



Neutral Citation Number: [2021] EWCA Civ 626

Case No: A2/2021/0031

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MR JUSTICE WILLIAM DAVIS
QB-2020-002492

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE COULSON

Between :

STOKOE PARTNERSHIP SOLICITORS

**Appellant/
Claimant**

- and -

(1) PATRICK TRISTAM FINUCANE GRAYSON
(2) GRAYSON + CO LIMITED

**Defendants/
Respondents**

- and-

(3) STUART ROBERT PAGE
(4) PAGE CORPORATE INVESTIGATIONS LIMITED

Defendants

Tim Lord QC, Gerard Rothschild and Frederick Wilmot-Smith (instructed by **Stokoe Partnership Solicitors**) for the **Appellant**
Jeff Chapman QC and Samuel Ritchie (instructed by **BDB Pitmans LLP**) for the **Respondents**

Hearing date: 15 April 2021

Approved Judgment

Lord Justice Bean :

1. The Claimant solicitors' firm appeals with permission of Coulson LJ from an order of William Davis J refusing to make an order that Patrick Grayson, the First Defendant, be cross-examined on the content of an affidavit sworn by him on 29 July 2020. I gratefully adopt the judge's narrative of the background:-

“3. The firm currently acts for a man named Karam Al Sadeq. He has been detained in a prison in Ras Al Khaimah in the UAE for something over 6 years. His incarceration follows his conviction in the UAE in respect of substantial fraud said to have been committed by him. Mr Al Sadeq disputed and continues to dispute this allegation. He alleges that he came to be in the UAE only because of an act of unlawful rendition. He further alleges that he was tortured during interrogation once he had been taken to the UAE. His case is that his conviction was based on material obtained as a result of torture and duress. Mr Al Sadeq has brought proceedings in this jurisdiction against an international law firm and some of that firm's current or former partners. The proceedings were issued by the firm in January 2020. Full particulars of claim were served in April 2020. The essence of the claim in those proceedings is that the defendants were complicit or involved in Mr Al Sadeq's rendition and subsequent interrogation and torture.

4. The partner of the firm with conduct of the Al Sadeq litigation is Haralambos Tsiattalou. At the end of March 2020 Mr Tsiattalou was contacted via an intermediary by a man named Oliver Moon. Mr Moon said that he had been instructed to obtain confidential information about the firm, in particular banking information. His instructions had come from a man named Gunning but his understanding was that Gunning in turn was acting at the behest of Paul Robinson (the First Defendant in the Claim number QB-2020-002218). In order to establish that Mr Robinson was involved as suggested by Mr Moon, the firm created two documents which purported to contain confidential banking information. In fact, the documents had been created so as to remove confidential information. The firm was able electronically to track the documents and to identify any person who accessed them. By this route the firm (with the assistance of an investigation agency) identified Mr Robinson.

The proceedings

5. On 29 June 2020 the firm issued a Part 7 claim against Mr Robinson and the company by which he operated. The proceedings were for injunctive relief to restrain Mr Robinson from actual or threatened breaches of confidence. In addition, the firm sought a disclosure order pursuant to *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133. The claim identified three categories of confidential

information which Mr Robinson had obtained or attempted to obtain. In addition, the claim referred to other alleged activity relating to confidential information in the hands of third parties. The overarching allegation made was that the obtaining of or attempting to obtain confidential information was linked to the Al Sadeq litigation.

6. The firm specified the *Norwich Pharmacal* order sought. It required Mr Robinson to swear an affidavit providing full information on three issues: the identity of the person providing him with instructions; the extent of the confidential information already obtained from the firm; the identity of those to whom he had passed on the confidential information.

7. On 5 July 2020 Mr Robinson attended the offices of the firm and answered questions relating to his activity vis-à-vis the firm. Either on that day or on the day following he provided the firm with his affidavit in draft form. On 7 July 2020 the case was considered by Chamberlain J. He made an order recording that the parties had compromised the claim on terms. For my purposes the relevant term is the order set out at paragraph 1 of the judge's order, namely that Mr Robinson was to swear an affidavit by 4.30 p.m. on that day dealing with disclosure. In fact, the affidavit had already been sworn in the same terms as the draft already provided to the firm. The affidavit was required to deal with the following:

- The identity of any person who had requested Mr Robinson or his company to obtain confidential information from the firm.
- The manner in which the requests were made including whether they were in writing, the gist of the requests and a copy of any written request retained by Mr Robinson.
- What confidential information was obtained from the firm.
- To whom the confidential information was provided and the circumstances of any such provision.

8. Paragraph 7 of the judge's order recorded the nature of the compromise. All further proceedings against Mr Robinson and his company were stayed save for the purpose of enforcing the terms of the order.

9. Mr Robinson' affidavit ran to 39 paragraphs. The essential matters to which I need to refer are as follows:

- His instructions came from Patrick Grayson who was a private investigator and by whom Mr Robinson had been instructed in the past.
- He was first instructed at a meeting at the Goring Hotel in Belgravia at some point in January 2020. He was able to produce messages dated 30 January 2020 which showed a meeting on that date.
- At the meeting Mr Grayson asked Mr Robinson whether he knew of anyone capable of obtaining bank records and other information relating to the firm in response to which Mr Robinson said that Mr Gunning would be able to do so.
- At no point did Mr Grayson identify by whom he was instructed and Mr Robinson did not ask him.
- Communication between Mr Robinson and Mr Grayson was by means of an encrypted application named Signal. Mr Robinson did not have a record of the messages sent and received via this application because Mr Grayson had configured the application to delete messages automatically after 12 hours. He did produce screenshots of the record of the voice calls carried out via the application i.e. the fact of the calls and when they were made.
- The gist of the communication between Mr Robinson and Mr Grayson after the meeting in January 2020 was following up on Mr Grayson's original request.
- Mr Robinson was paid £5,000 in cash by Mr Grayson. The total fee agreed was £10,000. The balance had not been paid.
- The confidential information obtained consisted of the two documents created by the firm following the contact from Mr Moon. Mr Robinson did not request or obtain any other confidential information.
- Mr Gunning passed information to Mr Robinson via e-mail. Mr Robinson would pass on the information to Mr Grayson.
- On one occasion thought to be in early March 2020 Mr Robinson had met Mr Grayson in Sloane Square and had given Mr Grayson a hard copy print out of the information passed by Mr Gunning together with a USB stick containing the same information in electronic form.

- On other occasions Mr Robinson sent Mr Grayson material received from Mr Gunning via an encrypted e-mail account. Mr Robinson had deleted the e-mails before being served with the claim.
- Mr Robinson had no knowledge of the purpose for which the information was required. He knew nothing about any surveillance of Mr Tsiattalou during the solicitor's visit to Dubai in February 2020.

10. Mr Robinson also made passing reference to a man named Stuart Page as being someone with whom he had worked from time to time. I infer from the terms of the questions apparently put to Mr Robinson prior to him swearing his affidavit that Mr Page was someone already regarded by the firm as a relevant party. Mr Robinson did not suggest that Mr Page was involved in the dealings he had with Mr Grayson.

11. On 16 July 2020 the firm issued a Part 7 claim (namely Claim number QB-2020-002492) against Mr Grayson and Mr Page and their respective companies. In relation to Mr Grayson (the First Defendant in that claim) the details of the claim principally were drawn from the material set out in the affidavit of Mr Robinson. I understand that the firm were unaware of the existence of Mr Grayson prior to Mr Robinson identifying him. No matter was pleaded beyond the material provided by Mr Robinson.

12. On 17 July 2020 the firm issued applications for interim relief from Mr Grayson and Mr Page in similar terms to the application made in respect of Mr Robinson. On 24 July 2020 Tipples J made an order by consent upon the applications. In relation to Mr Grayson the consent order largely consisted of recitals of undertakings given by him. The order provided a definition of confidential information. The definition was as follows:

"Confidential Information" shall mean any information sourced or derived, in whole or in part, from any document, whether paper or electronic, that has been obtained from the Claimant without its authority and is either designated as confidential, or is evidently confidential by reason of its subject-matter or the manner in which it has been obtained.

"Confidential Information" shall include, but shall not be limited to: (i) the Claimant's banking records, accounts and statements; (ii) the Claimant's telephone records, accounts and statements; and (iii) documents which have not been published and which, on their face, relate to the conduct of legal proceedings on behalf of Mr Karam Al Sadeq."

Mr Grayson undertook to swear a disclosure affidavit dealing with the four matters set out at paragraph 7 above, namely the matters in respect of which Mr Robinson had sworn an affidavit. Mr Grayson further undertook that his affidavit would state the treatment of any Confidential Information.

13. Mr Grayson's affidavit is dated 29 July 2020. He set out the definitions of Confidential Information as recited in the consent order. He said that no-one had requested him to obtain Confidential Information from or pertaining to the firm. He had not obtained any such information. In consequence, he had not provided such information to anyone. He concluded by stating "I never asked Mr Robinson to obtain Confidential Information relating to the Claimant (firm)". Wherever he used the term "Confidential Information" in his affidavit, Mr Grayson capitalised the first letter of each word. The proper inference to be drawn from that is that he was seeking to be strict in his definition of the term i.e. by reference to the definition in the order.

14. The firm took the view that the contents of Mr Grayson's affidavit were inconsistent with the affidavit sworn by Mr Robinson. On 10 August 2020 the firm wrote to the solicitors acting for Mr Grayson and made a request for further information pursuant to Part 18 of the Civil Procedure Rules. The firm set out two separate passages from Mr Robinson's affidavit and asked inter alia the following:

“Please state whether Mr Grayson accepts any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which.

Please state whether Mr Grayson denies any part of the account given in the text from Mr Robinson's affidavit reproduced above, and if so which.”

The solicitors acting for Mr Grayson declined to provide the further information requested. They argued that the request was wholly premature.

15. On 2 September 2020 the firm served the Particulars of Claim in the action against Mr Grayson and Mr Page. In relation to Mr Grayson the case as pleaded was based on the affidavit of Mr Robinson together with affidavit evidence previously obtained from Mr Gunning and Mr Moon. Three requests for information concerning the firm were pleaded as follows:

(1) On or about 2 April 2020, Mr Robinson requested Mr Gunning to obtain the banking co-ordinates of the Claimant;

(2) On or about 9 April 2020, Mr Robinson requested Mr Gunning to access the Claimant's main bank account and to obtain transactional data for the past three months;

(3) On or about 21 April 2020, Mr Robinson requested Mr Gunning to obtain information as to the "movements in and out of Dubai - for Feb 2020" of Mr Haralambos Tsiattalou.

16. The requests as pleaded were termed "the Example Requests". It was averred that these were the only requests known to the firm at the time of the pleading. The right to add other matters should they become known was reserved.....

18. The evidence of Mr Robinson was the foundation of the firm's case against Mr Grayson. Indeed, it properly can be said that it was and is almost the entirety of the firm's case.....

19. The Defence of Mr Grayson was served on 30 September 2020. It admitted that a meeting between Mr Grayson and Mr Robinson took place at the end of January 2020 at the Goring Hotel. It denied that at the meeting Mr Grayson asked Mr Robinson if he could obtain banking information relating to the firm. Mr Grayson's case was that the meeting was a social catch-up between friends. His case further was that he had not sought or obtained any information relating to the firm of the kind alleged. At the same time as the Defence Mr Grayson responded to the request for further information which had been made in August 2020 by the firm. It was said that the request had been superseded by the later pleadings, the position of Mr Grayson having been made clear in his Defence.

20. On 9 October 2020 the firm issued an application notice both in the proceedings involving Mr Grayson and the stayed proceedings to which Mr Robinson was a party. The nature of the application in each case effectively was identical. I recite the order sought against Mr Grayson:

“An order, pursuant to s.37 of the Senior Courts Act 1981 and/or the Court's inherent jurisdiction that the First Defendant be cross-examined on his sworn affidavit dated 29 July 2020 made on behalf of the First and Second Defendants. The affidavit is inconsistent with an affidavit of Mr Paul Robinson dated 6 July 2020 in separate but related proceedings (QB-2020-002218). The Claimant needs to resolve the inconsistency in order to uncover the identity of the ultimate perpetrator of very grave wrongdoing, i.e. an apparent attempt wrongfully to interfere with litigation pending before the High Court.”

The submissions made to the judge

2. The judge recorded that the headline arguments put on behalf of the firm on its application to cross-examine Mr Grayson were as follows:
 - The litigation underlying the claims against Mr Robinson and Mr Grayson involves very serious allegations which are of considerable public interest.
 - Ever since it became apparent in early 2020 that the firm was acting in the Al Sadeq litigation, the firm, in particular Mr Tsiattalou, has been subject to increasingly worrying attempts to subvert its conduct of the litigation. Evidence served two days before the hearing on 11 November 2020 showed that there had been a concerted attempt to mount a cyber-attack on the firm.
 - What has happened to the firm – which shows every sign of continuing – is of the highest order of seriousness. The firm has been attacked as has (indirectly) Mr Al Sadeq. The rule of law is under threat.
 - Mr Robinson has admitted participation in efforts to obtain confidential information. He was not acting on his own behalf. He was merely doing the bidding of others. The court should take urgent action to allow the identification of the malicious actors engaging in the attacks on the firm.
 - The purpose of the *Norwich Pharmacal* jurisdiction is to allow a party to identify the ultimate wrongdoer. In this case that purpose is being thwarted not only by Mr Grayson but also by Mr Robinson. In order to achieve the purpose intended by the orders made in July 2020, it is just and convenient for cross-examination of both men to be ordered.
 - The cross-examination would not be anything to do with the action involving Mr Grayson which currently is moving towards trial. It would be solely designed to achieve the end meant to be achieved by disclosure i.e. identification of the ultimate wrongdoer.
 - Mr Grayson in effect consented to a *Norwich Pharmacal* order when he undertook to swear a disclosure affidavit. By definition that meant that he accepted that he was mixed up in wrongdoing. The stance he took in his affidavit was inconsistent with that position. Cross-examination was the only reasonable and effective means of resolving the matter.

The decision of the judge

3. The judge noted at paragraph [25] of his judgment the well-established elements of an application for *Norwich Pharmacal* relief. At paragraph [26] he set out five principles listed in *Gee on Commercial Injunctions*, which are those set out in the judgment of Vos J in *Jenington International Inc v Assaubayev* [2010] EWHC 2351 (Ch). He then referred to two cases in which cross-examination on a *Norwich Pharmacal* affidavit was ordered: *Kensington International Ltd v Republic of Congo* [2006] 2 CLC 588 and *JSC BTA Bank v Solodchenko* [2011] EWHC 843 (Ch). I shall return to these authorities later.

4. He continued at paragraph [34]:-

"34. [T]here is little guidance on whether there is any jurisdiction at all to order cross-examination on a disclosure affidavit ordered under the *Norwich Pharmacal* procedure. The defendants in these proceedings did not invite me to reject the applications purely on the basis that there is no jurisdiction to order cross-examination in the circumstances of this case. I suspect that they considered that these proceedings were not a suitable vehicle to reach such a conclusion. What does seem to me to be a proper conclusion is that cross-examination on a disclosure affidavit sworn under the *Norwich Pharmacal* procedure when the intended purpose simply is to identify the ultimate wrongdoer should be ordered only in exceptional circumstances. It is common ground that cross-examination in an asset disclosure case should be the exception rather than the rule. When cross-examination is appropriate it will tend to be in cases where documents and digital material are at odds with the affidavit and where cross-examination might reasonably be expected to assist in the tracing of assets. Similar considerations are less likely to apply in cases where the issue is the identification of a wrongdoer so as to allow proceedings to be taken against that wrongdoer. What is "just and convenient" – that being the overarching test – will take those matters into account.

35. The applications in respect of Mr Robinson and Mr Grayson are separate and must be considered separately. I shall deal first with Mr Robinson. His case is straightforward. His affidavit was sworn after the firm and those representing the firm had had a significant opportunity on 5 July 2020 to question him directly. It has not been suggested that the affidavit differed in any material respect from what Mr Robinson said on 5 July 2020. I infer that there was no material difference. Had there been, procedural steps would have been taken forthwith. When the order was made in his case, the firm knew precisely what Mr Robinson was going to disclose. The Part 7 claim was merely a means to an end which had been achieved by the date of the order.

36. The claim made by the firm in the proceedings against Mr Grayson is based almost entirely on the evidence set out in the affidavit. The Particulars of Claim conclude with a statement of truth. That must mean that the firm is proceeding on the basis that the affidavit of Mr Robinson is true. That position is in stark contrast to the circumstances of Dr Nwobodo and Mr Ereshchenko in the authorities to which I have referred.

37. The basis upon which it is now suggested that Mr Robinson should be subjected to cross-examination is strained. In the firm's skeleton argument, it is said that "the possibility

that he has not revealed everything and given a fully truthful account cannot be discounted, especially in view of Mr Grayson's inconsistent evidence". The general proposition that a person who has sworn an affidavit has not revealed everything could apply in almost every case. That can hardly be a reason for ordering cross-examination, especially when such an order is to be the exception rather than the rule. Here, the general proposition is said to be supported by the inconsistency with Mr Grayson's account. I regret that I do not follow that argument. Mr Grayson's evidence is that he did not give Mr Robinson any instructions to seek confidential information. The firm's case is that he did. The firm has pleaded its case on the basis of the truthfulness of Mr Robinson's evidence to that effect. In those circumstances the fact that Mr Grayson has given an inconsistent account is of no assistance at all in supporting a suggestion that Mr Robinson has not revealed everything. [...]

39. I turn to the application in relation to Mr Grayson. His affidavit was sworn in very different circumstances to that of Mr Robinson. Although the order in his case was made by consent, it did not follow a consensual approach of the kind applicable in Mr Robinson's case. Mr Grayson was served with a claim form setting out the confidential information said to have been sought by Mr Robinson. Thus, he was on notice of what Mr Robinson said but he did not engage in any discussion with the firm prior to swearing his affidavit. In addition, his affidavit was sworn with specific reference to the definition of Confidential Information as set out in the order. I asked Mr Chapman QC who represented Mr Grayson at the hearing before me whether he accepted that the inconsistency between the two affidavits could only be explained on the basis that either Mr Robinson or Mr Grayson was lying. I raised that question because I could see that it might be said that Mr Grayson's affidavit, in adhering to the strict definition of "Confidential Information" given in the order, was truthful in its face even though it might appear to be inconsistent with the evidence of Mr Robinson. Mr Chapman did not pursue that line of reasoning. I hope that I shall be forgiven for saying that I found his response to my question a little opaque. He referred to the possibility of mistake which seems to me to be an unlikely proposition. The safest course is to proceed on the basis that there is a clear inconsistency between the two affidavits and that Mr Robinson and Mr Grayson cannot both be giving accurate and reliable accounts. In plain English one or other of them is lying as to the part played by Mr Grayson."

5. Finally, the judge set out four reasons which led him to the conclusion that an order for cross-examination could not be made:-

"40. The first difficulty with the application in relation to Mr Grayson is that he is a party to current proceedings which are moving towards a trial albeit that I cannot say when that trial might take place. The claim against him is that he sought to obtain confidential information in relation to the firm. It has been particularised by reference to the evidence of Mr Robinson. Mr Grayson denies the claim and he has served a defence of which no further particulars have been sought. The remedies sought by the firm include *Norwich Pharmacal* relief. Thus, an issue for the trial judge will be the adequacy of the affidavit sworn by Mr Grayson. Mr Grant on behalf of the firm argued strenuously that the original *Norwich Pharmacal* order was and is juridically separate from the claim to be tried. He pointed out that the Particulars of Claim on which the firm will present its case did not exist at the time of the order made by Tipples J. That is true but the proposition misses the true point. In the proceedings the cross-examination of Mr Grayson inevitably will concentrate on his assertion that he has made full disclosure. The firm's case is that he has not done so and that he has breached the firm's confidence. To permit cross-examination now on Mr Grayson's affidavit would be to preempt the cross-examination at trial. On the face of it that cannot be just and convenient. The fact that the case is proceeding to trial is not of Mr Grayson's making. The firm has determined that this is the appropriate course. It is not for me to comment on that determination. However, it does have consequences as I have set out above.

41. The second difficulty is that the case against Mr Grayson is limited in scope. The pleaded case is that there were three attempts to obtain confidential information as set out at paragraph 15 above. Each of the attempts occurred in April 2020. Whether the sort code and account number of the firm's bank account was confidential information is doubtful. Many solicitors will include those details on any invoice they submit. The same lack of confidentiality could be said to apply in relation to historic information concerning Mr Tsiattalou's travel arrangements. Confusingly the pleaded case is that whatever information in fact was obtained was provided to Mr Grayson in early March 2020. For Mr Grayson now to be required to attend for cross-examination on events which occurred some seven months ago and which were of such limited ambit does not seem to me to be an obvious requirement taking into account what is just and convenient. Mr Grant argued that this approach fails to take account of the continuing depredations of the firm's business. The submission is that cross-examination is required "so that we can put a stop to what is happening". I accept that the case against Mr Grayson is not to be considered in a vacuum. If he gave instructions to Mr Robinson in April 2020 in respect of

information relating to the firm and he did so at the request of another (potentially the ultimate wrongdoer), it is a possible inference that the wrongdoer responsible for those events is concerned with more recent events. But it is not a clear and inevitable inference. What is just and convenient must be judged principally by reference to the wrongdoing in respect of which the *Norwich Pharmacal* relief was obtained.

42. The third difficulty is that this is not a case in which the firm can call upon the same kind of material as was available to the claimants in *Kensington* and the *Ereshchenko* case. Those cases were different in nature since they were principally concerned with asset tracing, an exercise which is bound to give rise to documentary and digital material in relation to which effective cross-examination can be mounted. The chronology in those two cases in simple terms was that the affidavit was sworn following which significant material emerged which contradicted its contents and which demonstrated the inadequacy and untruthfulness of the affidavit. In the *Ereshchenko* case there were two untruthful affidavits. Here Mr Grayson has given an account which is inconsistent with that of Mr Robinson. Had e-mail traffic or other documents emerged which demonstrated that Mr Grayson in fact had engaged with Mr Robinson in some kind of search for information, that might have allowed a conclusion that cross-examination would be just and convenient. Beyond the limited material which was produced by Mr Robinson at the outset, no such digital or documentary material is available.

43. The fourth matter of relevance is that, given the proceedings against Mr Grayson are continuing and the respective cases have been pleaded, there is scope for the firm to use the mechanism of Part 18 to obtain further information. The request for further information first requested in August 2020 has not yielded any useful result so far as the firm is concerned. However, the issue has yet to be considered by a Master or judge. Part 18 gives the court a wide power to order additional information in relation to any matter in dispute in the proceedings. I have not been asked to consider how that power might be exercised on the facts of this case but that it is a potential route available to the firm cannot be disputed. This is a highly relevant consideration in respect of whether ordering cross-examination would be just and convenient.

44. Taking all of those matters into account, I am satisfied that, even assuming there is jurisdiction to order cross-examination in the circumstances of this case, such an order is not appropriate in relation to Mr Grayson. It would not be just and convenient to make such an order.

45. It follows that both applications fail. At the end of his oral submissions Mr Grant said that the *Norwich Pharmacal* orders had not succeeded in their aim for "extraordinary reasons". It does not seem to me that for two witnesses to contradict each other is extraordinary. Clearly it is frustrating for the firm given the lengths to which they have gone in pursuing this matter. However, it is not such an exceptional circumstance that either Mr Robinson or Mr Grayson should be required to attend for cross-examination."

The grounds of appeal

6. The Appellant notes that the judge proceeded on the basis that it was faced with two inconsistent affidavits from Mr Robinson and Mr Grayson and that one of them must have been lying. It is submitted that "given the Claimant's predicament, there was therefore a strong prima facie case that Mr Grayson should attend for cross-examination". It argues that none of the judge's four reasons for rejecting that case was tenable.

7. The judge's first and (as I see it) principal reason for refusing the application was the one given in paragraph [40] of his judgment, that "cross-examination on the affidavit would pre-empt cross-examination at trial" and that it cannot be just and convenient to order cross-examination on a *Norwich Pharmacal* affidavit sworn by a party to substantive proceedings concerning overlapping issues. The argument, which Mr Tim Lord QC developed before us, that this was an error of principle, is well summarised in the grounds of appeal as follows:

"(a) [...] A claimant should not be hampered in its ability to obtain *Norwich Pharmacal* relief (identifying a third party wrongdoer) merely because they have issued timely substantive proceedings.

(b) It is unrealistic. There is no date for a trial. Meanwhile, the ultimate wrongdoer remains at large.

(c) The reason could only have weight if Mr Grayson was guaranteed to give evidence at trial. There is no such guarantee.

(d) The focus of cross-examination in this application would be upon those who instructed Mr Grayson, not whether Mr Grayson's actions were wrongful.

(e) The Claimant was prepared to undertake not to use any material obtained via cross-examination at any future trial."

8. Turning to the other three reasons given by the judge, the grounds of appeal continue:

"(2) Second, at §41, the Judge stated that "the case against Mr Grayson is limited in scope". However, the nature of the substantive case against Mr Grayson was irrelevant: the purpose of cross-examination was to discover who instructed

Mr Grayson, in order to enable the Claimant to ascertain the full extent of the wrongdoing and bring such other proceedings against other wrongdoers as may be appropriate.

(3) Third, at §42, the Judge relied upon the fact that there was limited material available to deploy in cross-examination. However, the essential difference between Mr Robinson and Mr Grayson is stark, and Mr Grayson's answers to date suggest that he has responded in an extremely technical manner. The purpose of cross-examination was to elicit more complete answers from Mr Grayson, and thus to reveal the identity of those orchestrating the campaign against Stokoe. It is a legitimate expectation that the process of giving evidence under oath before a High Court Judge would, by its solemn and rigorous nature, cause or compel Mr Grayson to give a true account of his part in material matters.

(4) Fourth, at §43, the Judge stated that the Claimant could use CPR Part 18. However, this was wrong in principle: CPR Part 18 is not an appropriate substitute for cross-examination when the veracity of an affidavit is in issue." [The grounds of appeal went on to describe subsequent developments in the litigation, to which I turn next.]

The application to adduce fresh evidence

9. After the order of Tipples J made on 24 July 2020 had produced the short and unhelpful response contained in Mr Grayson's affidavit on 29 July 2020, the Claimant tried the more conventional route of a request for further information under CPR Part 18. The first such request, served on 10 August 2020, produced, after some protestation, a response by Mr Grayson and his company on 30 September 2020 which, in the manner of a pleading before the Woolf reforms, said that the Claimant was not entitled to the information sought. A further request was served on 20 November 2020, to which a similarly unhelpful response was given on 4 December 2020. Master Brown, at a hearing on 11 December 2020, then made an order requiring Mr Grayson to give substantive answers to a number of the requests, verified by a statement of truth. That order was stayed pending an application to a judge for permission to appeal. When by an order made on the papers on 12 March 2021 Johnson J refused permission to appeal, adding that the application was totally without merit, Mr Grayson was at last compelled to answer the Claimant's questions about whether he or his company had ever given instructions or requests (directly or indirectly) to Mr Robinson to investigate the Claimant and/or to obtain information about the Claimant.
10. The response dated 19 March 2021 stated (among other things) that Mr Grayson was interested in the Claimant's financial affairs as a result of conversations with Mr Nick del Rosso of Vital Management Services. The Claimant says that Mr del Rosso's name could and should have been provided months earlier.
11. The Appellant seeks to rely on further new material which was not available to the judge. On 22 March 2021 Mr Page and his company, the Third and Fourth defendants

to the present claim, gave disclosure and inspection of documents in the claim; Mr Grayson and his company did so on 29 March 2021. Some of these documents at least arguably reinforce the Claimant's case against Mr Grayson. It appears that Mr Grayson had been retained by Vital Management Services for a three-year period from August 2018 (and so, says the Claimant, his conversations with Mr del Rosso about the firm were not simply casual chats between friends over a drink). Another arguably significant document is an email sent by Mr Grayson to himself attaching a chart showing links between various individuals (including some lawyers) involved in the Al Sadeq litigation. At the outset of the oral hearing of this appeal we indicated that we had read the new material and that it could be considered at the hearing *de bene esse*.

12. In my view the fresh evidence should be formally admitted. It is well established that the principles of *Ladd v Marshall* [1954] 1 WLR 1489 do not apply in their full rigour to appeals against interlocutory decisions. It would be wholly artificial to ignore pleadings served since the order of William Davis J. I also agree with the submission made by Mr Lord that it would be unjust not to take the disclosed documents into account. They do not show that in swearing the affidavit ordered by Tipples J Mr Grayson was in contempt. He was entitled as a matter of law to answer the question exactly as it was drafted. But they do show that, in responding as he did, Mr Grayson was sailing very close to the wind.

Cross-examination of a defendant prior to trial

13. Although the judge gave four reasons (or, as he described them, "difficulties") which led him to refuse the Claimant's application, the most important by far and the one which (if I may say so) justified the grant of permission to appeal to this court, was the first. It raises an important question on the circumstances in which a defendant to a claim can be cross-examined prior to trial.
14. CPR 32.7(1) provides that "where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence". As the notes to this rule in the White Book make clear, the evidence concerned may be in a statement of case, an affidavit, a witness statement, a witness summary or an application notice.
15. It appears to have been common ground before the judge, and was again before us, that the court may order such cross-examination whenever it is "just and convenient". This hallowed phrase is contained in s 37 of the Senior Courts Act 1981, which deals with the power of the High Court to grant an injunction, and has been held by this court to apply to applications to cross-examine a deponent to an affidavit in answer to an order ancillary to a freezing injunction. The present case does not involve an injunction, and it is therefore less obvious that the s 37 test is the right one. But even assuming that it is, the phrase "just and convenient" does not confer a discretion of infinite width. The discretion must be exercised in accordance with established principles.
16. The jurisdiction to order disclosure established in *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133, in its classic form, is exercised against an innocent third party who has become mixed up with the tortious activities of a wrongdoer. In *Norwich Pharmacal* itself the appellants owned a patent for a

chemical compound which they alleged was being infringed by illicit importations into this country. Their claim against the Commissioners of Customs and Excise did not suggest that the commissioners were themselves infringing the patent: all the appellants wanted was to see the customs documents which might reveal the names of the importers. But here the Claimant does not say that Mr Grayson has innocently become mixed up in wrongdoing: far from it. He is a defendant to a claim against him seeking damages and other relief for conspiracy with others to injure the Claimant.

17. English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at a trial where that party has chosen to give evidence. Examination of a judgment debtor is an obvious and long-standing exception; and it should be noted that an order for a judgment debtor to attend for examination can be endorsed with a penal notice (CPR 71.2). So too, since the 1980s, is the jurisdiction to order cross-examination on an affidavit sworn in answer to an application for a freezing injunction containing an order for disclosure of the whereabouts of assets. But there the court is not assisting the claimant to establish its substantive case against the defendant: it is merely seeking to protect the assets from being concealed, dissipated or transferred abroad so as to frustrate the effectiveness of any judgment which the claimant will obtain at trial.
18. The jurisdiction to order cross-examination on an affidavit giving disclosure of assets as a remedy ancillary to a freezing injunction was first established by the decision of this court in *House of Spring Gardens Ltd v Waite* [1985] FSR 173. In *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (The Rialto)* [1996] EWCA Civ 759 Phillips LJ said that an order for cross-examination on an affidavit in what was then called a *Mareva* injunction case was an exceptional measure. He continued:

“Mr Allen's most forceful submission was that it was wrong in principle to order cross-examination on a *Mareva* discovery affidavit in respect of matters which had relevance to the substantive issues in the action. He pointed out that the defendant has an option whether or not to give evidence and submit to cross-examination at the trial. Before the defendant takes that decision the plaintiff has to undertake the burden of adducing evidence to make out his case. It was, submitted Mr Allen, manifestly unjust that a plaintiff should be able to compel a defendant to submit to cross-examination which might provide the plaintiff with the material on which to advance his case on the merits. It was doubly unjust that this should occur before the close of pleadings and discovery. Here, with more justification, Mr Allen relied again upon Scott J's reference [in *Bayer v Winter* [1986] 1 WLR 540] to the Star Chamber inquisition.

In my judgment, it is undesirable that a plaintiff should be able in *Mareva* proceedings to extract, by cross-examination under order of the court, material upon which to build his case for the substantive hearing. I envisage circumstances where, if this were the price that had to be paid for an effective *Mareva* injunction, it would, nonetheless, be a price worth paying in the

interests of justice. But the court must be astute to guard against abuse of the *Mareva* process by plaintiffs who are using it in an attempt to discover facts that will assist them in the action. The fact that cross-examination on a *Mareva* discovery affidavit will relate to matters which are relevant to the substantive issues, is a matter to which the judge should have regard when considering whether to permit this process.”

19. In *Jenington International Inc v Assaubayev* Vos J said at [22] that the requirements for ordering cross-examination in a freezing injunction case may be summarised as follows:

“(1) the statutory discretion to order cross-examination is broad and unfettered. It may be ordered whenever the court considers it just and convenient to do so;

(2) generally cross-examination in aid of an asset disclosure order will be very much the exception rather than the rule;

(3) it will normally only be ordered where it is likely to further the proper purpose of the order by, for example, revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment against the defendants going unsatisfied;

(4) it must be proportionate and just in the sense that it must not be undertaken oppressively or for an ulterior purpose. Thus, it will not normally be ordered unless there are significant or serious deficiencies in the existing disclosure; and

(5) cross-examination can in an appropriate case be ordered when assets have already been disclosed in excess of the value of the claim against the defendants.”

20. At [74] Vos J said:-

“Under all heads the cross-examination that is to be allowed must be clearly focused on identifying assets belonging to the defendants against which the worldwide freezing order should bite. No ancillary cross-examination affecting the merits of the claim will be permitted. That is not the purpose of what is being allowed. I will be astute to ensure that the cross examination does not become excessive or oppressive or counterproductive and that the claimants do not obtain a collateral advantage in the substantive litigation by being allowed to pursue the disclosure process to this exceptional next stage.”

21. In *Matthews and Malek on Disclosure* (5th Edition, 2017) the authors write:-

“Even if there is no jurisdictional bar to ordering cross-examination of a deponent on his affidavit or disclosure statement, the exercise of such power is reserved to extreme cases where there is no alternative relief. In general, the only circumstances whereas cross-examination to documents and disclosure may be appropriate at an interlocutory stage is in the context of freezing and search orders, where it may be crucial to establish what has happened to and the location of assets prior to trial.”

22. As the judge noted, there are very few examples of cross-examination being ordered on an affidavit sworn pursuant to a disclosure order in the *Norwich Pharmacal* jurisdiction. *Kensington International Ltd v Republic of Congo* [2006] 2 CLC 588 concerned proceedings taken by Kensington after that company had purchased debts owed by the Republic of Congo. The Congo had gone to great lengths to avoid meeting those debts. The Congo's assets principally consisted of oil, which it traded in a convoluted and arcane manner in an effort to hide its interest in the oil. Dr Nwobodo was an individual said to be involved in the running of a company through which the Congo traded oil. Kensington obtained a search order against Dr Nwobodo as part of the process of enforcement of a judgment obtained against the Congo. In connection with that order he swore an affidavit, the content of which was sparse and gave little or no detail of his dealings with the Congo and its oil.
23. Kensington applied for an order requiring Dr Nwobodo to submit to cross-examination both on his affidavit and more generally in relation to his dealings with the Congo. Morison J granted the order. He found that Dr Nwobodo had been and continued to be involved in the efforts of the Congo to avoid execution of the judgment. At [17] he said:

“It seems to me that there is power to make such an order under section 37 of the Supreme Court Act and under the *Norwich Pharmacal* jurisdiction. On any view, the *Norwich Pharmacal* jurisdiction is apt to cover situations post judgment. Also, on any view, Dr Nwobodo has become mixed up, at the very least, in dishonest attempts to defeat execution of the judgments against Congo....”
24. Morison J described his order as a “blended” order. Thus, it was not an order made solely to enforce a disclosure affidavit. But it is important to note that it was an order made after a judgment and in order to assist in execution of that judgment. As such it seems to me to be analogous to an order for cross-examination of a judgment debtor. I agree with Morison J that the *Norwich Pharmacal* jurisdiction is apt to cover post-judgment situations.
25. *JSC BTA Bank v Solodchenko and others* [2011] EWHC 843 (Ch) was a decision of Henderson J in the course of the complex and long-running *Ablyazov* litigation. It concerned attempts by a Kazakh bank to trace and to recover huge sums of money appropriated dishonestly by senior managers of the bank. The misappropriated funds were channelled through various companies, one of which was called Eastbridge. A Mr Ereshchenko for a number of years was a director of Eastbridge. There came a point at which the court made freezing and disclosure orders against Mr Ereshchenko.

The disclosure required was in respect of bank accounts and the current whereabouts of funds, the purpose being to obtain information to assist in the tracing of misappropriated assets. Disclosure was also required as to the ownership and management of Eastbridge and other companies associated with the channelling of misappropriated assets. The disclosure order was under the *Norwich Pharmacal* jurisdiction, Mr Ereshchenko at that point not being a party to the proceedings.

26. Mr Ereshchenko made a witness statement which was served in the proceedings. His affidavit, sworn a few days later, repeated what was set out in his witness statement. He said that had little knowledge of the supposed involvement of Eastbridge in the misappropriated assets and that he knew nothing of the other companies. He stated that he had no access to relevant documents.
27. On the evening of the day on which the witness statement was served, Mr Ereshchenko was seen to go to the premises of a firm of accountants in a white van. He took away a large number of document boxes. He delivered them to a storage unit. As a result of these events the bank obtained a search order in relation to the unit. The documents disclosed that Mr Ereshchenko's involvement was significantly greater than he had disclosed in his affidavit.
28. Henderson J made an order requiring Mr Ereshchenko to attend for cross-examination. He said at [50] that he was “satisfied that there is no other obvious person from whom to seek information about the role of Eastbridge and the tracing of the disputed assets”. At [54] he said that “it is common ground that the focus of the cross-examination must be on ensuring compliance with the disclosure order, and that it should not be permitted to become a roving inquiry into the general merits of the action, or indeed of the claim against Mr Ereshchenko himself”.
29. I consider that William Davis J was right to describe the order made by Henderson J against Mr Ereshchenko as being essentially about asset tracing. Mr Ereshchenko was not being ordered to set out his defence to the allegation of fraud but to explain the apparent destruction of evidence.
30. At least one other order for cross-examination of a respondent to a disclosure order was made in the *Ablyazov* litigation (see *JSC BTA Bank v Ablyazov* [2015] 1 WLR 1547 at [11]) but there is no reported information about the basis on which Cooke J made that order.
31. I do not accept the submission on behalf of the Appellant that once Tipples J (by consent) made an order for disclosure not merely in the form of a witness statement or the provision of further information under CPR 18 but by affidavit, the door was automatically open to cross-examination on that affidavit. As noted above, CPR 32.7 is of general application. Under the old Rules of the Supreme Court it was usual for all evidence in support of or in opposition to applications for interlocutory injunctions to be on affidavit. The authorities such as *House of Spring Gardens* and *Yukong v Rendsburg* proceed on that basis. Affidavits are still required in certain types of case, such as freezing injunctions and search orders, but not in others. I do not accept that by consenting to provide an affidavit (as opposed to, say, a witness statement verified by a statement of truth) in July 2020 Mr Grayson was automatically opening himself up to cross-examination in order to assist the Claimant in establishing with whom he had, on their case, conspired to commit torts against it.

32. The judge recorded that the Claimant had conceded that it would have to give an undertaking that any material obtained in cross-examination would not be used against Mr Grayson at trial. Mr Lord told us that he doubted whether that concession had been rightly made. For my part I do not see that it could be effective in practice. No doubt an order could be made that answers given on such a cross-examination could not themselves be put in evidence at the trial save by leave of the court. But that would give only very limited protection to the defendant.
33. I consider that the judge's first reason for refusing cross-examination was a sound one. Witness statements are not due to be exchanged until 14 May this year, and until then little is known about what evidence Mr Grayson will put forward. All one can say at this stage is that if the case goes to trial and Mr Robinson's evidence is accepted Mr Grayson will be in grave difficulties. But the Claimant is not entitled to an order that he must attend for cross-examination prior to that trial and be liable to imprisonment for contempt if he refuses to comply.
34. In those circumstances it is not necessary to deal in detail with the judge's other reasons at paragraphs [41]-[43]. I do not agree that the case against Mr Grayson is "limited in scope" as he said in paragraph [41]; and if it were, that would if anything be a pointer in favour of allowing cross-examination on issues unconnected with that limited scope. I have already dealt with the distinctions between the present case and the decisions in *Kensington International Ltd v Republic of Congo* and *JSC BTA Bank v Solodchenko*. Finally, I agree with the judge's view that an application for an order by a master or judge requiring the provision of further information under CPR 18 would be an alternative open to the Claimant. The fresh evidence shows that this alternative procedure has indeed moved the Claimant's case forward.

Conclusion

35. I would dismiss this appeal. I reach that conclusion with some reluctance, because in my view Mr Grayson has brought this litigation on himself. Since the swearing of the affidavit of 29 July 2020 he has engaged in months of stonewalling and bare denials. He was fortunate to obtain an order for costs in his favour from the judge. Subject to any submissions in writing lodged and served by 2 pm on Thursday 29 April 2021, I would make no order as to costs in this court.

Lord Justice Peter Jackson:

36. I agree that the appeal should be dismissed for the reasons given by Bean LJ and I also agree with his provisional view about costs. I particularly support what he says about the judge's second reason for refusing the application, and would only add this. The underlying complaint in this case is very troubling if it is true. However, the judge, when describing the case against Mr Grayson as "limited in scope", did not refer to the most serious of the allegations, which concerned hacking into the Claimant's bank account. This, and his observation about "the lengths to which they have gone in pursuing this matter", may suggest that he did not entirely place the application in its wider context when assessing justice and convenience. However, that cannot invalidate his decision to refuse specific relief that was, even in the circumstances of the case, inappropriate.

Lord Justice Coulson:

37. I also agree that, for the reasons given by my Lord, Lord Justice Bean, this appeal should be dismissed. I also agree with his preliminary view on costs at [35]. On the face of it, all the time and money spent on this aspect of the dispute would have been saved if Mr Grayson had complied with the CPR and provided a proper answer to the original Part 18 request.

(Order: Appeal dismissed with no order as to costs. Claimant's application for permission to appeal to the Supreme Court refused.)