Neutral Citation Number: [2022] EWHC 3313 (Comm)

Case No: CL-2022-000483

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/2022

Before :

MR. ADRIAN BELTRAMI KC
Sitting as a Judge of the High Court

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Between :

(1) AQR CAPITAL MANAGEMENT, LLC
(2) DRW COMMODITIES, LLC
(3) FLOW TRADERS BV
(4) CAPSTONE INVESTMENT ADVISORS, LLC
ON BEHALF OF
CAPSTONE GLOBAL MASTER (CAYMAN) LIMITED
(5) WINTON CAPITAL MANAGEMENT LIMITED **Claimants**

- and -

(1) THE LONDON METAL EXCHANGE
(2) LME CLEAR LIMITED **Defendants**

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Paul McGrath KC and Sophia Hurst (instructed by **Kirkland & Ellis International LLP**) for the **Claimants**
James McClelland KC and Emily MacKenzie (instructed by **Hogan Lovells International LLP**) for the **Defendants**

Hearing date: 16 December 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ADRIAN BELTRAMI KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 23 December 2022 at 10:30am.

ADRIAN BELTRAMI KC:

1. By Claim Form issued on 8 September 2022, the Claimants seek the following relief:

   "The Applicants apply under section 33(2) of the Senior Courts Act 1981 and CPR 31.16 for an order that the Respondents give Norwich Pharmacal and/or pre-action information and disclosure in relation to the decision and reasons for the decision by the First and/or Second Respondent to suspend and thereafter cancel all trades executed on or after 00.00 UK time on 8 March 2022 and defer delivery of all physically settled nickel contracts due for delivery on 9 March 2022, including oral discussions and correspondence both internally and with relevant third parties, to the extent that such information and documents are in their custody, possession or control."

2. There is also an application notice of the same date, seeking the same relief. Relief is accordingly sought both under the equitable jurisdiction described in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 and pursuant to CPR 31.16. Strictly speaking, I imagine that, insofar as the *Norwich Pharmacal* jurisdiction is being invoked, I am being asked to grant final judgment on the Claim Form, whereas the resort to CPR 31.16 is a separate application outside existing proceedings. At any rate, I shall treat the claim and the application together and refer generally to the Claimants and the Defendants.

3. The matter was fixed for hearing in the Friday Commercial Court list, with a time estimate of two hours. The 27 authorities cited by the Claimants, together with the 16 cited by the Defendants (even with some duplicates) signalled that the time estimate was more than ambitious. Apparently important arguments were truncated and, even then, it was not possible to give judgment on the day. This is accordingly my reserved judgment.

4. The application was supported by the 1st and 2nd witness statements of Richard Matthew Boynton, dated 7 September 2022 and 21 November 2022 respectively, and opposed by the 1st witness statement of Alexander Charles Sciannaca dated 31 October 2022.

Introduction

5. The Claimants are a group of separate investment firms. The First Defendant (the **LME**) is an unlimited company incorporated in England and Wales. It is a subsidiary of LME Holdings Ltd which, on 6 December 2012, was acquired by Hong Kong Exchanges and Clearing Ltd (**HKEx**). The LME is a Recognised Investment Exchange under the Financial Services and Markets Act 2000 (**FSMA**), regulated by the Financial Conduct Authority. It is governed by and subject to the LME Rules and Regulations, as set out in the applicable LME Rulebook. It is one of the world's largest metal trading markets. The Second Defendant (**LME Clear**) is the clearing house for the LME and a central counterparty for all LME Clearing Members and their trading activity.

6. Both the LME and LME Clear are public bodies for the purposes of section 6 of the Human Rights Act 1998 (**HRA**) and their decisions are amenable to judicial review.

As recognised public bodies, they are also entitled to the statutory immunity granted under FSMA s. 291. As a result, and save in respect of unlawfulness under HRA s. 6(1), they cannot be liable in damages for anything done in the discharge of their regulatory functions unless it is shown that the act or omission was in bad faith.

The Decisions

7. The events which have given rise to the present application concern trading on the LME nickel market in March 2022. Each of the Claimants is said to have held nickel positions in that market at that time. The events were well publicised and, at least insofar as not in dispute, for present purposes may be shortly summarised:

    a. In late February/early March 2022, the price of nickel on the LME market began to increase amidst fears that the Russian military invasion of Ukraine would affect global supplies.

    b. The evidence on the application describes the scale of the price rises by reference to public information or information reported in the press. I do not know whether the precise detail will be in dispute, but this does not matter for present purposes. Taking the information from Mr Boynton's 1st statement:

        i. Between 25 February 2022 and 4 March, the 3 month closing price increased from USD 24,700 per metric tonne (**pmt**) to USD 29,800 pmt.

        ii. On 7 March 2022, the closing price reached a high of USD 48,078 pmt.

        iii. On 8 March 2022, the 3 month nickel price had risen still further, surpassing USD100,000 pmt by the early morning.

    c. At 08.15 on 8 March 2022, the LME published Notice 22/052, which announced that nickel trading on LME venues was being suspended with immediate effect (the **Suspension**). This was said to be "*following further unprecedented overnight increases in the 3 month nickel price*". The Notice explained further:

    "*The LME, in close discussion with the Special Committee, has been monitoring the LME market and the effect of the evolving situation in Russia and Ukraine. It is evident that this has affected the nickel market in particular, and given price moves in Asian hours this morning, the LME has taken this decision on orderly market grounds."*

    d. Sometime later on 8 March 2022, the LME then published Notice 22/053, which stated as follows:

    "*The LME has been monitoring the impact on the LME market of the situation in Russia and the Ukraine, as well as the recent low stock environment and high pricing volatility environment observed in various LME base metals and in particular Nickel. With immediate effect, and following the suspension of*

*the LME Nickel market announced in Notice 22/052, the LME (acting where required through the Special Committee) has determined that it is appropriate in the circumstances to take the following actions in respect of physically settled Nickel Contracts: (i) cancel all trades executed on or after 00.00 UK time on 8 March 2022 in the inter-office market and on LME select until further notice (**Affected Contracts**)…*

"The current events are unprecedented. The LME is committed to working with market participants to ensure the continued orderly functioning of the market. The suspension of the Nickel market has created a number of issues for market participants which need to be addressed. This Notice is intended to address the most pressing of those issues. Further communications will be issued during the source of today, including regarding the process for reopening the market."

e. The Claimants describe the effect of the above as the **Cancellation**. The Defendants refer to it as the **Wind back**. It may be that on some future occasion this difference carries a legal significance but it does not do so on the present application and I shall adopt the Claimants' term purely as a matter of convenience. I refer also to the Suspension and the Cancellation together as the **Decisions**.

f. On 10 March 2022, the LME published Notice 22/057 which gave "*further information*" on the Decisions:

"7. Throughout the recent days, the LME has been monitoring closely the impact of the evolving situation in Russia and Ukraine and, in particular, the recent low-stock environment and high pricing volatility in the Nickel market. During Monday 7 March, significant upward price movements were observed. However, the LME considered that trading activity up to and including close of trading on Monday evening had been orderly.

"8. During the early hours of trading on the morning of Tuesday 8 March, Nickel prices moved up significantly in a short period of time. It became clear that pricing in the early hours trading did not reflect the underlying physical market and that the Nickel market had become disorderly. The LME therefore took the decision, in consultation with LME Clear, to suspend trading in all Nickel contracts with effect from 08:15 UK time (Notice 22/052).

"9. Given the extreme price moves and thin trading volume during early hours trading, the LME also took the decision (Notice 22/053), in the interests of market stability and integrity, to cancel all trades executed on or after 00:00 UK time on 8 March in the inter-office market and on LMEselect. Cancellations were made retrospectively in order to take the market back to the last point at which the LME could be confident that the market was operating in an orderly fashion and that prices reflected the underlying physical market – i.e. the close of the previous trading session.

"10. This was in part due to the LME's conclusion that the significant price moves during the early hours trading activity had created a systemic risk to

> *the market, including in relation to margin calls, which if LME had not acted would have closed at levels far in excess of those ever experienced in the LME market. The LME and LME Clear had serious concerns about the ability of market participants to meet their resulting margin calls, raising the significant risk of multiple defaults and a consequent reduced ability for market participants to continue to access the market and manage their risk."*

g. The LME nickel market was re-opened for trading on 16 March 2022.

8. It is the Claimants' case that the Decisions, especially the Cancellation, have caused them substantial losses. In very crude terms, investors who entered into nickel futures trades on 8 March for the sale of nickel at the elevated prices seen on that day could expect to make significant profits, whereas investors who held "*short*" positions saw those positions become loss-making on the rapidly risking market. Accordingly, a retrospective cancellation of agreed trades would operate to the disadvantage of one group of investors but to the advantage of a different group of investors. This complaint is put into sharp focus by the Claimants' further contention, or at least belief, that there was one very large investor, who had been taking significant short positions, and who was in effect "*bailed out*" by the Cancellation. That investor has been identified in press articles as Tsingshan Holding Group (**THG**), owned by the Chinese entrepreneur Xiang Guangda (**Mr Guangda**).

9. On present information, and one of the Defendants' complaints is that there is very little information coming from the Claimants, the Claimants estimate their losses caused by the decisions at USD 95 million.

The correspondence

10. By letter dated 10 March 2022, the First Claimant (**AQR**) wrote to the LME contending that there had not been a proper explanation for the Decisions and seeking a detailed answer to various questions about the decision-making process as well as copies of applicable minutes. The letter concluded:

> "*Unless an explanation is given for the LME's actions, market participants are left with the impression that a deliberate decision has been made to favor some market participants over others (or at the least, that the LME failed properly to consider the overall position of all market participants when making its decision)… Unless a clear rationale is provided, it appears that the LME has failed to perform its regulatory functions, including running the exchange in an orderly manner which provides proper protection to investors in breach of paragraph 1(a) of "The London Metal Exchange Complaints Procedure"."*

11. This letter was followed up by a further letter from AQR, dated 16 March 2022, in which it was said that AQR was "*considering commencing litigation or arbitration against the LME*", that the LME should take steps to preserve documents and that it should treat the two letters as letters before action in accordance with the Practice Direction on Pre-Action Conduct and Protocols.

12. The Defendants first responded, through their solicitors, Hogan Lovells International LLP (**HLI**), by letter dated 17 March 2022, which reiterated the reasons for the

Decisions summarised in the LME Notices. This letter may have crossed with a further letter to the LME, sent on this occasion by three investment funds, AQR, Elliott Investment Management LP and Teacher Retirement System of Texas. There was then a series of exchanges between HLI and Kirkland & Ellis International LLP (**KE**) on behalf of AQR, in which KE sought what they referred to as a "*full explanation*" of the rationale for the Decisions.

13. By letter dated 8 April 2022, HLI provided, or at least purported to provide, such a full explanation. This is a letter which runs to 13 pages and describes the market developments over the critical period. So far as the decision making is concerned, and amongst other things, the letter sets out the following by way of explanation:

"5.4 In the judgement of the LME and LME Clear Executives:

(a) It was clear that (i) the sharp price increases (in particular the large gaps in price moves); and (ii) the fact that the high prices appeared to have no connection with news relating to the situation in Ukraine, meant that the price volatility on the morning of 8 March 2022 could not have been caused by rational market forces; the price at which trades were occurring had clearly become significantly dislocated from the real-world factors that the LME considered would generally impact the price of forward contracts for the delivery of metal to which the trades related and was being influenced by other, disorderly causes (although at the time the LME was not aware of what those causes were). For these reasons, the LME and LME Clear Executives' view was that the Nickel market had become disorderly.

(b) The price increase would have resulted in significantly large margin requirements. Increases in margin requirements of this magnitude would, in the LME and LME Clear Executives' view, place significant stress on the market, as Clearing Members and their Clients would be required to find substantial liquidity (of an order of magnitude never before seen on LME's market) to meet their requirements. This would create a systemic risk to the market, as it was likely to result in:

(i) multiple Clearing Members being at risk of defaulting on their margin requirements and potentially going insolvent;
(ii) the Default Fund likely being entirely depleted by the losses that would potentially crystallise if margin requirements caused multiple Clearing Members to go into default; and
(iii) fewer viable Clearing Members in the market potentially meaning Clients not having access to the market to respond.

(c) The magnitude of the price increase, and the widespread and severe impact on Clearing Members and their Clients of the release by LME Clear of the resultant margin requirements, was such that no amount of delay in the release of margin calls or the provision of liquidity support to market participants could remedy the situation. In particular, while LME Clear had paused margin calls from 13:00 for the rest of the day on Monday 7 March 2022, this could only ever be a temporary measure to avoid liquidity risk caused by too-frequent margin calls being released and LME Clear could not

continue to be not-fully collateralised against Clearing Member default, particularly in such a volatile market, given the risk this posed to the market as a whole.

"5.5 In the circumstances, in particular the record-breaking and volatile prices that had been generated by the, in the LME and LME Clear Executives' view, disorderly market conditions and the systemic risk this posed to the market as a whole, the LME and LME Clear Executives considered that the disorderly nature of the market justified suspending the market. The LME and LME Clear Executives concluded at around 6:10am that, if the current market conditions persisted, suspension of the market would be the only viable option. The LME and LME Clear Executives began to make arrangements for the suspension of the market and convened a meeting for 7:30 to discuss taking the decision to suspend."

The JR proceedings

14. In the period after these exchanges between HLI and KE, certain investment funds commenced judicial review proceedings against the LME and LME Clear in respect of the Decisions. The first proceedings were brought by Elliott Associates LP and Elliott International LP, funds which I understand to be linked with the Elliott Investment Management LP who were co-signatories alongside AQR to the letter to the LME of 17 March 2022. The second proceedings were brought by Jane Street Global Trading, LLC.

15. The Statements of Facts and Grounds in those proceedings contain the basis on which judicial review is sought. Similar Grounds are advanced in both proceedings. The grounds in the Elliott proceedings fall under the following heads:

    a. Lack of Vires.

    b. Procedural Unfairness, comprising failure to allow representations, bias and absence of published policy.

    c. Relevant and irrelevant considerations.

    d. Improper purpose.

    e. Insufficient enquiry.

    f. Unreasonableness.

16. The judicial review proceedings also include claims for damages for violation of those Claimants' rights under HRA, in total sums in excess of USD 450 million.

17. It is a feature of both sets of proceedings that the judicial review Claimants complain about what they consider to be inadequate explanations given by the LME as to the reasons for the Decisions and contend that there has been a failure to comply with the LME's public law duty of candour. Be that as it may, the proceedings were in fact commenced on the basis of the information known and supplied. Further, by Order of Sir Ross Cranston dated 3 October 2022, applications for permission to apply for

judicial review were granted in both cases. On 28 November 2022, accordingly, LME and LME Clear served Detailed Grounds of Defence, running to 59 pages.

18. None of the present Claimants was party to the judicial review proceedings. There was no explanation as to why they did not take the course adopted by these other investment funds but I do not see that that particularly matters. The fact is that they did not do so and that they are now unable to do so because they are out of time. I was told that the Claimants consider that they might still be able to make a free-standing claim under HRA though the Defendants reserve their position on whether such a claim is now available. I was not asked to resolve that dispute and so leave the possibility of any such proceedings out of account.

The application

19. I attach, by way of Appendix to this Judgment, the body of the draft order sought by the Claimants. This had been subject to some modification in advance of the hearing, which the Claimants said was by way of limitation and the Defendants said involved significant expansions. Putting that debate to one side, it will be seen that the claimed relief is in two parts:

    a. The provision of the documents specified in Schedule 1, comprising both internal documents "*in respect of*" the Decisions and communications including external communications "*relating to*" the Decisions.

    b. An affidavit that "*sets out and explains*" the matters in Schedule 2, namely details of "*all oral discussions",* both internal and external, the latter with a broad list of categories of potential third parties.

20. Mr McClelland KC, on behalf of the Defendants emphasised the very broad scope of Schedules 1 and 2. Mr McGrath KC, on behalf of the Claimants suggested that the scope was not so very broad but that, in any event, I could pare it down if I were otherwise prepared to grant an order of some description (and he also said that the Defendants had not engaged on scope). As to the first point, I disagree with Mr McGrath. As it seems to me, the draft Order is extremely broad and indeed intrusive. It seeks (a) what is in effect early disclosure on a broad scale; and (b) early witness evidence from the proposed Defendants on the very matters which will be in dispute in any future action. Indeed, it is not just early witness evidence. It is early evidence, by affidavit, on all matters which the Claimants consider should be addressed by the Defendants in that evidence. As to the second point, whilst there is always scope for fine tuning a draft order, I need to address the application as it is made and by reference to the relief which is sought, especially given the clear warnings in the authorities about the appropriate scale of the jurisdiction.

The intended claims

21. The application for *Norwich Pharmacal* relief is put on the basis of an intention to bring legal proceedings against the Defendants. Insofar as the application is made under CPR 31.16, one of the criteria is that the respondent is likely to be party to subsequent proceedings. Hence, it is important at the outset to be clear about what the proceedings are or may be, in order to frame the analysis.

22. As I have indicated, the Claimants are out of time to bring judicial review proceedings for what might be called the public law unlawfulness which is alleged in the two extant claims. Equally, the argument over a potential claim under HRA is not a matter for me. Instead, the Claimants have identified various "*private law*" claims which they say they may be able to bring against the Defendants. These are described in Mr McGrath's skeleton argument as being, or at least as including:

    a. A claim in "*general negligence*".

    b. The economic tort of causing loss by unlawful means.

    c. Conspiracy to cause loss by unlawful means.

23. Of these three potential causes of action, the claim in "*general negligence*" would require the establishment of a duty of care, presumably based on objective criteria. Elements of the other causes of action include intention and unlawfulness. Of more immediate relevance is the statutory immunity under FSMA s. 291. Mr McClelland submitted, and I did not understand Mr McGrath to disagree, that any "*private law*" cause of action would be viable only if the Claimants could also establish that the Defendants acted in bad faith.

Norwich Pharmacal jurisdiction

24. The *Norwich Pharmacal* jurisdiction has been developed and applied beyond the fact pattern described by their Lordships in the case then before them. There have also been various attempts to structure the applicable considerations on any application. Both parties directed me to the framework set out by Saini J in *Collier v Bennett* [2020] EWHC 1884 (QB), [2020] 4 WLR 116 at [35], after a review of previous cases, which I adopt:

    "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 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").

    (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")."

25. Saini J went on to flesh out certain further considerations applicable to the above tests, many of which are also relevant to the present application and which I can also therefore usefully repeat:

"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.

"37. Based on the submissions made to me, I would identify a number of particular points which require emphasis when applying these conditions.

"38. First, in relation to condition (i), Arguable Wrong, as Ramilos makes clear at para 17, showing a good arguable case requires more than "an honest and reasonable belief that there has been wrongdoing".

"39. Second, the court has to be vigilant in guarding against "fishing exercises" in what is regarded as an exceptional jurisdiction. Flaux J in Ramilos cited Lord Mance JSC's analysis of the scope of the jurisdiction in the Privy Council in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675 at [139]–[140] and at [62] held that:

> *"As that analysis demonstrates, the Norwich Pharmacal jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide ranging disclosure or gathering of evidence, as opposed to focused disclosure of necessary information: see the judgment of Rimer J in Axa and the Divisional Court in Mohamed at [133]. It clearly does not extend to the sort of wide ranging requests set out in the schedule to the draft order in the present case. Furthermore, 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. This emerges from the decision in Norwich Pharmacal itself, particularly in the speech of Lord Cross of Chelsea, in the passage where he approves the Post case to which Rimer J refers in Axa as cited at [23] above. I agree with Rimer J that Lord Cross was approving the whole of the passage he cited from the Post case, including the statement that bills of discovery could not be used: 'to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant."*

"40. Third, in relation to condition (iv), the Overall Justice Condition, the principles to be derived from the authorities generally, including the factors relevant to the exercise of the court's powers were considered by the Supreme Court in The Rugby Football Union v Consolidated Information Services Ltd (Lord Kerr) at [15]–[17]. I will not set out that lengthy extract which is now well known. Lord Kerr's summary is

helpful but not intended to cover every possible factor which might go to the Overall Justice Condition. It is not intended to be used as a form of statutory check-list.

"41. Finally, I observe that it is not necessary to resolve the issue raised before me as to whether the court is conducting some form of discretionary exercise in applying the Overall Justice Condition. It is simply a heavily fact-specific judicial assessment of whether the remedy is required to do justice. I refer to Andrew Baker J's observations in Burford Capital at para 42.2 where he neatly summarises what I think is the nub of the question the court must answer in relation to the Overall Justice Condition."

26. In addition to the above, there were certain other considerations which were the subject of argument or discussion before me and which also bear upon the application.

27. First, it was common ground that the test for a "*good arguable case"* is the same as that applied on an application for a freezing order, namely a case which is more than barely capable of serious argument yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success: *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm) at [14], per Flaux J, citing from *The Niedersachsen* [1983] 2 Lloyd's Rep 600, at p 605.

28. Second, Mr McGrath was at pains to emphasise that the subject matter of the "*good arguable case*" is the existence of a legally recognised wrong, and that this is so whether or not the Claimant is aware of sufficient material to enable it to plead out a cause of action. This must be right, so far as it goes: in the paradigm case of unknown identity, as in *Norwich Pharmacal* itself, the case could not be pleaded until that identity was revealed.

29. Third, and that said, it seems to me that it may often be quite difficult to draw the distinction between the facts sufficient to establish a good arguable case of the existence of a legally recognised wrong and the facts sufficient to plead a case which vindicates that wrong. In many situations, I would expect there to be little real distinction in practice. This is because the question of what needs to be shown to establish a good arguable case of wrongdoing cannot be divorced from the legal elements of that wrongdoing. In *Hickox v Dickinson* [2020] EWHC 2520 (Ch) at [51], Clare Ambrose, sitting as Judge of the High Court, said that where the application is made on the basis of an arguable cause of action, "*It is insufficient if there is no good arguable case for an essential element of that action."* With respect, I agree. Whatever the flexibility of the jurisdiction, a party seeking to establish a good arguable case that a legally recognised wrong has been committed against it, must be able to show a good arguable case of the essential elements necessary to vindicate the claim for that wrong, even if there is something else which may be necessary for the pleading.

30. Fourth, this also ties in with the point made by Saini J in *Collier*, at [39]. The jurisdiction is an exceptional jurisdiction, which is not to be used for "*fishing expeditions*" to establish whether or not the Claimant has a good arguable case. That risk will be avoided, or at least ameliorated, by the requirement that the Claimant demonstrate a good arguable case of (at least) the essential elements to vindicate any

claim. Mr McGrath took me to the decision of Sir Richard Scott VC in *P v T* [1997] 1 WLR 1309, at p 1318, where an order was made even though the plaintiff was not able to say without more information whether a tort had been committed against him. He also referred to the decision of Neuberger J in *Coca Cola v British Telecommunications plc* [1999] FSR 518, at p 523. However, as noted by Flaux J in *Ramilos*, at [16] and [17], these were exceptional cases at the "*outer limits*" of the jurisdiction and I do not regard them as standing for any broader proposition. On the contrary, and as noted by Flaux J, at [62], "*It is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case…".*

31. Fifth, a notable feature of this case is that the claim for *Norwich Pharmacal* relief is made against the only potential Defendants in the intended action. I accept the submission of Mr McGrath that there is no formal bar to such a claim. This is not a jurisdiction which is likely to have such hard-edged rules and I was referred to one case, *Sarayiah v Williams* [2017] EWHC 2915 (Ch), at [28], where Jay J was of the view that it was not a misuse of the jurisdiction to claim against intended Defendants. The Judge in that case said that that was "*a relevant consideration but it is not decisive."* I agree. I see no reason in theory why a party cannot seek *Norwich Pharmacal* relief against an intended Defendant but this is bound to affect the overall evaluation of the claim. It is not a claim based on the need for third party assistance but on an entitlement to require a defendant to provide evidence against itself. That immediately raises questions as to why that is thought necessary and appropriate and indeed why such a case differs from any other action in which a Claimant may be expected to proceed with what it has already got and without further assistance from equity. It also raises fundamental questions about procedural fairness, which questions become more pressing the greater the scale of the relief sought. That is why I mentioned earlier the scope of the draft order sought by the Claimants. Mr McClelland submitted that, even in the context of an already exceptional jurisdiction, it would be unusually exceptional to order an intended defendant to provide full disclosure and indeed full witness evidence about the subject matter of a complaint before the action has been begun. I entirely agree.

32. In this context, it is relevant also to refer to CPR 31.16. The applications under *Norwich Pharmacal* and CPR 31.16 were advanced as distinct procedural routes, albeit that almost all the attention was focussed on the former. That may be correct as a matter of form and it is right that tests are not identical, but, where the *Norwich Pharmacal* claim is made against the intended Defendant, the request for documents has similar basic characteristics to that under CPR 31.16. I was taken by Mr McClelland to *Carillion plc v KPMG LLP* [2020] EWHC 1416 (Comm), where Jacobs J noted, at [15], that applications under CPR 31.16 were "*relatively rare*" in the Commercial Court and that the authorities to which he was referred contained "*no recent examples of successful applications*." That does not of course mean that the Commercial Court will not make such an order when appropriate to do so but it does illustrate the very exceptional nature of such an order against an intended Defendant. I see no reason why a Claimant should stand an appreciably better chance of success by invoking the *Norwich Pharmacal* jurisdiction rather than CPR 31.16 to seek the same documents against the same intended Defendant.

Application of the criteria

The arguable wrong condition

33. At paragraph 24 of his skeleton argument, Mr McGrath identified the factors that his clients rely upon to establish a good arguable case "*that some form of wrongdoing has been committed*" (emphasis in original). This approach was objected to in principle by Mr McClelland who submitted that it could not be enough, in a case such as this, for the Claimants to be able to demonstrate, to the relevant standard, that "*some*" form of wrongdoing had occurred. Specifically, it would not help the Claimants to point to any factors which support the contention that there has been some form of public wrongdoing, of the sort alleged in the judicial review proceedings. That is because the Claimants have chosen, for whatever reason, not to pursue such proceedings and are now unable to do so. In such circumstances, it would be unprincipled to permit the Claimants to use an argument as to the existence of "*public*" wrongdoing, if I can call it that, to justify a claim for *Norwich Pharmacal* relief to support a private law claim.

34. By the end of the hearing, I was not sure if Mr McGrath disagreed with this but, in any event, I consider it to be correct. The focus and purpose of the claim for *Norwich Pharmacal* relief is to enable the Claimants to bring (or, as Mr McGrath reminded me, to decide not to bring) the private law claims which I have described above. The "*wrongdoing*" is not at large and cannot be divorced from the purpose of the claim. In my judgment, Mr McClelland is right to submit that what must be established by the Claimants is a good arguable case of such wrongdoing as can be vindicated in the causes of action identified as potentially available to the Claimants.

35. That takes the analysis back, specifically, to the statutory immunity under FSMA s. 291. Given the terms of that section, an element, and indeed an essential element, of any private law cause of action available to the Claimants is that the Defendants acted in bad faith. Mr McClelland submitted that the Claimants had demonstrated no good arguable case to that effect. Mr McGrath countered that there was on the available evidence a good arguable case of bad faith, sufficient to satisfy the arguable wrong condition, even though, as he candidly accepted, he himself would not feel "*comfortable*" putting his name to a pleading with such an allegation.

36. As I mentioned above, paragraph 24 of Mr McGrath's skeleton identified all the factors relied upon to show "*some*" form of wrongdoing. It is not necessarily easy to distil this paragraph into those factors which are said to demonstrate a good arguable case of bad faith. As I see it, the following are the principal factors relied upon:

    a. It is said that the Decisions were "*unprecedented*", that they involved an interference with the property of the Claimants, that that interference "*demands justification*" and that the Defendants have failed to provide a justification "*beyond asserting that cancelling the trades was necessary to protect the market."* This failure is said to be especially significant in the light of the Defendants' duty of candour.

    b. To similar effect, it is said that the explanations given to date by the LME and by HLI have been unclear and in places inconsistent.

c. Reference is made to the fact that the decisions taken by the LME were binary as to their effect, with certain parties benefiting and others losing. Further reliance is placed on the facts, as alleged, that Mr Guangda/THG was "*the most favoured individual/entity who benefited*", that he is Chinese and that the LME is owned by the Hong Kong Stock Exchange.

d. Finally, it is said that "*credible business media*" have suggested that the LME "*may well have been influenced*" by the consequences to Mr Guangda/THG. Mr McGrath took me to various press articles in which views were expressed about the reasons for the Decisions although, as Mr McClelland pointed out, it seems that AQR may have been a contributor to some of them.

37. The various points are expressed in different ways but the above is a summary of their main thrust. In any event, I have reviewed each of the individual points set out in the paragraph of the skeleton. I do not consider that these points made, taken individually or cumulatively, satisfy the test of demonstrating a good arguable case of wrongdoing through, as an essential element, bad faith. Of the principal matters relied upon, I cannot attach any significant weight to the thoughts expressed in press articles, about the source or basis of which I know nothing. That would be to shore up speculation by speculation. Nor do I regard the link between the LME and the Hong Kong Stock Exchange, and through that body to China and then to THG as anything more than further speculation. Finally, I have re-read the various statements and correspondence of which complaint is made. Mr McClelland rejected any suggestion that the LME had not provided a full explanation of its decision-making processes and also that there was any inconsistency in what had been said. On the former point, it does seem to me that the LME has indeed provided a detailed explanation of its case about its decision making, in particular by the letter of 8 April 2022 and latterly by the Detailed Grounds of Defence in the judicial review proceedings. On the latter point, it suffices for me to say that I have seen no inconsistency which begins to support a case of bad faith.

38. In all the circumstances therefore, I find that the Claimants do not satisfy the arguable wrong condition and that the claim for *Norwich Pharmacal* relief fails accordingly. I will, however, go on to consider the other elements of the test, on the working hypothesis that the arguable wrong condition can be satisfied.

The mixed up in condition

39. Given that the Defendants are the very persons said to be responsible for the Decisions, I proceed on the basis that this element is satisfied.

The possession condition

40. Although described by Saini J as the "*possession condition*", I agree with Mr McClelland that "*possession/necessity condition*" may be more apt. The documents or information in question must be necessary to enable the ultimate wrongdoer to be pursued. This also reflects the second condition as described by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), at [21], that "*there must be the need for an order to enable action to be brought against the ultimate wrongdoer."* In *R (Omar) v Secretary of State for Foreign and Commonwealth*

Affairs [2013] EWCA Civ 118, [2014] QB 112, at [30], Maurice Kay LJ emphasised that the necessity test is a threshold condition. However, the test is to be applied flexibly and there is no substantial difference between a requirement of "*necessity in the interests of justice*" and a test of what is "*just and convenient in the interests of justice*."

41. Even assuming that the Claimants had otherwise satisfied the arguable wrong condition, I would have found that they failed to satisfy this test of necessity. This is for the following reasons:

42. First, it is important to have regard to the overall landscape of the dispute. The intended claims in anticipation of which relief is sought are not the only, or indeed perhaps even the most obvious, claims potentially available to the Claimants. Other investment funds affected or allegedly affected by the Decisions have pursued judicial review and damages claims without the need for *Norwich Pharmacal* relief, and the Court has granted permission for those claims to proceed. It is not clear why the Claimants did not pursue a similar course but, at any rate, there was no suggestion that they were in a materially different position to those parties who did bring the claims.

43. Mr McGrath submitted that the existence of the judicial review proceedings did not undermine the Claimants' position. Because, as he said, the Claimants were not "*obliged*" to bring such proceedings, they cannot be "*criticised*" for not doing so. However, it is not to my mind a matter of either obligation or criticism. It is just a matter of record. In applying the test of necessity, I consider that it is a relevant fact (I do not say it is a decisive fact) that claims could have been brought, and indeed have been brought, without the need for *Norwich Pharmacal* relief, and that the Claimants appear to have put themselves in the position of requiring relief because they are now out of time on those claims. I do not want to push this point too far, not least because the outcome of the judicial review proceedings is unknown, but I do consider that the ostensible availability of alternative causes of action does colour and weaken the case of necessity.

44. Second, and turning specifically to the intended claims themselves, I am not persuaded that the relief sought does satisfy any test of necessity:

    a. It was submitted by Mr McGrath that what the Claimants needed was the "*missing piece of the jigsaw*". That is, of course, the metaphor that is frequently adopted to describe that which can properly be sought on a *Norwich Pharmacal* application: see eg See eg *Mitsui*, at [19], per Lightman J.

    b. I pause to observe that, whatever the flexibility of the test, it is quite difficult to equate the very wide-ranging disclosure and evidence sought in the draft Order with the "*missing piece"* of any conventional jigsaw.

    c. In his second witness statement, Mr Boynton states that the purpose of the application is "*simple*": "*the Applicants have suffered significant losses as a result of the Respondents' actions and need the Court's assistance to obtain documents to identify <u>why</u> and <u>how</u> the wrong was committed"* (emphasis in original). Put in such broad terms, the request is much more redolent of a

general review of the evidence, directed indeed to enabling the Claimants to assess in the light of all materials whether they do in fact have a claim at all, rather than for more discrete information necessary to enable a claim to be advanced.

d. In his skeleton argument, Mr McGrath sought to explain the purpose of the request in the following terms: "*In the present case, there is first-hand evidence from the LME Group that the position of one particularly exposed clearing member was taken into account in reaching the Decisions, and there is circumstantial evidence to suggest that entity was THG/Mr Guangda. What the Applicants seek is narrowly focussed disclosure of the discussions which took place on 8 March 2022 from identifiable sources, in order to join the dots between these two points.*" This is a much narrower explanation than that given by Mr Boynton, which does not sit easily with the breadth of the draft Order. But if the only dots which are being sought to be joined involve the identification of THG/Mr Guangda as the "*exposed clearing member*" then it is not obvious how this piece of information is necessary to enable any claim to be advanced.

45. Third, the context for much of the Claimants' case is that the LME has not given a proper or full explanation of the reasons for the Decisions. However, this is certainly not a case where the LME has given no explanation of its case. As I have indicated, it has sought to explain its conduct in detail in a number of places, including in correspondence from HLI and in the Detailed Grounds of Defence. My sense is that the Claimants' real complaint is that they do not accept that what the LME has said is correct. Hence they would like to see underlying documents and obtain early evidence in order to establish whether the explanations given to date are (or, indeed, are not) incomplete or erroneous, before they decide whether it is worthwhile commencing proceedings. However, I do not consider that it can be said to be necessary, for the purposes of the condition, for the Claimants to be able to test the Defendants' case in this way.

46. Fourth, the test of necessity must be considered through the prism of a jurisdiction which is itself exceptional. It is possible to conceive of many situations in which an intended Claimant would wish to have sight of the intended Defendants' documents, or indeed obtain the intended Defendants' evidence, before deciding whether to commence proceedings. But that is not a remedy which is freely available. In my judgment, there is nothing in this case which makes it exceptional; nor is the relief sought necessary in the interests of justice.

The overall justice condition

47. Whether as a matter of evaluation or discretion, I am equally unsatisfied that the application is an appropriate and proportionate response in all the circumstances of the case. Several of the factors that I have already discussed feed into the analysis under this head, especially as regards the necessity condition. Even if (as per the current hypothesis) there is a good arguable case of wrongdoing, I consider the merits of the case as weak. Conversely, the ambit of the draft Order is very wide. Its width is of especial significance in circumstances in which the relief is sought against intended Defendants and where there is therefore a real risk of procedural unfairness. Further, I

reiterate that I do not consider that the claim for relief satisfies any criteria of exceptionality so as to justify the relief sought.

The application under CPR 31.16

48. This application, which is restricted to a request for documents, attracted barely any attention in the written skeletons and was not supplemented by oral submissions. I intend, therefore, to deal with it equally briefly. I have already referred to the observations of Jacobs J as to the restrictive nature of the jurisdiction in the Commercial Court. It will be apparent from what I have said in the context of the *Norwich Pharmacal* claim that I am not satisfied that the disclosure sought would dispose fairly of the anticipated proceedings, would assist the dispute to be resolved without proceedings or would save costs. Nor do I consider it appropriate as a matter of discretion to make the order sought.

Disposition

49. I dismiss the claim and application.

APPENDIX: THE DRAFT ORDER

IT IS ORDERED THAT:

1. By [time] on [date] each Respondent shall serve on the Applicant's solicitors a list of documents:

    a. specifying whether each of the documents or classes of documents specified in Schedule 1 to this order are presently in the Respondent's control;
    b. If not, specifying which of those documents or classes of documents are no longer in the respondent's control and indicating what has happened to those documents; and
    c. specifying of which of those documents or classes of documents the respondent claims to be entitled to withhold inspection.
2. The Applicants shall make any request for inspection of the documents disclosed by the Respondents in writing within [seven] days after service of the list of documents.
3. The Respondents shall provide the Applicant with copies of the requested documents within [seven] days of receipt of the request.
4. By [time] on [date] the Respondents shall provide the Applicant with an affidavit that addresses the matters set out in Schedule 2 to this order.
5. [The Respondent's reasonable costs, including the Respondent's costs and expenses of complying with this order, be paid by the Applicant unless a claim form be served within 90 days of disclosure, in which case the costs are to be costs in the case.]
6. The Respondents may apply to the court at any time to vary or discharge this order, but if any Respondent wishes to do so, it must first inform the Applicants' solicitors in writing at least 48 hours beforehand.

SCHEDULE 1

The Applicants seek disclosure of the following categories of documents within the Respondents' control relevant to the decision, and the reasons for the decision, by the First Respondent to suspend and cancel all trades executed on or after 00:00 UK time on 8 March 2022 and defer delivery of all physically settled nickel contracts due for delivery on 9 March 2022:

1. Any documents and electronic written communications involving members of the Special Committee, LME Clear Executives and/or any other relevant decision maker within LME Group in respect of the following:

(a) On 7 to 8 March 2022 as to whether to suspend trading and the precise reasons for that decision;

(b) The decision to cancel trading on 8 March 2022 and the precise reasons for that decision including whether any consideration was given to the impact of such a decision on the nickel market as a whole.

2. Any documents and electronic written communications between the Special Committee, LME Clear Executives and/or the LME Group and/or:

(a) Any other relevant decision-maker;

(b) Any third-party market participant or representative thereof including, but not limited to, Mr Guangda and/or Tsingshan Holding Group ("THG") or representative thereof;

(c) Any banks with exposure to, or otherwise involved in, any financing of the margin obligations owed by market participants to LME Clear, including but not limited to, Mr Guangda and/or THG;

(d) Any shareholder of the LME Group,

relating to the Suspension and Cancellation decisions in the period 7 to 8 March 2022

SCHEDULE 2

The Respondents shall provide the Applicant with an affidavit that sets out and explains the following:

1. Details of all oral discussions involving members of the Special Committee, LME Clear Executives and/or any other relevant decision maker within the LME Group in respect of the following, to the extent not included in any transcript or meeting note disclosed under Schedule 1:

(a) as to whether to suspend trading and the precise reasons for that decision in the call at 07:30hrs on 8 March 2022 identified in paragraph 2 below;

(b) as to whether to cancel trading on 8 March 2022 and the precise reasons for that decision in the call at 09:00hrs on 8 March 2022 identified in paragraph 3 below;

(c) any other discussion on the 7 or 8 March 2022 involving any one of the CEO, COO, Chief Regulatory and/or Compliance Officers and Chief Risk Officer of LME and LME Clear with (i) Mr Guangda and/or THG and/or (ii) any market participants with a representative on the board of the LME and/or LME Clear and/or (iii) any authorised representative or broker of either (i) or (ii) relating to the issues of Suspension or Cancellation.

2. The attendees on the call at 07:30hrs on 8 March 2022 included Matt Chamberlain (CEO, LME), James Cressy (COO, LME and LME Clear), Adrian Farnham (CEO, LME Clear), Kirstina Combe (Chief Regulatory and Compliance Officer, LME and LME Clear), Gavin Hill (Chief Compliance Officer, LME Clear), Tom Hine (General Counsel, LME and LME Clear), Chris Jones (Chief Risk Officer, LME and LME Clear), Miriam Heywood (Head of Corporate Communications, LME), Robin Martin (Head of Market Development, LME), Paul Kirkwood (Head of Market Risk, LME), Jamie Turner (Head of Market Structure, LME), David Abrahams (Head of Pre-Trade, LME), Maxine Norris (Head of Regulatory Compliance, LME), James Macdonald (Head of Trading Operations, LME), Richard Wise (Group Chief Risk Officer, HKEX), Tori Cowley (Group Chief Communications Officer, HKEX), Tao Chen (Group Head of Quantitative Risk, HKEX), Jeffrey HW Ng (Head of Media Relations, HKEX) and the Senior Manager of Electronic Trading & Price Discovery LME.

3. The attendees on the call at 09:00 on 8 March 2022 included Matt Chamberlain (CEO, LME), Adrian Farnham (CEO, LME Clear), James Cressy (COO, LME and LME Clear), Tom Hine (General Counsel, LME and LME Clear), Miriam Heywood (Head of Corporate Communications, LME), Kish Chandarana (Head of Legal, LME), Elizabeth Monk (Head of Legal, LMEC), Paul Kirkwood (Head of Market Risk, LME), Jamie Turner (Head of Market Structure, LME), Peter Mason (Head of Market Surveillance, LME), David Abrahams (Head of Pre-Trade, LME), Maxine Norris (Head of Regulatory Compliance, LME), James Macdonald (Head of Trading Operations, LME), Richard Wise (Group Chief Risk Officer, HKEX), Lok Tang (Group Head of Financial Risk Management, HKEX), Tao Chen (Group Head of Quantitative Risk, HKEX), along with the following individuals: Deputy Head of Market Surveillance LME, Deputy Head of Relationship Management LME, Senior Legal Counsel LME and LME Clear, Legal Counsel LME and LME Clear, Manager of Trading Operations LME, Relationship Manager LME, Relationship Manager LME, Relationship Manager LME, Senior Associate Market Surveillance LME, Senior Manager of Electronic Trading & Price Discovery LME, Senior Regulatory Specialist LME, VP of Market Surveillance LME and Partner, Hogan Lovells.