sensitive material leaving the jurisdiction and going beyond the control of the court. Separately, the Commissioner contended that the plaintiff had not satisfied what was said to be the test posited in *Megaleasing UK v Barrett*, requiring very clear proof of the existence of wrongdoing.

80. Laffoy J considered that the "*crucial questions*" were whether the court had an inherent jurisdiction to grant relief where the sole cause of action was for discovery and, if so, the extent of that jurisdiction (at 258). In her view, the Supreme Court's decision in *Megaleasing* "*unequivocally*" laid down that the jurisdiction to grant such relief only arose where "*there is very clear proof of the existence of wrongdoing*." The rationale underlying the jurisdiction (which, she noted, was equitable in origin) was that "*justice required the defendant in the discovery action, who had been caught up in the tortious act, to assist in righting the wrong.*" *Megaleasing* suggested that the relief was limited to compelling disclosure of the names and addresses of the wrongdoers, though that might not be "*set in stone*". At the same time, there was no suggestion in *Megaleasing* that the jurisdiction could be developed into a power equivalent to the court's jurisdiction under Order 31, Rule 29 relating to non-party discovery (at 261).

81. In circumstances where the plaintiff had not adduced any proof, let alone very clear proof, of a violation of Article 2 ECHR by the UK, Laffoy J considered that the jurisdiction of the court did not extend to granting the relief sought. Even if the plaintiff had adduced such proof, it was doubtful whether the jurisdiction extended to making an order of the breadth sought, which was aimed at "*obtaining disclosure of factual information concerning the commission of the alleged wrong*." Laffoy J noted that, in England and Wales, the *Norwich Pharmacal* jurisdiction was only available in aid of contemplated proceedings in that jurisdiction. As regards the jurisdiction to assist a complaint to the Commission, Laffoy J observation that for the court to make "*a finding of very clear proof of wrongdoing by an identified alleged wrongdoer in proceedings in which the identified alleged wrongdoer is not a party*" would constitute a breach of the principle *audi alterem partem* (at 262).[20] The application was therefore dismissed on the basis that the court had no jurisdiction to grant the relief sought.

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[20] Though made in the specific context of the disclosure being sought in aid of a complaint to the Commission under the ECHR, this observation is, in my view, of wider significance. In *Doyle*, the alleged wrongdoer – the UK – was, of course identified and Laffoy J was understandably concerned at the prospect of a court being asked to make a finding of wrongdoing against the UK in its absence as a prelude to making the disclosure order sought. However, insofar as the jurisdiction to make such an order is said to be dependent on proof of wrongdoing by an unidentified wrongdoer(s), the same issues potentially arise. If an applicant must prove that he or she has been the victim of wrongdoing (in the sense of establishing such wrongdoing as a matter of probability) in order to obtain an order requiring the wrongdoer to be identified, the court is effectively engaging in a trial of the alleged wrongdoer, in their absence. These considerations indicate, in my view, that the evidential threshold for the granting of a disclosure order cannot be as high as the Commissioner appears to contend for. I will come back to this issue later in this judgment.

82. Mr Doyle was no more successful on appeal. Barrington J gave the sole judgment in the Supreme Court (O'Flaherty, Denham, Keane and Murphy JJ agreeing with that judgment). In his view, there was "*no doubt*" that the High Court had jurisdiction at common law to entertain an action for sole discovery but the authorities established that the jurisdiction was to be exercised sparingly and *"it has been exercised only in cases where the plaintiff was in the position to prove that he had suffered a wrong but he was not, and the defendant was, in a position to establish the identity of the wrong doer*." That was the position in *Orr v Diaper* and in *Norwich Pharmacal*. Having referred to the judgments in *Megaleasing*, Barrington J went on to observe that the present case was totally different from *Orr v Diaper* and in *Norwich Pharmacal* or from the type of case contemplated by *Megaleasing* as being appropriate for sole discovery. The alleged wrongdoer was a sovereign government over which the court had no jurisdiction and no evidence had been produced to show that the UK had been guilty of any wrongdoing or which supported the plaintiffs' allegations. Accordingly, it was not an appropriate case for sole discovery.

83. Barrington J next addressed an argument by the plaintiff to the effect his right to bring a claim against the UK under the ECHR was an unspecified personal right protected by Article 40.3 of the Constitution. On that basis – so it was argued – the court's jurisdiction to assist him in exercising the jurisdiction set out in Article 34.3.1 of the Constitution was not limited in the manner set out in *Megaleasing*. In Barrington J's view, even if the plaintiff was correct in his submissions – and Barrington J did not express any view on the merits of those submissions – they would not avail the plaintiff in the concrete circumstances of the case. *Megaleasing* had not turned on any want of jurisdiction but on the "*self restraint which the court should observe in exercising a jurisdiction which could*

have very far fetched (sic) implications and which might, unless exercised with restraint, result in injustice." There was no reason why the same self-restraint should not be observed in exercising jurisdiction under Article 34.3.1. In particular "*the court should insist on evidence that a wrong had been established before making an order for sole discovery*". Here, however, the plaintiff had not produced any evidence admissible in an Irish court "*to establish even a prima facie case*" that the UK was guilty of wrongdoing.

84. According to the Commissioner, *Megaleasing* and *Doyle* set down strict limits which the High Court (and this Court) cannot overreach. Those decisions are, of course, binding on the High Court (and this Court) but they are binding only as to their actual *ratio*.

85. There is no doubt but that in his (controlling) judgment in *Megaleasing*, Finlay CJ expressed the view that the authorities on which the High Court's judgment was based (principally *Norwich Pharmacal*) in fact confined the remedy to cases "*where a very clear proof of a wrongdoing exists*" and, "*possibly*" – at least as far as actions for sole discovery are concerned – to cases where what is sought are the names and identify of the wrongdoer, rather than factual information concerning the commission of the wrong (at 504). However, while Finlay CJ characterised the evidence in *Megaleasing* as falling *"very far short indeed of the clear establishment of a wrongdoing*", that does not appear to have been fatal in itself. It was certainly a significant factor but another such factor was "*the breadth and scope of the inquiries which the plaintiffs seek."* It appears to have been those factors in combination that led the former Chief Justice to conclude that it was not *"an appropriate development of this discretion… to apply it to the facts of this particular case*" (at 505). I do not read that analysis as indicating that, in the absence of "*very clear proof of a*

wrongdoing" (whatever that may mean in terms of a precise standard of proof) the court had no jurisdiction to make the order sought; rather, in my view, Finlay CJ was indicating that the absence of such evidence was a (significant) factor in declining to exercise the court's discretion to grant that order. The separate judgments of McCarthy J and O'Flaherty J are also consistent with the decision of the court ultimately resting on discretionary – not jurisdictional – grounds.

86. It should be said that in *Doyle*, Laffoy J took a different view of *Megaleasing*, suggesting (at 261) that it "*unequivocally lays down that the jurisdiction of the court to grant relief in an action for discovery only arises where there is very clear proof of the existence of wrongdoing."* Notably, however, no such statement is to be found in the judgment of Barrington J on appeal. He took from the authorities that the jurisdiction to order "*sole discovery*" was one to be "*exercised sparingly"* and noted that it had been exercised only in cases where the plaintiff was able to "*prove that he had suffered a wrong*" (at 266). Significantly, he seems to have read *Megaleasing* as turning, not on any want of jurisdiction, but on the exercise of judicial self-restraint. An element of such self-restraint was to "*insist on evidence that a wrong had been established before making an order for sole discovery*" but the plaintiff had "*produced no evidence … to establish even a prima facie case*" that the UK had been guilty of any wrongdoing. Therefore, it was not an appropriate case in which to make the order sought.

87. Accordingly, I respectfully differ from the view expressed by Laffoy J in *Doyle* as to the effect of *Megaleasing*. In my view, neither *Megaleasing* nor *Doyle* is authority for any proposition that, as a matter of principle, "*very clear proof of the existence of wrongdoing*"

is a threshold jurisdictional prerequisite to the making of an order for sole discovery (i.e. a *Norwich Pharmacal* order), as the Commissioner contends. That is not to say that cogent evidence of wrongdoing is not required. There is no doubt but that *Megaleasing* emphasises that the threshold for making a disclosure order is a high one and that speculative applications should not be entertained. But I do not read *Megaleasing* as intending to lay down "*very clear proof of the existence of wrongdoing*" as a universal standard or threshold test. If the Supreme Court had intended to do so, it would surely have given further guidance as to what such a standard or test actually involved and how it should apply. Nevertheless, the observations made by the Court in *Megaleasing* must inform any consideration of what the threshold ought to be. That is an issue to which I will return below after considering the subsequent Irish authorities.

88. Before leaving *Doyle*, I would observe that it appears to have been no part of Mr Doyle's case that the Commissioner had *facilitated*, or had been otherwise *mixed up* or *involved* in, the alleged wrongdoing of the UK. Notably, that is not identified as a ground for refusing the application either by Laffoy J or by Barrington J in the Supreme Court. It is also worthy of note that disclosure was being sought not for the purpose of identifying an alleged wrongdoer for the purpose of commencing proceedings against the wrongdoer n this jurisdiction. In *Doyle*, the alleged wrongdoer – the UK – had already been identified and was already the subject of complaint before the Commission under the ECHR. The disclosure was sought for the purpose of substantiating that complaint. However, the Supreme Court does not appear to have been regarded that as a fatal impediment to granting disclosure: certainly it is not identified as such by Barrington J.

Post-Megaleasing authorities

89. There are a considerable number of post-*Megaleasing* decisions, the majority of them decisions of the High Court but including decisions of this Court also.

90. In *EMI Records (Ireland) Ltd v Eircom Ltd* [2005] IEHC 233, [2005] 4 IR 148, the plaintiffs sought an order directing Eircom and BT to disclose the names and addresses of certain of its subscribers alleged to have infringed the plaintiffs' copyright in sound recordings. No wrongdoing was alleged against the defendants. Kelly J referred to the speech of Lord Reid in *Norwich Pharmacal* and to the statement of Finlay CJ in *Megaleasing* which has been set out above in which the former Chief Justice stated that the existing authorities confined the remedy to cases where very clear proof of wrongdoing exists. He also referred to a then recent decision of the Federal Court of Appeal of Canada, *BMG Canada Inc v Doe* [2005] FCA 193, in which the court had made a disclosure order in similar circumstances, stating that the privacy concerns must yield to the public interest in the protection of intellectual property rights. [21] On the evidence adduced by the plaintiffs, Kelly J was satisfied that "*there is prima facie demonstration of a wrongful activity*", namely copyright infringement. There was no other way for the plaintiffs to ascertain the identity of the alleged infringers. While there was jurisdiction to make the order, the jurisdiction was one "*which falls to be exercised sparingly*" and required the court to undertake a balancing exercise, weighing the rights of the plaintiffs on the one hand against

[21] In passing, it may be noted that the threshold adopted in Canada is that of a *bona fide* claim. That is reflected in the passage set out by Kelly J at page 150 of the report. See also the discussion in *Disclosure of Information: Norwich Pharmacal and Related Principles* at pages 87-89.

the obligations of confidentiality that the defendants owed to their subscribers and the privacy rights of those subscribers on the other hand. In the circumstances, Kelly J was satisfied that the right to confidentiality, however arising (i.e. whether under statute, contract or the common law) could not be relied upon by a wrongdoer or a person against whom there was evidence of wrongdoing to protect his or her identity. In his view, the right to privacy or confidentiality of identity had to give way when there was *prima facie* evidence of wrongdoing. Accordingly, he considered that it was appropriate to make the order sought, though only on the basis of an express undertaking that the information disclosed on foot of it would be used solely for the purpose of seeking redress for copyright infringement in sound recordings in which the copyright was licensed to the plaintiffs for the territory of Ireland. Even though the court considered it probably unnecessary to do so, at the request of BT, and without objection from the plaintiffs, the court made the order conditional upon a further undertaking not to disclose the names and addresses to the media. The rationale for that additional undertaking was that the order might lead to the disclosure of persons who were innocent of any wrongdoing. The report is silent as to the allocation of costs.

91. The next decision of significance appears to be *O'Brien v Red Flag Consulting* [2015] IEHC 867. It featured prominently in argument in this appeal. The plaintiff brought an action against a number of parties alleging conspiracy and defamation in connection with the preparation and alleged publication of a dossier relating to him. *O'Brien* was not, therefore, a paradigm *Norwich Pharmacal* application for disclosure against an "*innocent*" defendant (albeit one "*mixed up*" in the alleged wrongdoing of others) – the plaintiff was claiming damages (including exemplary damages) against the existing defendants and

sought (by way of interlocutory application made in those proceedings) an order requiring those defendants to disclose the identity of the client(s) on whose behalf the dossier had been prepared so that the client(s) could be joined as a co-defendant(s) as a concurrent wrongdoer. The plaintiff then sought disclosure by interlocutory motion in those proceedings.

92. Mac Eochaidh J had no doubt that the court had jurisdiction to order a defendant to identify a concurrent wrongdoer in an appropriate case (para 14) and could make such an order at interlocutory stage (para 15). As regards the plaintiff's argument that any duty of confidentiality owed by the defendants to their client must give way to the public interest in the prosecution of wrongdoers, the judge noted that in the authorities, and in particular in the Irish authorities, "*wrongdoing by unidentified persons, to a very high degree of probability, had been made out by the plaintiffs"* (para 21). Whereas in "*pure actions for disclosure*" the party seeking disclosure could litigate whether the unidentified person had done something wrong to the appropriate level of proof in that plenary action, that was much more difficult where the application was made at an interlocutory stage. In such circumstances, the law required a plaintiff to establish "*to a high degree of certainty that an unknown person has engaged in unlawful activity before disclosure orders will be made*" (para 22). The judge then examined closely the allegations of defamation and conspiracy and the basis for them and held that the alleged wrongdoing was not made out to the required level of certainty. For disclosure to be directed at interlocutory stage – involving as it did the irreversible loss of confidentiality – "*there really would have to be a very strong case indeed about the alleged wrongdoing, to the point of almost certainty*" (para 30). In the circumstances, the order sought was refused.

93. The plaintiff did not appeal the decision of Mac Eochaidh J. However, he subsequently sought the same information (*inter alia*) – the identity of Red Flag's client – by way of discovery pursuant to Order 31, Rule 12. That discovery application was heard by Mac Eochaidh J in the High Court and, while he ordered discovery of a number of categories, he refused to direct any discovery that would identify the client. He declined to entertain any argument that such discovery should be ordered so as to enable the plaintiff to sue the client, on the basis that that issue had been determined in the earlier *Norwich Pharmacal* application and could not be reopened (para 7). As regards "*ordinary discovery*", the judge declined to order discovery of material that would disclose the identity of the client on the basis that the plaintiff had failed to establish the relevance of that information to the existing proceedings: [2016] IEHC 719, paras 15-21.

94. That refusal was appealed to this Court. The appeal was unsuccessful for the reasons set out in the detailed written judgment given by Ryan P (Peart and Hogan JJ agreeing): [2017] IECA 258. The President agreed with the judge's assessment of relevance. He then addressed the plaintiff's argument that discovery was available to identify a concurrent wrongdoer, an argument advanced by reference to the decision in *Norwich Pharmacal* and in particular the observations made in the speech of Lord Reid. The President agreed with Mac Eochaidh J that the plaintiff was not entitled to re-open that argument. "*More fundamentally*", he considered that the plaintiff had misread the decision in *Norwich Pharmacal*. In his opinion, *Norwich Pharmacal* did not recognise or create a separate jurisdiction to direct the disclosure of the identity of a concurrent wrongdoer in proceedings brought against others alleged to have a liability in respect of the same wrongdoing (the

alleged fact situation in *O'Brien v Red Flag*). There was only one jurisdiction, which was exercisable both where the requested party was also an alleged wrongdoer and where the requested party is "*involved in the wrongful conduct in significant degree but is itself innocent of liability to the applicant*". The same standard of evidence or proof – expressed variously as "*a high standard of proof on a provisional basis*", a "*strong case"* and "*a strong prima facie case*" – applied in each situation (para 41(x)). Even if entitled to invoke the *Norwich Pharmacal* jurisdiction within the framework of an application for discovery, there was no evidence before the court sufficient to conclude that "*the plaintiff had reached the base camp of fact that would enable him to invoke this procedure*" (para 45).

95. The Supreme Court refused the plaintiff's application for leave to appeal ([2018] IESCDET 25) *inter alia* because it was not satisfied that the Court of Appeal applied anything other than well-established principles to the question of whether the identity of a potential wrongdoer is required to be disclosed in accordance with the *Norwich Pharmacal* principles.

96. I will come shortly to the decision of the High Court (Hyland J) in *Grace v Hendrick* [2021] IEHC 320 in which she concluded that there is, in fact, a distinct jurisdiction to direct the disclosure of the identity of a concurrent wrongdoer and that a different (and significantly less onerous) threshold of proof applies in that context. This appeal is not, however, concerned with concurrent wrongdoers. No claim has been made or intimated against the Commissioner here. *Grace v Hendrick* does not call into question the standard of proof applicable where disclosure is sought from an "*innocent*" defendant.

97. *Muwema v Facebook Ireland Limited* [2018] IECA 104 was another decision of this Court. The plaintiff, a lawyer in Uganda, sought an order directing FB to identify the registered user(s) of a FB page on which material said to have been defamatory of the plaintiff had been published (the proceedings also sought damages against FB for defamation). As Peart J noted at the commencement of his judgment (with which Whelan and Gilligan JJ agreed), such applications were common and in most instances went unopposed by FB. The High Court (Binchy J) had made the order in agreed terms but, before that order was perfected, FB came back before the judge seeking permission to adduce new evidence with a view to opposing the order. That evidence was very detailed but, in essence, was to the effect that disclosure of the information sought would expose the subscriber to arrest and ill-treatment by the Ugandan government. On the basis of that evidence the High Court judge refused to make the order sought, though he gave the plaintiff liberty to renew his application in the event that the posts complained of were not taken down by FB within 14 days. The plaintiff appealed.

98. Peart J had no doubt that there was a jurisdiction to make the order sought but it was "*a discretionary jurisdiction to be exercised in the light of the facts and circumstances of any particular case*" and *"not an order made as of right, even where there is prima facie evidence of wrongdoing*" on the part of the person whose identity is sought to be disclosed. In any particular case, there may be "*countervailing facts and circumstances which would warrant a refusal of an order*" (para 30). As with the exercise of any discretion by a court, a "*balancing exercise*" was involved, analogous to the exercise of considering the balance of convenience/justice in the context of deciding whether or not to grant an interlocutory injunction (para 31). Here the plaintiff had made out at least a *prima facie* case that he had

been defamed and, in normal circumstances, that would be sufficient to justify the making of a disclosure order (para 36). But the judge was entitled to take the view that the FB evidence was sufficiently cogent to substantiate on the balance of probabilities a real risk to the life and bodily integrity of the subscriber and, being so satisfied, it was "*inevitable*" that the disclosure order would be refused.

99. *Parcel Connect t/a Fastway Couriers v Twitter International Company* [2020] IEHC 279 (which was decided after the High Court's decision in this case) also involved alleged posts on social media, this time on a Twitter account which used the Fastway name and logo (which was a registered trademark) and which purported to be the genuine Fastway account. The plaintiff asserted that the posts were defamatory and that the use of their logo constituted an infringement of its trademark. Allen J noted the observations of Humphreys J in the judgment under appeal to the effect that certainty or a high degree of certainty was not required (in the context of establishing wrongdoing) and that it was sufficient to establish a "*prima facie case*" (as it had been put in *EMI Record v Eircom*) or a "*strong prima facie case*" (as per *O'Brien v Red Flag Consultation*) (para 15). Although noting that there might be issues as to whether the tweets complained of amounted to no more than vulgar abuse and/or whether anyone would take them seriously, Allen J accepted that a case in defamation had been sufficiently made out (para 17). He also accepted that a trademark infringement case was made out sufficiently (para 18). There was some debate as to the form of order. Observing that it was undoubtedly correct that "*an order must be clear, precise and unambiguous*", Allen J did not consider that an order requiring Twitter to disclose such information as it held relating to the identity of the person(s) who created or controlled the account offended against that principle (para 21). Finally, while

expressing the view that, in principle, any order made for the disclosure of information was made on the basis of an implied undertaking similar to the well-established implied undertaking in discovery) the judge considered that, for the avoidance of doubt, the order should be made subject to an express condition to that effect and subject to a written undertaking being given by the plaintiff's solicitors (para 22).

100. *Grace v Hendrick* is next in time. The plaintiff sued in respect of sexual abuse allegedly inflicted on him by the first defendant, a member of the Congregation of Christian Brothers, while the plaintiff was a pupil at Westland Row CBS. The plaintiff sued the first defendant for assault, battery and trespass to the person. The second defendant was the Province leader of the Congregation of Christian Brothers in Europe and was sued in negligence. The plaintiff brought an application for (*inter alia*) an order directing the second defendant to disclose the names and addresses of all members of the Congregation between 1979 – 1984 (the period when the plaintiff was a pupil in Westland Row). The plaintiff had requested the Congregation to nominate a person to defend the proceedings on its behalf and had also sought the information regarding the identity of the members but that was not forthcoming.

101. In asserting that the court had jurisdiction to make the order sought, the plaintiff invoked the *Norwich Pharmacal* jurisdiction. In response, the second defendant argued – and Hyland J agreed – that the plaintiff had failed to adduce sufficient evidence of wrongdoing on the part of the Congregation members and thus did not come under the existing *Norwich Pharmacal* jurisdiction as it applied in Ireland (para 43). However, the judge noted, the action was not an action for sole discovery. The defendants were sued in their own right

and had not been joined simply for the purpose of discovery/disclosure. As a matter of principle, in her view, the inherent jurisdiction of the court was sufficiently flexible to permit a disclosure order to be made in such circumstances even where the *"traditional Norwich Pharmacal requirement of establishment of prima facie wrongdoing"* was not met (para 46). An analysis of the judgments in *Norwich Pharmacal* itself suggested that, where there was an independent claim against the defendants, a much lower threshold was applicable to an application for disclosure (paras 47-54). The judge then turned to consider the decisions of the High Court and of this Court in *O'Brien v Red Flag*. As for the decision of this Court, Hyland J did not consider that to be binding authority on the point before her because the observations made by Ryan P were *obiter* (paras 64 – 67). That was not the case as regards the 2015 decision of Mac Eochaidh J (i.e. his *Norwich Pharmacal* decision) but the judge considered that that decision should not be considered authoritative and it was, in her view, appropriate that she should depart from it (paras 68 – 71). Having concluded that the court had jurisdiction to make the order sought, Hyland J went on to consider whether, in the particular circumstances, such an order should be made. She attached importance to the fact that, as was made clear in *Hickey v McGowan* [2017] IESC 6, [2017] 2 IR 196, the Christian Brothers could not be sued as such. Absent the nomination of a representative defendant, the only way that the Congregation could be sued was to sue all the Brothers individually. If the order was not made, the plaintiff could be prejudiced in realising any judgment he might obtain and could also be prejudiced by the operation of section 35(1) of the Civil Liability Act 1961 (which, for the purposes of determining contributory negligence, deems a plaintiff responsible for the acts of any concurrent wrongdoer against whom the plaintiff's claim has become barred by the Statute of Limitations). No reason had been given for the decision not to provide the names and

Hyland J was of the view that the order would not impact on any protected privacy interests of the Brothers as their identity as Christian Brothers was not a private matter. In any event, their interests would be protected by the fact that the information could only be used for the purposes of issuing proceedings and such would be a condition of the order. The costs of the application were awarded against the second defendant.

102. As already noted, it is not necessary to resolve the apparent conflict between *O'Brien v Red Flag* and *Grace v Hendrick* for the purposes of this appeal and it should await determination in proceedings where it is a live issue. The facts were not identical and there are features of *Grace v Hendrick* – most especially the collective character of the Congregation, even in the absence of legal personality, and the public nature of their activities – that arguably distinguish it from *O'Brien v Red Flag.* It might seem surprising if no remedy was available to the plaintiff in the particular circumstances presented in *Grace v Hendrick*.

103. Next in time is the decision of the High Court (Simons J) in *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Ltd* [2021] IEHC 287. That was another application against FB, this time in respect of the identity of the person or persons who had created and operated an Instagram account which had published content relating to the plaintiff school. Notably, the disclosure was sought not for the purpose of bringing proceedings against the person(s) but rather for the purpose of "*dealing with*" them by way of what the school described as a "*disciplinary or pastoral response*". FB did not consent to the order being made but it appears not to have substantively opposed the application either. The application was made on an interlocutory basis and, having been

part-heard, was adjourned to allow the Attorney General to be put on notice and counsel duly appeared on the Attorney's behalf.

104. Simons J began his analysis by noting that one of the striking aspects of the disclosure applications before him was that the individuals most directly affected – the persons whose identity the application sought to reveal – were not on notice of the application. Generally, there was no *legitimus contradictor* as internet service providers or social media platforms did not usually actively oppose such applications (*Muwema* being a notable exception). An application for a disclosure order was thus, he reasoned, analogous to an *ex parte* application and accordingly there was a duty of candour on the applicant, entailing not only to a duty to put all material facts before the court but also involving an obligation to identify the relevant legal principles governing the jurisdiction (including any applicable EU law principles) (para 22). The applicant had to put before the court evidence which satisfied the threshold conditions for making a disclosure order and which established that the disclosure sought was necessary for, and proportionate to, a legitimate aim. The precise purpose for which disclosure was sought had to be identified and, if disclosure was granted it would be conditional on an undertaking that the information disclosed would be used only for that purpose (para 23). The respondent would ordinarily be entitled to recover the costs of the application as against the applicant, at least where the respondent was not itself guilty of any wrongdoing (para 24).

105. The novelty of the application in *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Ltd* was that the purpose of seeking disclosure was not to bring proceedings against the account holder. In addition, it seems, the school contended

that the jurisdiction was not confined to tortious conduct but was available also where a breach of contract was alleged. Thus (the school argued) the jurisdiction was available where disclosure was sought for the purpose of taking disciplinary proceedings or imposing disciplinary sanctions arising from a breach of an employment contract. That is, of course, precisely what the House of Lords had decided in *Ashworth Hospital Authority* (which, along with *British Steel Corp v Granada Television*, was relied on by the school). In Simons J's view, acceptance of the school's position would represent a "*significant departure*" from existing case law which indicated that disclosure orders had only ever been granted in the context of intended legal proceedings and where there was "*at the very least a prima facie case of tortious wrongdoing on behalf of the individuals sought to be identified*" (Simons J went on to note that *Megaleasing* arguably posited a higher standard). There was scope for the jurisprudence to evolve, as was illustrated by *Grace v Hendrick*. But, in contrast to *Grace v Hendrick*, the order sought in the proceedings before him engaged the right to privacy. Simons J did not accept that there was any bright line rule to the effect that the establishment of a *prima facie* case automatically trumped any countervailing right to privacy (para 50). He went on to consider data protection under EU law in some detail. While the making of disclosure orders in the context of intended legal proceedings would, at least in certain circumstances, appear to be permitted by the Data Protection Act 2018 and consistent with the GDPR and the EU Charter of Fundamental Rights, an issue arose as to whether the stated purpose of disciplining members of the school community, whether students or staff, was a public interest objective capable of justifying an interference with rights to privacy, data protection and freedom of expression. In the circumstances, Simons J concluded that it was appropriate to refer a number of

questions to the CJEU pursuant to Article 267 TFEU, including as to the effect of Articles 7, 8 and 11 of the Charter.[22]

106. In the event, however, the school withdrew the application, the reference did not proceed and the application was not the subject of judicial determination. However, quite apart from the legal issues which caused particular concern to Simons J, it is not easy to see how the High Court might have concluded on the evidence that the order sought by the school was a proportionate and appropriate remedy in the circumstances and one can readily understand the evident reluctance of the judge to make the order.

107. Subsequently, in *Portakabin Limited v Google Ireland* [2021] IEHC 446, the High Court (Allen J) saw no difficulty in making an order against Google requiring the disclosure of

[22] Article 8 of the Charter was considered by Lord Kerr in *Rugby Football Union v Consolidated Information Services Ltd*. In his judgment, he stressed that all that was sought was the "*names and addresses of persons who have sold or bought tickets for international rugby matches in contravention of unambiguously stated rules that they should not do so*" (para 43). He accepted that the proper approach to proportionality was that set out by Arnold J in *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) involving a weighing or balancing exercise. In his view, that weighing exercise favoured the granting of the order having regard to the limited information liable to be revealed and the "*entirely worthy motive*" of the RFU (including its objective of deterring further breaches of its ticketing policy). While the particular circumstances affecting the individual whose personal data would be revealed on foot of a *Norwich Pharmacal* order would always call for close consideration and might, in some limited instances, displace the interests of the applicant for disclosure even where there was no feasible alternative means of obtaining the information, the interests of the individuals whose data was sought was not, in his view, of the type that could possibly offset the interests of the RFU in obtaining that data (para 46).

subscriber information relating to an email account from which emails had been sent to customers of the plaintiffs said to be defamatory of them. The plaintiffs suspected that the author of the emails was an employee and their object in seeking his or her identity was both to bring proceedings for defamation and (if their suspicions were well-founded) to take appropriate disciplinary steps against him or her. Allen J distinguished *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Limited.* In his view, the plaintiffs' intention to take disciplinary steps as well as seeking legal redress did not bring the case beyond the established jurisdiction to make the order sought and it would be "*wholly artificial*" to contemplate that an employer who had made out a *prima facie* case of wrongdoing sufficient to warrant the making of a disclosure order and the institution of legal proceedings might not be able to take disciplinary action against an employee responsible for such wrongdoing. While not making any finding as to the truth of the statements complained by the plaintiffs, they had "*adduced sufficient evidence which if accepted at trial would be a sufficient foundation for the action they propose to bring and the taking of disciplinary action against the author*" (para 25). Allen J. thus decided that the order should be made, subject to an undertaking limiting the use of the information.

108. The issue of whether the jurisdiction extends to directing disclosure for a purpose other than the institution of proceedings does not arise here. Disclosure was sought by Mr Blythe for the purpose of bringing defamation proceedings against the person or persons responsible for the WhatsApp material and for no other purpose. It does not appear that an order for disclosure solely for the purpose of seeking redress other than by way of court proceedings has been made in this jurisdiction at any stage. Access to the courts, an aspect of which is the right to litigate, is a fundamental constitutional value in this jurisdiction:

see for instance the observations of McKechnie J in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741, at para 48 of the report. It is, the judge noted, "*the primary vehicle by which both personal and all fundamental constitutional rights can be articulated and given effect to*." While the *Norwich Pharmacal* jurisdiction involves burdening innocent third parties by the imposition of obligations of disclosure on them, that is in principle justifiable as a necessary means of vindicating and protecting the right of access to the courts (a point made by the Judge in his Judgment here). Extending the jurisdiction beyond disclosure for the purpose of invoking the jurisdiction of the courts (or, as in *Portakabin Limited v Google Ireland,* where invoking the jurisdiction of the courts is one of two purposes) would decouple it from that justification as well as departing from its historical roots in the bill of discovery in equity.[23] Even so, the vindication of legal rights by means other than court proceedings (or by court proceedings in a foreign jurisdiction, domestic or international (as in *Doyle*) arguably constitutes a sufficient interest as to justify the approach taken in *Ashworth Hospital*.[24] But even if such a broader jurisdiction were to be recognised, it may

[23] Which, as Lord Sumption JSC explained in *Cartier International AG v British Sky Broadcasting* [2018] UKSC 28, [2018] 1 WLR 3259, was a proceeding in Chancery ancillary to proceedings against the wrongdoer at law, in which the sole relief sought was an order for disclosure for use in the principal proceedings (at para 8).

[24] The question of whether an Irish court would be entitled to make a disclosure order in aid of actual or intended proceedings in a foreign jurisdiction might require consideration of the continuing vitality of *Serge Caudron v Air Zaire* [1985] IR 716 in light of the recent Privy Council decision in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389. Whether a disclosure order could be made for the purpose of enabling the applicant to bring proceedings before a statutory tribunal such as the WRC or the CCPC might require the court to resolve the conflict between *Holland v Athlone Institute of Technology* [2011] IEHC 414 and *Power v Health Service Executive* [2019] IEHC 462. Particular issues might also arise where a disclosure order was sought here in aid of intended proceedings elsewhere in the EU, having regard to Article 35 of Regulation (EU) No 1215/2012 (recast), and the requirements of EU law more generally. As a supra-national court applying public international law – the ECHR – the European Court of Human Rights may be in a different position in this context (as indeed is suggested by *Doyle*).

be that less weight should be attached to the interests in disclosure where it is sought for a purpose other than the bringing of proceedings and it may also be the case, as Simons J suggested in *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Limited,* that additional considerations would arise in such circumstances, including by reference to the Charter and GDPR. However, given that the issue does not arise in this appeal, and that no arguments were addressed to it by the parties, it would not appropriate to express any definitive view on any of these issues (including the application of the Charter and GDPR to an application of this kind) and the question of as to whether this aspect of *Ashworth Hospital Authority* should be followed here must await determination in a case where it actually arises.

109. Finally, there is the decision of the High Court (Sanfey J) in *Moore v Harris & Twitter International Company* [2022] IEHC 677. The somewhat unusual facts need not detain us. What is notable is the judge's discussion of the standard to which wrongdoing must be established. In his view, the phrase "*very clear proof of a wrongdoing*" used in *Megaleasing* was perhaps somewhat misleading and had to be seen in context. In his view, the court could not – and should not – delve into the respective merits of the plaintiffs' claims, much less express any opinion as to their strength or otherwise (para 65). The plaintiffs had made allegations as to meaning and effect of various tweets but it was likely that, even if those tweets were attributable to the first defendant or any other parties joined as defendants, significant issues would arise at trial regarding meaning, truth and fair comment. Determinations would have to be made at trial and, Sanfey J re-iterated, "*the*

court cannot express even the most tentative view as to the strength of the plaintiffs' cases" (para 68). What the court could (and should) do was to satisfy itself that there was a "*prima facie demonstration of a wrongful activity*" (a formulation taken from *EMI v Eircom*) and the court was so satisfied and thus the plaintiffs were entitled to apply for a disclosure order (para 69). The court considered it appropriate to make the orders sought against Twitter subject to an undertaking limiting the use of the information disclosed. Twitter was awarded the costs of the applications and the costs of compliance with the orders.

The Principles to be Applied

110. The jurisdiction to direct disclosure is undoubtedly a valuable one insofar as it enables victims of (alleged) wrongdoing to assert their legal rights and obtain an appropriate remedy against the (alleged) wrongdoer. But, in the paradigmatic case, it involves the involuntary imposition of disclosure obligations on a third party against whom no claim of wrongdoing is made, impacting on the interests of a person or persons not before the court and who therefore is not afforded any opportunity to be heard in response.

111. There are, of course, other circumstances in which a third party may become involuntarily entangled in the litigious activity of others. Order 31, Rule 29 RSC specifically empowers the High Court to make orders requiring non-parties to make discovery and to answer interrogatories and Rule 30 confers a power to direct a non-party to provide information. Even so, the courts have consistently emphasised that such powers must be exercised with circumspection. Thus in an early challenge to the *vires* of Rule 29, Costello J accepted that

as a general rule the court should not make an order for discovery against a non-party if the documents sought were otherwise available to the applicant: *Fitzpatrick v Independent Newspapers* [1988] IR 132, at page 137. In *Chambers v Times Newspapers Ltd* [1999] 2 IR 424, Morris P made observations to the same effect, expressing the view that "*it is undesirable and the court should be slow to put someone, not a party to the action, to the trouble of making discovery if it can be avoided*" (at page 429) and that "*as a general principle third party discovery, with all the inconvenience which it involves, should only be ordered where is no realistic alternative available*" (at page 430). The requirement in Order 31, Rules 29 and 30 that the applicant indemnify the non-party in respect of "*all costs ... reasonably incurred"* – which, according to *Dunne v Fox* [1999] 1 IR 283, involves a more generous level of costs than party and party costs, corresponding to the costs allowable as between solicitor and client (now legal practitioner and client costs) – also reflects special consideration for the position of the non-party in this context.

112. An order for non-party discovery will normally be made only after the pleadings are closed. At that stage, the issues will be (or ought to be) clearly identified and informed assessments of relevance and necessity can be made. While the court is not generally concerned with the merits of the plaintiff's case (or the defendant's defence) at the stage of discovery (*Hartside Ltd v Heineken Ltd* [2010] IEHC 3 and *Mythen Construction Ltd v Allianz plc* [2020] IECA 148), the proceedings are nonetheless subject to the supervisory control of the court and the court has power to dismiss the proceedings if it appears that they are frivolous or vexatious or otherwise doomed to fail. In deciding whether to grant non-party discovery, the court will have the benefit of hearing from *all* interested parties.

113. Courts also have power to issue a *subpoena* to require the attendance in court of a third-party, who may then find themselves called as a witness to an action and subject to the obligation to respond to questions under oath and also, where relevant, to produce documents. While a *subpoena* may issue out of the Central Office without any judicial intervention (an exception being a *subpoena* coming within the scope of Order 39, Rule 30 RSC), it can be challenged and, where appropriate, set aside by the court: see e.g. *Duncan v Governor of Portlaoise Prison* [1998] 1 IR 433 (*subpoena* served on Attorney General set aside on the basis that he had no relevant evidence to give and, even if he had, it was protected by legal professional privilege in any event) and *McConnell v Commissioner of An Garda Síochána* [2003] 2 IR 19 (*subpoena duces tecum* set aside on grounds of oppression). In addition, the court exercise control over the evidence that may be admitted and can exclude evidence that is irrelevant or unnecessary.

114. The *Norwich Pharmacal* jurisdiction bears some similarities to these procedures but also has some particular characteristics of its own. It is not expressly provided for by the Rules (though there appears to be no reason why Rules could not be made to regulate the jurisdiction).. It is typically invoked at a time when there are no proceedings in being and where, as a result, the precise parameters of the intended cause of action may be uncertain. The making of the order sought may not affect the interests of the respondent in any meaningful way (though that will not always be so) and, as Simons J observed in *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Ltd,* the real *legitimus contradictor* – the alleged wrongdoer whose interests are liable to be affected by the order sought – will not ordinarily be represented or have an opportunity to be heard (at least directly) prior to the order being made. The order is made for once and for all and, if

and when disclosure is made in accordance with the order, it cannot effectively be reversed or undone. Any legitimate privacy interests of the alleged wrongdoer may potentially be compromised before he or she becomes aware of the order.[25]

115. In these circumstances, it is hardly surprising that since the rebirth of the jurisdiction in *Norwich Pharmacal* it has been recognised that its exercise must be attended by significant safeguards. That is not in dispute in this appeal. What is in dispute is the calibration and application of those safeguards.

116. The courts – both here and in England and Wales – have sought to reconcile the conflicting demands of flexibility, and certainty/predictability by identifying certain threshold conditions which must be satisfied before any order may be made but also recognising that satisfaction of those threshold conditions does not mean that an order is available as of right; no such order should be made unless the court considers that such is required in the interests of justice. Whether that is properly characterised as the exercise of a "*discretion*" is an issue discussed from time to time in the case law but whether characterised as discretion or as judgment, the essential point is the same: a variety of factors may have to be weighed and considered in any given case.

[25] That is certainly so as regards applications for disclosure of the *identity* of third parties. Even where such third parties are put on notice of such an application (or made aware of the making of an order requiring disclosure in advance of disclosure being made) an obvious difficulty arises as to how they might be heard in opposition to the application. In the case of a *"missing piece of the jigsaw"* application, where the identity of the suspected wrongdoer is known, there is no reason why the wrongdoer should not be a notice party.

117. That is, in my view, the correct approach in principle. While any threshold condition, however formulated, may be described as "*arbitrary*", to approach the making of an order of this kind as wholly a matter of discretion would be unsatisfactory. But the threshold conditions identified in the case law are not set in stone and are subject to further judicial development (at least in the absence of legislative intervention defining the conditions for the exercise of the jurisdiction).

118. Finally, as already discussed, the jurisdiction at issue here is rooted in equity. While the scope and exercise of that jurisdiction are informed by considerations of ensuring access to the court and the right to an effective remedy (which is guaranteed by the Constitution as well as by the ECHR and the Charter: see *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798), it is not necessary or appropriate to seek to locate it directly in the Constitution (or, *a fortiori*, in the ECHR or the Charter), as the Judge appears to have done (Judgment, para 6).

The requirement to demonstrate wrongdoing

119. That an applicant must demonstrate to some minimum standard or threshold that he or she has a cause of action against the alleged wrongdoer (or would have, subject to the identification of the wrongdoer) is not in dispute. What, however, is that threshold?

120. Our legal system applies different thresholds in different contexts and for different purposes. An applicant for leave to apply for judicial review generally need only demonstrate a "*stateable case*": *G v DPP* [1994] 1 IR 374. An applicant for an interlocutory

injunction generally has to establish only "*a fair bona fide question"* for trial: per O'Higgins CJ in *Campus Oil v Minister for Energy & Commerce (No 2)* [1983] IR 88, 107. *Campus Oil* – following in this respect the House of Lords' decision in *American Cyanamid v. Ethicon Ltd* [1975] AC 396 – rejected the suggestion that an applicant for an interlocutory injunction was required to establish their case on the balance of probabilities – such a standard was applicable at trial, not at interlocutory stage. While expressed in different terms, it seems clear that, in substance, the test for obtaining leave to seek judicial review, or an interlocutory injunction, and indeed the test required to surmount an application to dismiss a claim as being an abuse of process of the Court are the same.

121. However, there are some circumstances where an applicant for an interlocutory injunction is required to meet a more exacting standard. Thus, an applicant for a mandatory injunction must demonstrate a "*strong case*", that is to say a case that is "*likely to succeed at trial*": *Maha Lingam v HSE* [2005] IESC 89, (2006) 17 ELR 137, per Fennelly J at 140. That does not, however, involve the court in a trial of the action: "*even in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather, it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold*." (*Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 152, per Clarke CJ at para 80). [26] It will be recalled that in *O'Brien v Red Flag*, Ryan P formulated the applicable threshold in terms of (*inter alia*) the applicant being required to make out a "*strong case*" though it is not

[26] See also the earlier observations of Clarke J (as he was then) in *Allied Irish Banks Ltd v Diamond* [2011] IEHC 505, [2012] 3 IR 549, at para 55 and following.

clear whether, in doing so, he had the threshold for a mandatory injunction specifically in mind. The language of *"strong case"* was also employed by the Judge here.

122. Somewhere between the threshold of "*fair bona fide question*" (or, as it is sometimes put, "*a serious issue to be tried*") and that of "*strong case",* is that of "*good arguable case*". That, it seems, is the threshold generally applicable in England and Wales in applications for *Norwich Pharmacal* orders (though references to "*arguable case*" simpliciter can also be found). The "*good arguable case*" threshold is applicable here to applications to serve out under Order 11 RSC in terms of establishing an applicable head of jurisdiction under Order 11, Rule 1: see, for instance, *Analog Devices BV v Zurich Insurance Company* [2002] IESC 1, [2002] 1 IR 272, per Fennelly J at 281. It is also the threshold applied in England and Wales in respect of jurisdictional disputes (including disputes under the Brussels Regulation).[27] In that context, it has been glossed to mean that the applicant must have "*the better of the argument*" but that gloss has been rejected by the High Court here: *Microsoft Ireland Operations Ltd v Arabic Computer Systems* [2020] IEHC 549, at para 57 and following. In *Microsoft*, Barniville J (as he then was) comprehensively surveyed the authorities, including *Analog Devices* and the later Supreme Court decision in *Irish Bank Resolution Corporation v Quinn* [2016] IESC 50, [2016] 3 IR 197. In *Quinn*, Clarke CJ characterised the test as "*a low bar*" and "*a very low threshold*" (para 50). Barniville J preferred to approach "*the good arguable case*" on the basis that "*it is a flexible test which is not conditional upon the relative merits of the case on jurisdiction and which*

[27] Which, in this jurisdiction, appear to be subject to a different standard, namely the balance of probabilities: see *Ryanair Ltd v Billigfluege.de GmbH* [2015] IESC 11.

can be satisfied by the plaintiff establishing a sound and plausible case on the facts and on the evidence that the claim falls within one of the paragraphs or sub-rules of O. 11, r. 1 RSC, even though that case is contested by the defendant." In his view, the test could be met where a plaintiff could show "*that it has good arguments on the jurisdiction issue without necessarily having to demonstrate that its arguments are better or more impressive or persuasive than those which might or could be raised by opposing parties.*"[28]

123. The threshold of "*prima facie case*" is also frequently encountered in the case law. As is evident from the discussion above, variants of it – "*prima facie demonstration of a wrongful activity*" "*a strong prima facie case*", "*prima facie evidence of wrongdoing*"- can be found in the *Norwich Pharmacal* jurisprudence here. In the area of security for costs, it is well established that an applicant for security must establish a "*prima facie defence*" and, where an impecunious plaintiffs asserts that its impecuniosity is attributable to the alleged wrongdoing alleged of the defendant, that must be established *prima facie*: see eg *Quinn Insurance Limited v Pricewaterhouse Coopers* [2021] IESC 15, [2001] 2 IR 70. But what exactly is a "*prima facie*" case and at what point in the spectrum of proof is it located? The jurisprudence is not always consistent. Thus in *Truck & Machinery Sales Ltd v Marubeni Komatsu* [1996] 1 IR 12, where the High Court held that an applicant for an injunction to restrain the presentation of a petition to wind up a company had to demonstrate *prima facie* that the presentation of the petition was an abuse of process, it is apparent from the judgment of Keane J (as he then was) that he regarded that as a high threshold, significantly

[28] *Microsoft* was affirmed by this Court on appeal: [2023] IECA 225. The High Court's analysis of the "*good arguable case*" threshold was not the subject of that appeal.

more exacting than the ordinary *Campus Oil* threshold and requiring the applicant to adduce *"evidence which satisfied the Court that the petition is bound to fail or, at the least, that there is a suitable alternative remedy*" (at page 27). In contrast, in *Okunade* Clarke CJ appeared to equate *prima facie* case with the standard *Campus Oil* threshold, characterising it as a "*relatively low threshold*" (para 102). "*Prima facie case*" was used in the same way as Keane J by Fennelly J in his judgment in *Maha Lingam v HSE*. In further contrast again, in *IBRC v Quinn* the former Chief Justice appeared to conceive of a *prima facie* case as involving something *more* than a case that is "*both on the law and the facts, reasonably capable of being proven*" (at para 53). In *Merck Sharp & Dohme v Clonmel Healthcare Ltd* [2019] IESC 65, [2020] 2 IR 1, in the context of discussing *American Cyanamid*, O'Donnell J (as he then was) observed that a *prima facie* case implied that "*on the balance of probabilities it was more likely than not that the plaintiff would succeed at the trial*" (para 28). In other contexts, the law draws a sharp distinction between a *prima facie* case and proof on the balance of probabilities, as for instance where an application for a non-suit is made at the conclusion of a plaintiff's case: *Moorview Developments Ltd v First Active plc* [2009] IEHC 214 and the authorities discussed there. In that context, a *prima facie* case is made out if "*assuming that the trier of fact was prepared to find that all the evidence of the plaintiff was true and taking the plaintiffs case at its highest, the defendant has a case to meet*." [29]

[29] At para 5.1, citing *Delaney & McGrath on Civil Procedure in the Superior Courts* (2nd ed; 2005) at para. 19 - 44.

124. What is clear is that, on an application for a *Norwich Pharmacal* order, the court cannot try the applicant's intended claim or seek to arrive at any definitive determination as to its merits or prospects of success. All other considerations aside, the absence of the intended defendant(s) would make any such exercise both impracticable and unjust. That being so, statements in the authorities to the effect that what is required is "*the clear establishment of a wrongdoing*" (per Finlay CJ in *Megaleasing*), that there be "*very clear proof of wrongdoing*" (per Laffoy J in *Doyle*) and that "*wrongdoing ... to a very high degree of probability*" (per Mac Eochaidh J in *O'Brien (No 1)*) cannot be read or applied literally or understood as requiring the court to be satisfied that the applicant is entitled to succeed in his or her intended action. I agree with the Judge that certainty or a high degree of certainty is not required. But it is equally clear, in my view, that the court must critically assess the intended claim and satisfy itself that it has real substance and is not speculative or vexatious. As Flaux J stressed in *Ramilos Trading Ltd v Buyanovsky*, it is impermissible to use the jurisdiction as a "*fishing expedition*" to establish whether the applicant has a case. That necessarily involves forming *some* view, however provisional, as to the merits of the intended claim and, insofar as Sanfey J seemed to suggest otherwise in *Moore v Harris,* I respectfully disagree.

125. The post-*Megaleasing* case law in this jurisdiction – including the decisions of this Court in O'*Brien v Red Flag* and *Muwema v Facebook* – largely applies some version of a *prima facie* case threshold, albeit without any real analysis of what such a threshold actually involves (or as to what may be the difference between a "*prima facie case*" and a "*strong prima facie case*"). The Draft General Scheme Defamation (Amendment) Bill also uses

the language of a *prima facie* case (though, curiously, it contemplates that such a case must be established "*on the balance of probabilities").* However, as I have sought to demonstrate above, the expression "*prima facie* case" has not always been understood uniformly or applied in a consistent way. Its continued usage in this context is apt to generate uncertainty and for that reason is undesirable.

126. How then should the applicable threshold be formulated in this context? A cogent argument can be made for adopting the approach taken in England and Wales, namely that, as a threshold requirement, an applicant for a *Norwich Pharmacal* order must demonstrate that he or she has a "*good arguable case*" against the alleged wrongdoer. Such a threshold would correspond with the threshold that applies in the context of Order 11 RSC and it may be said that, if such a threshold is adequate to protect the position of persons brought to this jurisdiction to be sued who otherwise have no connection to it, it can also do duty in the context of disclosure.

127. However, it appears from the Order 11 jurisprudence – and in particular from the Supreme Court's decision in *Irish Bank Resolution Corporation v Quinn* – that the good arguable case threshold is a low one. It is sufficient (per Barniville J in *Microsoft*) that the plaintiff has "*good arguments ... without necessarily having to demonstrate that its arguments are better or more impressive or persuasive than those which might or could be raised by opposing parties*."

128. A cogent argument can also be made for requiring an applicant to demonstrate that he or she has a "*strong case"* against the alleged wrongdoer, in the sense in what that expression

has been explained in *Maha Lingam* and *Okunade.* That would require the applicant to put forward a case that, on the basis of the material before the court, appears likely to succeed at trial. That is the threshold applying to interlocutory applications for mandatory injunctions (and for interlocutory injunctions in certain other circumstances also) and, arguably, the same approach should apply to *Norwich Pharmacal* orders, which are mandatory in form and which, once made and complied with, are effectively irreversible. A further (and highly significant) factor weighing in favour of the application of this higher threshold test is that *Norwich Pharmacal* orders are generally made in the absence of the party or parties most affected by such orders. Furthermore, in the paradigm case, a party against whom no wrongdoing is alleged is subjected to the burden of being brought involuntarily to court and, where an order is made, being compelled to make disclosure even where they object to it and/or consider it to be against their interests.

129. Having regard to these considerations, I am not persuaded that the approach taken in England and Wales should be followed in this jurisdiction. In my view, a "*good arguable case*" threshold is too low a bar and the adoption of such a standard would not be consistent with the thrust and tenor of *Megaleasing*. Rather, in my view, as a threshold requirement, an applicant for a *Norwich Pharmacal* order should be required to demonstrate that he or she has a strong case against the alleged wrongdoer. That threshold test is well-established in this jurisdiction and its application is more predictable and certain than any threshold based on a "*good arguable case*", "*prima facie*" or "*strong prima facie case*". It requires that the court be satisfied that the applicant's putative claim against the alleged wrongdoer is "*likely to succeed at trial*": That does not, however, involve the court in a trial of the action or require it to adjudicate on complex or contested issues or on the merits of any

defence potentially available to the alleged wrongdoer (unless it be clear that a given defence must inevitably succeed – such as where it is clear that privilege applied to an allegedly defamatory statement or that any claim is very clearly statute-barred).

130. Formulating the threshold in these terms is not, in my view, inconsistent with the thrust of the Irish case law. Rather, it simply seeks to express the threshold that, in practice, has been applied by the courts here in more precise terms and within the parameters suggested by *Megaleasing*.

131. For the purpose of determining this appeal, it is not necessary to decide whether the *Norwich Pharmacal* jurisdiction extends, or ought to extend, to circumstances where what is sought is not the identity of the alleged wrongdoer but a "*missing piece of the jigsaw*" needed to confirm that an actionable wrong has indeed been committed and/or to enable a claim to be properly brought (particularly perhaps claims which are required to be verified on oath). Where an applicant has substantial grounds for considering that they may have a good cause of action or complaint but lacks a specific and limited piece of information (or documentation) which is needed in order to confirm that such a cause of action or complaint is well-founded in fact, there would appear to be much force in the argument that the court should, in principle – but exceptionally – be entitled to order disclosure. As already noted, access to the courts is a fundamental constitutional value in this jurisdiction and access to court, and the right to an effective remedy, are also enshrined in the ECHR and in the Charter. But it is better to await a concrete case before expressing a concluded view on this issue. Any such jurisdiction should – as indeed the Judge observed – be strictly limited to disclosure sought for the purpose of bringing a claim and would not extend to the disclosure

of material required to prove that claim: that would be a matter for discovery in the ordinary way.

The requirement to show involvement in the wrongdoing

132. This issue has not received much attention in this jurisdiction. That is perhaps unsurprising – most of the decided cases concerned the publication of allegedly defamatory (or otherwise wrongful) material on social media platforms and in such circumstances the involvement of the platform operator in the alleged wrongdoing was manifest. Whatever the applicable threshold condition of "*involvement*" – whether facilitation, participation or some more attenuated form of involvement – it was clearly satisfied in those cases.

133. This is not such a case and so the issue must be addressed. The Judge rejected as an "*arbitrary limitation*" any requirement to show that the defendant had been "*mixed up*" in the matter complained of to the extent of *facilitating* the wrongdoing (§25). In his view, the Commissioner had been involved "*beyond the mere bystander role*" and that was sufficient (§24). That is essentially the same approach as was taken by Mann J in *Various Claimants*.

134. I do not, with respect, find the analysis in *Various Claimants* wholly persuasive. In my view, a threshold test that turns on whether the defendant can be characterised as something more than a "*mere witness*" or "*mere bystander*" would be difficult to apply with any consistency or predictability and would appear to set the bar too low in any event. In my opinion, it is only if the defendant had some involvement in the allegedly wrongful

transaction (or series of transactions) such that, absent such involvement, the transaction(s) would not have taken place in the manner it did that a jurisdiction to direct disclosure properly arises. That was, in essence, the causal approach taken by the Court of Appeal of England and Wales in *NML Capital Limited v Chapman Freeborn Holdings* and, for the reasons given by Tomlinson LJ, it appears to me to be the correct approach. A meaningful requirement for involvement is essential if the jurisdiction is to be properly delimited. Such a limitation is not, in my view, "*arbitrary*". Nor do I find persuasive the suggestion in *Ashworth Hospital Authority v MGN Ltd* that the requirement for involvement or participation on the part of the party from whom discovery is sought should be regarded as "*significant*" but not "*stringent*" [30] In my view, a requirement that is not stringent is not significant.

135. Ought the fact that AGS has a duty to investigate suspected wrongdoing to be regarded as enough to satisfy the requirement for "*involvement*" in this context? I did not understand the Plaintiff to advance such an argument, at least as his primary argument (on the Plaintiff's case the Commissioner was involved in the wrongdoing here in multiple respects). However, given that the issue was raised in *Various Claimants,* and also touched on by the Judge (Judgment, §30), it is only to be expected that it would be the subject of discussion in submission.

136. AGS is under a public duty to investigate crime in the State. That is now reflected in section 7(1)(f) of the Garda Síochána Act 2005. In addition, there are many statutory agencies,

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[30] Para 35 (per Lord Woolf CJ).

such as the Revenue Commissioners, the Corporate Enforcement Agency, the Health and Safety Authority, the Commission for Communications Regulation (ComReg), and the Competition and Consumer Protection Commission (CCPC) that have significant investigatory duties (and powers). To regard such agencies as having an *involvement* in any (suspected) wrongdoing they may investigate, thereby potentially exposing them to the prospect of being compelled to make disclosure of information obtained in the course of (and for the purpose) of such an investigations would have significant implications both for the agencies concerned and more broadly, including for the persons who provided such information, whether on a voluntary basis or otherwise, in the expectation that it would be used only for the statutory purposes of the agency concerned. It would not be appropriate to allow such agencies – which are entrusted with very significant investigative powers, including powers of compulsory entry and search – to be *de facto* co-opted as the inquiry agents of potential private litigants.

137. On the other hand, if a person suffers injury by the act of an unidentified third party, and that third party is subsequently identified by AGS, should not it not be obliged to disclose the identity to the victim so as to enable them to pursue civil redress? The Judge clearly thought so and there is, perhaps, an intuitive appeal to that position (though questions immediately arise – where, for instance, AGS and/or the DPP decide that there is no sufficient evidence to justify a criminal prosecution, should a duty to disclose nonetheless arise? What would be the position if AGS merely *suspected* that X was the wrongdoer, without any clear proof, should it be obliged to disclose its suspicions? Of course it may be said that any such issues can and should be addressed at a later stage of the inquiry but, either way, they illustrate some of the difficulties that potentially arise in disclosure

applications involving AGS). Furthermore, it is not clear whether in practice any actual difficulty arises in obtaining information from AGS. Were such a difficulty to arise, it would have to be addressed and, it may be, a different approach might be warranted. The case for applying a different approach in such circumstances would arguably derive support from *Doyle* where, as already noted, there was no suggestion of any involvement by AGS in any wrongdoing (other than their involvement in investigating the bombings). However, that is not this case.

138. Here, it is entirely unclear what criminal offence – if any – might ever have been the subject of Garda investigation (the offence of defamatory libel was abolished by the Defamation Act 2009) and it is equally unclear what connection – if any – there was between the complaints made by the Plaintiff and the disciplinary procedures ultimately pursued by the Commissioner. Although the evidential position is far from satisfactory, the reality appears to be that the Garda investigation was disciplinary in character and, albeit that Garda discipline is a matter of public law, the case for characterising the Commissioner's role in such an investigation as being sufficient to satisfy the requirement for "*involvement*" is, it seems to me, significantly less compelling than in the hypothetical examples given by the Judge in his Judgment. Many employers – including private employers – carry out workplace investigations into alleged disciplinary breaches at work but it is difficult to see how such employers could properly be said to be "*involved*" in the wrongdoing on that basis alone and it is not evident why the Commissioner should be regarded as being in a different position simply because of AGS' function of investigating crime.

139. In any event, as I shall explain, it is not necessary to reach a concluded view on this issue for the purposes of determining this appeal.

Possession/Necessity

140. In my view, a *Norwich Pharmacal* order ought not to be made unless the court is satisfied that (i) that the information sought is likely to be in the possession of the defendant; (ii) that the information is necessary for the purposes of bringing court proceedings (or, it may be, for the purpose of pursuing some other legitimate remedy arising from the alleged wrongdoing); and (iii) the applicant has no other practicable or more appropriate means of obtaining that information.

141. As to (i), the information sought here was not, in fact, in the possession of the Commissioner but, remarkably, he failed to disclose that fact to the Plaintiff or to the High Court. As to (ii), the information sought was plainly necessary for the purpose of proceedings. As regards (iii) there was considerable dispute between the parties in the High Court, a matter to which I will return below.

Discretion/Proportionality

142. As this Court (per Peart J) made clear in *Muwema*, satisfying the relevant threshold conditions does not mean that the applicant is entitled (or, I would add, even presumptively entitled) to disclosure. The interests favouring disclosure must be balanced against those

weighing the other way. The judgment of Lord Kerr in *Rugby Football Union v Consolidated Information Services Ltd* helpfully identifies many of the relevant factors likely to arise (see para [63] above) but the factors that apply, and the weight to be attached to them, are liable to differ from case to case.

143. The party against whom disclosure is sought may have legitimate grounds for opposing disclosure in its own right. Here, the Commissioner objected to the order on the ground (*inter alia*) of confidentiality (citing section 62 of the 2005 Act). That is, in principle, a legitimate ground of objection. Quite apart from the specific provisions of section 62 (which is really concerned with unauthorised disclosure of AGS information by individual members), there is clearly a compelling public interest in maintaining the confidentiality of information obtained by AGS in the course of carrying out criminal investigations. I agree with the analysis of Slade J in *Countess of Caledon v Commissioner of Metropolitan Police* on that point. That analysis is, in my view, entirely consistent with the jurisprudence here, conveniently discussed in *Gama Endustri v Minister for Industry, Trade and Employment* [2009] IESC 37, [2010] 2 IR 85 which draws a sharp distinction between disclosure for public and private purposes. Of course, in this context as in many others, that interest may be outweighed by the factors favouring disclosure but the weight of the point does not disappear because, ultimately, a court may direct disclosure.

144. Other grounds may relate to the position and/or interests of the alleged wrongdoer and/or any third party (any party other than the party from whom disclosure is sought) who may potentially be affected by the making of the order. One of the grounds of objection advanced by the Commissioner here was that disclosure would prejudice the member who

was then subject to disciplinary proceedings. The Judge characterised that objection as a *ius tertii* (though he also went to roundly dismiss it on its merits). In my view, that characterisation was not apt in this context. A party against whom a *Norwich Pharmacal* order is sought is fully entitled to bring to the court's attention any matters which may weigh against the making of the order, including potential prejudice that may arise to third parties (*Muwema* providing a concrete illustration of the importance of this). Those third parties will not be (or will not usually be) before the court to be heard in opposition to the order and justice and fairness require that the party sought to be fixed with the obligation of disclosure should be entitled to assist the court in fully understanding the potential effect of its order as well as identifying any objections that the third party might be in a position to advance if he or she were a party before the court.

145. As already observed, there is – or ought to be – no assumption that the order sought should be made merely because the court is persuaded that the intended plaintiff has a strong case against the third-party wrongdoer. As important as the right of access to the courts/right to an effective remedy undoubtedly is, it may, in the circumstances of any given case, be outweighed by other considerations, such as privacy. The nature and substance of the case and/or the nature and seriousness of the injury that the intended plaintiff has suffered or is likely to be suffer in the future may all be important considerations in that context.

Duty of Candour

146. However, as already noted, in many if not most cases the party from whom disclosure is sought may have no real interest in opposing the order and may not be in a position to

speak for the alleged wrongdoer in a meaningful manner. It was for that reason that, in the *Salesian Secondary School* case, Simons J considered that an application for a disclosure order is analogous to an *ex parte* application and, accordingly, a duty of candour rested on the applicant. It is, of course, well-established that applicants for *ex parte* relief are subject to duties of candour and good faith: see for instance *Bambrick v Cobley* [2005] IEHC 43, [2006] 1 ILRM 81. In certain contexts – as for instance where the application is for a *mareva* injunction or *Anton Piller* order – those duties are particularly onerous. I have no doubt that Simons J was correct in holding that a duty of candour applies to applications for disclosure, notwithstanding the fact that they are not strictly *ex parte* applications. Such applications are made in the absence of the person(s) most likely to be affected by the order being sought and, if made, the order can (and normally will) be executed without any input from the person concerned. In those circumstances, it is entirely appropriate that applicants should be subject to duties of candour and good faith. Of course, the normal remedy for a breach of such duties – the discharge of the order obtained *ex parte* – will not be available in this context but that does not mean that the duties are empty or that the court would be powerless to sanction a breach of them.

147. No issue of lack of candour or good faith arises in this appeal.

Undertaking

148. In my view, for the reasons identified in the cases, a person obtaining disclosure pursuant to a *Norwich Pharmacal* is subject to an implied undertaking similar to the implied undertaking that applies in the context of discovery. As with discovery, a court is also free

to impose such a restriction by the express terms of its order and/or to require an express undertaking to be given as a condition of making an order (such an undertaking was given by the Plaintiff here).

Costs

149. As regards costs, these will, ultimately, always be a matter for the court, subject of course to the applicable provisions of the Legal Services Regulation Act 2015 and the terms of Order 99 RSC (recast). However, I agree with Simons J in *Salesian Secondary College* that, as a general rule, the respondent ought ordinarily to be entitled to recover their costs from the applicant, at least where the respondent is not itself a wrongdoer. I also agree with the further guidance offered by the Court of Appeal of England and Wales on this issue in *Totalise plc v Motley Fool Ltd* (see para [64] above]. Where a respondent *bona fide* – but unsuccessfully – resists the making of a *Norwich Pharmacal* application, they ought still to have their costs, absent any further circumstances that warrant a departure from that general approach.

Should the Order have been made here?

150. I have identified above (para [33]) the principal grounds on which the Commissioner sought to impugn the Order made by the Judge. I will deal with each in turn. In doing so, I bear in mind the applicable standard of review on this appeal (para [47] above).

The Wrongdoing Ground

151. I have set out above the applicable test for this purpose. That threshold is materially less exacting than that urged on this Court on the Commissioner's behalf which, while not always formulated in quite the same terms, appeared to involve a showing of (at least) a probability of success. That is not the test. The test is, as I have explained, whether there was a strong case of actionable wrongdoing. Though not without hesitation, and even though the Judge did not express the test in precisely those terms (though he did express the view that a strong case of wrongdoing had in fact been made out on the evidence), I have come to the view that he was entitled to conclude that the wrongdoing requirement was satisfied on the material before him. That material disclosed a genuine and plausible cause of action against the authors of the WhatsApp material in terms both of identification of the Plaintiff and the defamatory meaning of that material, having regard to his specific life and family circumstances disclosed by the evidence. That a number of third parties (including but not limited to friends of the Plaintiff) understood the material to refer to him is apparent from the evidence and it is equally clear that the material was very distressing to the Plaintiff and his wife. It is clear from *Reynolds v Malocco* [1998] IEHC 175, [1999] 2 IR 203 that the fact that the conduct apparently attributed to the Plaintiff was lawful did not exclude a finding that the material was defamatory. Ultimately, in the event that proceedings had been brought, that issue would have been a matter for the jury (though that may not be the case for much longer) but, in my view, the Judge was entitled to hold that the threshold test of wrongdoing was satisfied here.

The Involvement in the Wrongdoing Ground

152. In this regard the Judge considered that the Commissioner's involvement was more than that of a mere witness and on that basis concluded that the requirement of involvement in the wrongdoing had been satisfied.

153. As will be apparent from the discussion above, in my view the Judge set the bar too low in this context. However, it does not necessarily follow that his ultimate conclusion was in error.

154. The facts here are very particular. The material to which the Plaintiff took objection was, it seems, circulated by members of AGS (all of whom are ultimately under the direction and control of the Commissioner) and clearly related to matters internal to AGS. According to the Plaintiff – and this does not appear to have been the subject of real dispute – the circulation of this material was prompted by the proceedings which he brought against the Commissioner and (so the Plaintiff also says) the material began to circulate before the proceedings had reached the public domain which, he says, points to the inappropriate dissemination of the fact of the proceedings within AGS. A lengthy AGS investigation – effectively an investigation into itself – was carried out in response to the Plaintiff's complaints. These facts are significantly different from the facts in *Various Claimants* (where the MPS was found to have been "*sufficiently engaged*" with the wrongdoing to satisfy the test of involvement) and *Countess of Caledon* (where no sufficient engagement was found to have been established) and, in my view, demonstrate a very significant involvement by the Commissioner in the alleged wrongdoing here that is sufficient to meet the applicable threshold test. On the particular facts here, the allegedly wrongful transactions (the circulation of the WhatsApp messages and other allegedly defamatory

material) were so intimately connected with the affairs of AGS (of which the Commissioner is the representative) that it can fairly be said that such transactions would not have taken place in the manner that they did (or indeed at all) without the involvement of AGS.

The Proportionality Ground

155. In light of the post-Judgment developments referred to above, much of the argument made on the Commissioner's behalf under this heading appears rather hollow.

156. I agree with the Commissioner that, at the level of principle, his argument based on section 62 of the 2005 Act had more force than the Judge allowed. Maintaining the confidentiality of information provided to AGS in the course of and for the purposes of carrying statutory functions is a legitimate and important public interest and the Judge was wrong to dismiss the Commissioner's arguments as "*legalistic*". Furthermore, the fact that section 62 does not provide for absolute confidentiality – disclosure of information to a court being one of a number of exceptions to the general prohibition on disclosure – was not an answer to the Commissioner's objection. There are a wide variety of circumstances where a court may direct the disclosure of confidential information but, before doing so, it must give proper weight to the interest in preserving confidentiality. Where – as here – such interest is a public interest rather than a merely private one, the issue must be approached with particular care and circumspection. The Judge was also mistaken to dismiss as a *ius tertii* the Commissioner's objection that the order sought would prejudice the disciplinary process in AGS. Any real risk of such prejudice was a legitimate matter of concern to the

Commissioner in the interests of the force (and the public interest) and he was also entitled to identify possible prejudice to the individual member(s) as a factor relevant to the court's assessment, given that such member(s) were not before the court to be heard.

157. The difficulty in this regard is that, even on the material that was before the High Court, these objections were made in general terms and lacked any concrete basis. The fact that – as has since emerged – the Commissioner did not actually know who circulated the material further deprives those objections of any credibility or force.

158. The Commissioner might perhaps appear to be on firmer ground in arguing that the order ought to have been refused on the basis that there were other practicable means available to the Plaintiff of obtaining the information sought from him and/or that the Plaintiff had frustrated AGS's capacity to identify the alleged wrongdoers by failing to provide his phone for forensic examination and/or failing to identify the colleagues who sent the material to him (these arguments were raised in the context of proportionality rather than as a stand-alone ground(s)). Again, however, it appears to me that the Judge was entitled to reach the conclusion he did on the evidence before him. The Plaintiff explained his position on affidavit and was not challenged on it and, in complaining that its investigation had been frustrated by the non-cooperation of the Plaintiff, the affidavit evidence filed by AGS was noticeably lacking in specifics. The Judge was, in the circumstances, entitled to conclude that AGS had failed to demonstrate that there was some other practicable means by which the Plaintiff could obtain the information necessary to commence his intended proceedings.

The Scope of the Order Ground

159. The Commissioner's objection here is that the form of order made encompassed – or potentially encompassed – material above and beyond the material identified and/or exhibited by the Plaintiff in his grounding affidavit and also that it required the Commissioner to exercise an element of subjective judgment as to what material came within the scope of the order.

160. The terms of a *Norwich Pharmacal* order should be sufficiently clear and precise so as to allow the person directed to make disclosure to identify with confidence what is required to be disclosed. Given the potentially serious consequences of non-compliance with such an order, clarity is crucial. Requiring the person making disclosure to exercise any element of subjective assessment as to what is liable to be disclosed is, in principle, unsatisfactory and inappropriate.

161. The Order made by the High Court here required the provision of "*the names and addresses of any persons in relation to whom [the Commissioner] considers that there is prima facie evidence of involvement in publication of allegations against the Plaintiff of the general nature described in the Affidavit of the Plaintiff ….*" In my view, the order should not have been made in such terms. It should have specified the particular publications (the WhatsApp messages and any other material) in respect of which disclosure was to be made. If, as appears to have been the case, the Judge considered it appropriate to encompass additional material, that material should have identified in more objective terms, namely material containing allegations similar to the allegations in the WhatsApp material.

162. The form of the Order made is, of course, an academic issue in light of the Commissioner's response to it. But I am not convinced that any real injustice arose here in any event. The order made was limited to material of the same nature as the material identified by the Plaintiff *and* which was in the possession of the Commissioner. There was a real prospect that there was additional material, whether in the group chats of which the Plaintiff was aware and/or in other similar group chats and, in the circumstances, it was not unreasonable to go beyond the already identified material. Furthermore, any Judgment which the Commissioner was required to make in that context was a limited one and, in making any such judgment, the Commissioner would have the assistance of his legal advisors. In the circumstances here I am not persuaded that justice requires the Order to be set aside on this ground.

Costs in the High Court

163. Finally, the Commissioner takes issue with the manner in which the Judge dealt with the costs of the application. To recap, the Judge awarded the costs of the application to the Plaintiff and made no order as to the costs of making disclosure. That was the order sought by the Plaintiff. The Commissioner had argued that no order should be made in relation to the costs of the application but the Judge held that costs followed the event. The Judge rejected the Commissioner's application for the costs of making disclosure on the basis of the Commissioner's approach to the application and his delay in dealing with the Plaintiff's request as well as the limited nature of the order and the consequently limited burden of compliance with it.

164. As regards the costs of the application, the Judge erred in approaching the allocation of those costs in the manner that he did. The fact that the Commissioner had unsuccessfully opposed the application did not, of itself, justify an order for costs against him. However, in this case there were a number of factors which justified such an order. One weighty factor was the failure of the Commissioner to engage with the Plaintiff or his legal advisors in the period prior to the commencement of these proceedings (see paras [11-14] above). Secondly, there is the fact – evident to this Court now though not apparent to the Judge at the time – that the Commissioner had allowed the Plaintiff to proceed with a practically futile application and had then engaged in a broad and intensive opposition to that application. That factor in itself demands in justice that the Commissioner should be liable for the costs of the application.

165. As regards the costs of making disclosure, again the general rule is that the applicant should be liable for such costs. The costs at issue here are surely *de minimis*. But the principle is nonetheless important. When a third party is subjected to the burden of making involuntary disclosure, justice requires that they should not have to bear the cost of doing so. That principle is reflected in the provisions of Order 31 RSC relating to non-party discovery. In my view, there were no grounds here for departing from that general principle. That the Commissioner unsuccessfully objected to the order was not, in my view, a basis for depriving him of the costs of making disclosure (whatever of the costs of the contested application). Similarly, the Commissioner's failure to engage with the Plaintiff was clearly a relevant factor in allocating the costs of the application but, in my view, was not relevant to the distinct issue of the costs of making disclosure. Effectively, the Commissioner was

being punished twice. Finally, the fact that such costs might be “*relatively insignificant*” did not justify relieving the Plaintiff of the burden of discharging them.

CONCLUSION AND ORDER

166. It follows that the Commissioner's appeal must be dismissed, both as regards the substantive order made by the Judge and the manner in which he dealt with costs (other than as regards the costs of making disclosure).

167. It would also appear to follow that the costs of this appeal should be borne by the Commissioner. Whatever success the Commissioner has had appears to be decisively outweighed by the considerations identified earlier in this judgment. That is a provisional view only, however. Should the Commissioner wish to argue for a different costs order, he should notify the Court of Appeal Office within 14 days. In that event, the Court will convene a short hearing at a date and time to be notified. It should be noted that the Commissioner will be at risk of costs in the event that the order ultimately made is as per the provisional indication above.

Murray and Ní Raifeartaigh JJ agree with this judgment and with the orders proposed.