Neutral Citation Number: [2020] EWHC 1849 (Admin)

Case No: CO/288/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2020

Before :

MRS JUSTICE CUTTS DBE

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Between :

JULIO FAERMAN	**Respondent**
- and -	
DIRECTOR OF THE SERIOUS FRAUD OFFICE	**Applicant**

- -
- -

Andrew Sutcliffe QC & Anne Jeavons (instructed by **the Director of the Serious Fraud Office**) for the **Applicant**
Charles Miskin QC (instructed by **Barnfather Solicitors**) for the **Respondent**

Hearing date: 16th June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be listed on 10th July 2020 at 14:00.

Mrs Justice Cutts DBE :

1. This is an application by the respondent to discharge a Disclosure Order made by Supperstone J on 29th January 2019, subsequently amended by Martin Spencer J on 29th March 2019, pursuant to s.357 of the Proceeds of Crime Act 2002 ("POCA"). Supperstone J made a Property Freezing Order pursuant to s.245A of POCA at the same time in relation to property at 8 Tasker Lodge, Thornwood Gardens, London, W8 ("the property"). The original application for discharge of this order was withdrawn. The respondent did so as this order is not onerous, the respondent has no wish to sell and the Serious Fraud Office ("SFO") must very shortly reach a decision about whether to issue proceedings.

2. It is submitted that by reason of the judgment of the Supreme Court in *Serious Organised Crime Agency v Perry [2012] UKSC 35; [2013] 1 A.C. 182* the court had no jurisdiction to make the Disclosure Order as drafted. It is defective because it only names Mr Faerman as a respondent. He is resident outside of the jurisdiction and s.357 of POCA does not authorise the issue of information notices under a Disclosure Order to foreign persons outside the United Kingdom.

3. It is further submitted that the failure to bring the judgment in *Perry* to the attention of Supperstone J constitutes material non-disclosure, as a result of which the Disclosure Order should be dismissed.

Background facts

4. The respondent, Mr Faerman, is a Brazilian national. He has admitted criminality in the form of bribery in Brazil. He is there subject to a co-operation agreement with the prosecuting authorities following his payment to them of US$54m. Prior to that, the Brazilian authorities sought the assistance of the SFO in the recovery and identity of Mr Fearman's assets in the UK. This request was withdrawn following the agreement.

5. In June 2015 the SFO commenced their own civil recovery investigation. That investigation has centred predominantly, although not exclusively, on the property at 8 Tasker Lodge. The SFO claims that the funds used to purchase the property were linked to corrupt funds obtained by Mr Faerman during his work as an agent for a Dutch company to enable it to further its business in Brazil with Petrobras, the Brazilian national oil and gas company.

6. The SFO has been investigating the Swiss bank accounts which, through a series of off-shore companies and other accounts, are believed to have received some of the proceeds of Mr Faerman's criminal activity. The SFO believes that these funds were used then to fund, at least in part, the purchase of the property. The property is estimated to have equity in the region of over £5m.

7. In January 2019 the SFO applied to the High Court for a Property Freezing Order and Disclosure Order. The written application for the disclosure order submitted that the requirements for such orders were met for the following reasons:

    i) It was known that the respondent (the person specified in the application) held property at 8 Tasker Court. There were reasonable grounds therefore for

suspecting that the property was recoverable property. S.358(2)(b) of POCA was therefore satisfied.

ii) The disclosure order was likely to enable the SFO to obtain information that would identify the ultimate source of the funds used to purchase 8 Tasker Lodge and in particular whether they could be traced to the known repositories of the proceeds of Mr Faerman's unlawful conduct. The disclosure order may also have allowed the SFO to ascertain the extent and whereabouts of other recoverable property held by the respondent. There were therefore reasonable grounds for believing that information which may be provided in compliance with the disclosure order (in particular from financial institutions) was likely to be of substantial value to the investigation for the purposes of which the disclosure order was sought. S.358(3) of POCA was therefore satisfied.

iii) It was in the public interest for those who have seemingly been involved in wide scale criminality to be thoroughly investigated and to lose any property which had been acquired by or in return for improper conduct. Approaching any close associates of the respondent asking them to provide information voluntarily at this stage (given the then covert nature of the investigation) was considered likely to prejudice the investigation by risking the destruction of evidence. It would be far more effective and far less prejudicial to the investigation to obtain the information pursuant to a disclosure order. S.358(4) of the Act was thus satisfied.

8. The SFO investigator, Elisabeth Larlham, set out the history of the investigation to date and the reasons for the application in a witness statement dated 21st January 2019. She outlined that production orders had already been granted in relation to the two bank accounts held by the respondent in the UK through which funds used to purchase the property had flowed and also in relation to the respondent's conveyancing solicitors. She gave the following grounds for her belief that material obtained pursuant to a disclosure order would be likely to be of substantial value to the investigation:

i) Having traced the purchase funds for 8 Tasker Lodge back to identified Brazilian and Swiss bank accounts the SFO now needed to obtain information to further trace the origins of those funds and to investigate whether or not they linked back to the proceeds of unlawful conduct.

ii) The disclosure order would allow her to ascertain the extent and whereabouts of recoverable property held by or on behalf of the respondent.

iii) It would allow her to ascertain the ultimate source of the funds used to acquire 8 Tasker Lodge.

iv) It would allow her to ascertain the full extent of any legitimate income obtained by the respondent.

v) It would allow her to ascertain the location of any other accounts or assets of which the SFO was currently unaware.

9. In the statement Ms Larlham said that she envisaged serving notices under a disclosure order on financial institutions and professional advisors, including accountants and solicitors.

10. Mr Sutcliffe QC, on behalf of the SFO, states in his skeleton argument that the SFO sought the assistance of the Disclosure Order "to complete the tracing exercise between the commission payments paid to Mr Faerman via his various connected companies and the funds used to purchase the property."

11. On 29th January 2019, following an oral hearing in private and without notice, Supperstone J made the Property Freezing Order and Disclosure Order as requested. It is common ground that the SFO failed to bring the judgment of the Supreme Court in *Perry* to the attention of the judge during the oral hearing.

12. Subsequently, on or about the 29th March 2019, after a further without notice application, both orders were varied by Martin Spencer J to allow its service on Mr Faerman's English and Brazilian lawyers in circumstances where personal service upon Mr Faerman was possible but considered impractical due to the length of time required to effect service through Mutual Legal Assistance channels.

13. The original order (and as amended) contained a penal notice addressed to "Julio Faerman or any person served with a notice under this order" which set out potential criminal sanctions for failure to comply with any notice served under the order. The original order was served on the respondent's solicitors by letter dated 3rd May 2019.

14. By letter dated 25th July 2019 the SFO served the Disclosure Order and an Information Notice under it to Mr Faerman, care of his English solicitors, requesting the origin of certain funds. The copy of the Order served had the entire penal notice redacted. It was otherwise in the same mandatory terms. The covering letter stated:

> *"Pursuant to the Order, you are obliged to produce the information specified in the Notice by 14th August 2019."*

The Notice contained the same phrase.

15. Initially Mr Faerman's solicitors requested more time to provide the information sought. In a letter dated 25th September 2019 they then pointed out that the SFO were not authorised to issue an information notice to someone outside the jurisdiction. They further maintained that the SFO were not permitted to obtain a disclosure order in such circumstances. They requested the SFO to withdraw the Notice and any others they had issued "in the same fashion".

16. On 5th November 2019 the SFO wrote to the respondent's solicitors saying that they were aware that they could not force compliance with the Information Notice which was why they had removed the penal notice. They said that they were requesting the information on a voluntary basis.

17. Further correspondence followed in which the SFO agreed to withdraw the Information Notice and to write a letter to the respondent in its place asking for the provision of the information sought on a voluntary basis. This is what then happened. The respondent did not provide the information upon request.

The legal framework

18. The Disclosure Order was issued under Part 8 of POCA which deals with "investigations". Part 8 applies to civil recovery proceedings under Part 5. In relation to Part 5 a disclosure order can be made only if property specified in the application for the order is subject to a civil recovery investigation and the order is sought for the purposes of the investigation. There is no dispute in the present case that the property specified in the application is subject to a civil recovery investigation.

19. S.357 of POCA defines a disclosure order as follows:

> *"(4) A disclosure order is an order authorising an appropriate officer to give to any person the appropriate officer considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, all or any of the following-*
>
> *(a) answer questions, either at a time specified in the notice or at once, at a place so specified;*
> *(b) provide information specified in the notice, by a time and in a manner so specified;*
> *(c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.*
>
> *(5) Relevant information is information (whether or not contained in a document) which the appropriate officer concerned considers to be relevant to the investigation."*

20. S.358 sets out the requirements for making a disclosure order:

> *(2) There must be reasonable grounds for suspecting that*
> *(a) …*
>
> *(b) in the case of a civil recovery investigation-*
> *(i) the person specified in the application for the order holds recoverable property or associated property,*
>
> *(ii) that person has, at any time, held property that was recoverable property or associated property at the time, or*
>
> *(iii) the property specified in the application for the order is recoverable or associated property.*
>
> *(3) There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not*

> *by itself) to the investigation for the purposes of which the order is sought.*
>
> *(4) There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained."*

21. S.359(1) provides that a person commits an offence if without reasonable excuse he fails to comply with a requirement imposed upon him under a disclosure order. The offence carries a maximum sentence on summary conviction of imprisonment for six months. Section 359(3) provides for the more serious offence of knowingly or recklessly making a false statement in purported compliance with a requirement imposed under a disclosure order. This carries a maximum sentence of two years imprisonment in respect of a conviction after a trial on indictment.

The judgment of the Supreme Court in Perry

22. It is necessary to set out the brief facts in this case before the Supreme Court. In October 2007 Mr Perry, an Israeli citizen, was convicted in Israel of a number of offences relating to a pension scheme that he had operated in that country. He was sentenced to a term of imprisonment and ordered to pay a substantial fine. In early May 2008 SOCA discovered that Mr Perry and his two daughters (also Israeli citizens) held bank accounts containing significant funds in the UK. In August 2008 SOCA obtained a disclosure order on a paper application without notice. That order named Mr Perry, Mrs Lea Perry (his wife), Miss Yael Perry and Mrs Tamar Greenspoon (his daughters) as respondents together with "any other individual or entity specifically associated to" the named respondents.

23. Notices under that order addressed to Mr Perry and his family, all of whom were at all material times out of the jurisdiction, were communicated to them by a letter to an address Mr Perry maintained in London. The point taken on appeal was that the authority given by a disclosure order to give disclosure notices only applies to notices given to persons within the jurisdiction.

24. At paragraph 90 of the judgment Lord Phillips of Worth Matravers PSC said:

> *"The Order made by [the judge] was addressed to all those named in the application notice, included* ***inappropriately****, a penal notice and conferred authority on SOCA in the general terms of section 357(4)…"* (my emphasis).

25. At paragraph 94 Lord Phillips concluded:

> *"The point is a very short one. No authority is required under English law for a person to request information from another person anywhere in the world. But section 357 authorises orders for requests for*

> *information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. Section 357, read with section 359 does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone, I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction."*

26. At paragraph 98 Lord Philips agreed with the appellant's counsel that the appropriate relief was a declaration that the disclosure order made by the judge did not authorise sending information notices to persons who are outside the jurisdiction.

The parties' submissions

The respondent to the civil recovery proceedings

27. The respondent is a Brazilian resident and at the time of the application for the Disclosure Order was known to be living there. The SFO believed him to be in custody and could not therefore have believed that he would be leaving or be able to leave Brazil at all.

28. The precise ratio of the judgment in *Perry* is that s.357 of POCA confers no authority to issue information notices on people outside the jurisdiction. It is implicit from that judgment that any disclosure order should be tailored to the circumstances of an individual case and should not infringe territorial limits.

29. The Disclosure Order in the present case, which named Mr Faerman as the only respondent, was unauthorised and defective as the SFO could not properly serve an enforceable information notice on him or any other persons overseas. The whole purpose of the Disclosure Order was to seek information about Mr Faerman and his property, particularly overseas. The domestic sources of information had been exhausted with production orders granted in 2015 and 2016. There was no other practical importance to it.

30. At the ex parte hearing on the application for the Disclosure Order Supperstone J was not told of the Supreme Court's decision in *Perry*. This was material non-disclosure. Had the SFO informed the judge that no information notice could be served on Mr Faerman it is highly unlikely that any disclosure order would have been granted. S.358 of POCA sets out the requirements which must be met before a disclosure order is made. Subs.(3) requires there to be "reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought." As no information notice

could be served on Mr Faerman the SFO could not show that any information which may be provided would have been "likely to be of substantial value" to the investigation. The proceedings were tainted by the SFO's failure to disclose the judgment as the court was presented with an inaccurate impression of the strength of their case. The way in which the SFO should have proceeded to obtain the information they wanted in the civil recovery investigation in this case was by way of mutual legal assistance.

31. Further, as is made clear in paragraph 90 of *Perry*, the disclosure order is flawed in that it should not have contained the penal notice. The only named respondent is Mr Faerman. As he was outside the jurisdiction, he was not in peril of committing any offences. This renders the document bad on its face and flawed for want of authority.

32. By July 2019 the SFO must have realised, if they had not before, that they had no authority under the disclosure order to give an information notice to Mr Faerman as he was outside of the jurisdiction. This is apparent from the Disclosure Order, redacted to remove the penal notice at its head, served on his solicitors under cover of the letter dated 25th July 2019 [see paragraph 14 above]. This should never have been sent. Even with the penal notice redacted, it was grossly misleading with its mandatory terms requiring compliance. It was not until November 2019 that the SFO responded to the solicitors' request to withdraw the notice accepting that they could not enforce compliance but were seeking the information on a voluntary basis. Mr Miskin QC, on behalf of the respondent, submits that at least by this point the correct course would have been to return to the High Court for a variation of the Disclosure Order.

33. In conclusion the Disclosure Order as it stands is ultra vires as it was beyond the powers of the court to make the order in the terms granted. It is not suggested that no disclosure order could have been made. It is submitted that one could not have been made in the terms of that granted in the present case. It follows that all information notices issued under it both here and abroad are invalid.

The SFO

34. Mr Sutcliffe QC submits that the respondent has fundamentally misunderstood the ratio in *Perry*. There is nothing in any judgment of the court regarding the making of a disclosure order where the target of the investigation is outside the jurisdiction. The judgment in *Perry* does not make the disclosure order itself invalid in such circumstances. *Perry* is authority for the proposition that a disclosure or information notice issued under a disclosure order may not be served outside of the jurisdiction. The disclosure order in *Perry* itself named Mr Perry and his family as respondents when they were known to be overseas yet it was only the disclosure notices and not the disclosure order that the court set aside by way of remedy.

35. The "authority given under s.357" referred to in the final sentence of paragraph 94 of *Perry* concerns the issue of a disclosure notice. It does not concern the disclosure order itself. In this regard, Mr Sutcliffe relies on Carnwarth LJ's judgment in *Perry* in the Court of Appeal [2010] EWCA Civ. 907; [2011] 1 W.L.R. 542, on a point not reversed in the Supreme Court:

> *"25…a disclosure order made pursuant to section 357 of the Act does not of itself order anyone to disclose anything. Rather it confers authority on an appropriate officer, by notice in writing, to require persons to answer questions, provide information or produce documents, as the case may be. The intention seems to be that, once made, the order can be used by the officer to pursue the investigation without need for further recourse to the court…"*

36. The contention that the SFO abused the disclosure order procedure solely to elicit information from Mr Faerman outside of the jurisdiction is wrong. The fact of prior production orders is irrelevant. Their existence does not indicate that all domestic sources had been exhausted. Since the making of the order the SFO has served and obtained information pursuant to a number of disclosure notices on persons within the jurisdiction, all of which has assisted in the investigation into the provenance of funds used by Mr Faerman to purchase the property. In any event the SFO is entitled to use such of the tools available to it under its investigative powers as it considers appropriate.

37. The conclusions that the respondent seeks to draw from the fact that he is the sole named respondent to the application for a disclosure order are misplaced. S.357(3)(b) of POCA requires the person who is the subject of the investigation to be specified in the application for a disclosure order. Once the order is granted s.357(4) authorises the appropriate officer to serve a disclosure notice on any person he or she considers has the relevant information. That power is not limited to the persons listed as respondents to the disclosure application.

38. Although paragraph 15 of the Practice Direction – Civil Recovery Proceedings ("the Practice Direction") states that an application for a disclosure order should normally name as respondents those persons on whom the appropriate officer intends to serve notices, this is no longer good practice for the following reasons:

    i) Disclosure orders are continuing orders which may exist for a lengthy period of time. Naming the potential recipients of disclosure notices as respondents at the point of obtaining the disclosure order is generally neither possible nor practicable.

    ii) Including proposed recipients of disclosure notices if they are known at the time of the original application is generally considered to imply complicity in the behaviour being investigated, which is both inaccurate and unfair to the recipients of any notice who are often entirely innocent third parties.

    iii) Where initially proposed recipients of disclosure notices are listed as respondents to the disclosure order there is the possibility of such third parties being interfered with by the target upon him or her becoming aware of their identity.

    Accordingly, current general practice is not to include potential recipients of disclosure notices as named respondents to the disclosure order application. Accordingly, the fact that Mr Faerman was the only named respondent to the

disclosure order has no bearing upon and in no way limits the recipients of disclosure notices.

39. The SFO accepts that paragraph 94 of the judgment in *Perry* was relevant to its application concerning the making of the disclosure order. The failure to bring the judgment to the court's attention was an unintentional oversight for which Mr Sutcliffe, who made the application for the Disclosure Order to Supperstone J and who represents the SFO in the present proceedings, apologises. Mr Sutcliffe accepts that had minds been turned to the issue at that point the solution of serving a copy of the disclosure order with the penal notice redacted, so as to meet the concerns expressed in *Perry*, would have been aired in court.

40. However, Mr Sutcliffe submits that such failing does not justify discharging the order. He submits that the omission was unlikely to have had any, or any significant, impact on the court's decision to grant the Disclosure Order. Mr Faerman has not challenged the merits of the SFO's grounds for suspecting that the property represents the proceeds of unlawful conduct. Had the arguments presented by the respondent in the present proceedings been before the court, and were the court to have rejected the SFO's submissions concerning redaction of the penal notice, the result would almost certainly have been (as it was in *Perry*) that the court simply clarified that no disclosure notice could be served on Mr Faerman outside the jurisdiction. It would not have prevented service of disclosure notices upon other persons within the jurisdiction or otherwise undermined the merits of the application for and/or decision to grant the disclosure order itself.

41. The SFO, by failing to disclose the judgment in *Perry*, did not act in bad faith. Mr Faerman has not been prejudiced. The SFO acquiesced immediately to the request that the redacted disclosure notice served be withdrawn. Its replacement with a letter that Mr Faerman voluntarily provide the information sought is on any view proper.

42. There is a clear and compelling public interest in maintaining the Disclosure Order. Mr Faerman does not challenge the merits of the SFO's submissions concerning the legality of the funds used to purchase the property. It is submitted that, given that the disclosure notice was withdrawn in short order and that Mr Faerman has not provided the information sought under it, the real aim of the present application to set aside the Disclosure Order itself is to prevent the SFO from being able to use any of the information obtained from third parties under other disclosure notices served against persons within the jurisdiction and about which there is no complaint.

43. Mr Sutcliffe submits that, as the disclosure notice with the redacted penal notice served on the respondent's solicitors was withdrawn on request, the question of its efficacy is "somewhat moot". Nonetheless he submits that by redacting the penal notice the SFO complied with the decision in *Perry*. This he submits is because the particular concern in *Perry* was the extra-territoriality of the criminal jurisdiction resulting from service outside of the jurisdiction of the disclosure notice containing a penal notice in circumstances where the court considered the connection with the jurisdiction (as to both the recipient and the assets which were the subject of the investigation) to be insufficient. He submits that the fact that this is the particular feature that concerned the Supreme Court is illustrated by reference to two recent cases.

44. The first, *R (KBR) v SFO [2018] EWHC 2368 (Admin); [2019] Q.B. 675* was concerned with a notice under s.2(3) of the Criminal Justice Act 1987 which contained a penal notice. Mr Sutcliffe relies on the consideration of the court in that case that service on a present employee within the jurisdiction was sufficient to avoid the concern of extra-territoriality in relation to the penal notice that had been raised by *Perry*. The second, *R v Jimenez v First Tier Tribunal [2019] EWCA Civ. 51* concerned a notice under paragraph 1 of schedule 36 to the Finance Act 2008. Mr Sutcliffe submits that the court distinguished *Perry* and held that there was no difficulty in serving a notice outside the jurisdiction so long as it did not contain a penal notice.

45. Mr Sutcliffe accepts that paragraph 15 of the Practice Direction requires a disclosure order expressly to contain the penal notice but submits that the requirement of a penal notice is not a statutory requirement. Direction that a disclosure order must contain a penal notice does not therefore mean that a penal notice is required for a disclosure notice to be effective. The absence of a penal notice means that no penal sanctions for non-compliance with the notice would be enforceable. It is his submission that the disclosure notice served with the redacted Disclosure Order was a request for information under s.357 of POCA on a voluntary basis. If he is wrong in that, he submits that the only other interpretation is that it was not a disclosure notice for the purposes of s.357 at all and was therefore either a non-statutory request for the voluntary provision of information or of no consequence at all.

46. In conclusion the SFO submits primarily that the disclosure notice, as served, did not contravene *Perry* because it contained no penal notice and was not served outside of the jurisdiction. If that submission is rejected, Mr Sutcliffe submits that the remedy in accordance with *Perry* would be a declaration that the Disclosure Order did not authorise the disclosure notice to be served on Mr Faerman's solicitors. All that reliance upon *Perry* could have achieved namely, the dismissal of the disclosure notice, has therefore already occurred and the replacement voluntary request for information is in accordance paragraph 94 of the judgment.

Discussion

The validity of the Disclosure Order

47. S.358 of POCA sets out the requirements for making a disclosure order. There is no dispute in the present case that, at the time the SFO made its application for the Disclosure Order, there were reasonable grounds for suspecting that the respondent held recoverable property. S.358(2)(b) was therefore satisfied. Before making the order, however, by subs.(3) the court had to be further satisfied that there were reasonable grounds for believing that the information which may be provided in compliance with a requirement imposed under the order was likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order was sought.

48. In the application for the disclosure order before Supperstone J the SFO identified that they wished to obtain information which would identify the ultimate source of the funds used to purchase 8 Tasker Lodge and whether they could be traced to the known repositories of the proceeds of the respondent's unlawful conduct. They made it clear, however, that this was not the sole purpose of their application. The written

application stated that they wished also to ascertain the extent and whereabouts of other recoverable property held by the respondent. The application further identified in general terms those from whom the SFO would wish to obtain information. These were particularly "financial institutions". There was also mention of approaching "close associates" of the respondent.

49. As identified above, in her witness statement served in support of the application, Ms Larlham set out why the material obtained pursuant to a disclosure order would be likely to be of substantial value to the investigation. This included allowing her to ascertain the location of any other accounts or assets of which the SFO were currently unaware. She envisaged serving notices under a disclosure order on financial institutions and professional advisors, including accountants and solicitors.

50. In my view, on the face of the documentation and representations made to Supperstone J the requirements of s.358 were met and it was appropriate to make the order sought.

51. The respondent submits, however, that Supperstone J was misled into making an invalid order by the failure of the SFO to draw the Supreme Court's judgment in *Perry* to his attention. Mr Miskin does not pursue any suggestion that this was in bad faith but submits that the order would never have been made or would have been made in different terms had the judge been aware of the judgment. It is therefore necessary to consider the import of that judgment and its relevance to the facts of this case.

The judgment in Perry

52. It is plain from the last sentence of paragraph 90 of the judgment that the focus of the appellant's submission in *Perry* was an attack on SOCA's authority to issue notices under the disclosure order to people outside of the jurisdiction. The appellant does not appear to have argued at any time that the disclosure order itself was invalid by reason of either the way that it was drafted or by reason of the issuing of notices under it to those outside of the jurisdiction.

53. The ratio of *Perry* in relation to disclosure notices is, in my judgment, plain from paragraph 94:

> *"Section 357, read with section 359, does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone, I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction."*

I agree with Mr Sutcliffe's reading of the last sentence of this paragraph. The "authority" described must relate to that given under s357(4) to issue an information notice. Thus, the judgment in *Perry* is authority for the proposition that no

information notice can be issued pursuant to a disclosure order to those outside of the jurisdiction.

54. That this is the ratio is confirmed by what is said in paragraph 98 of the judgement. The appropriate relief granted in *Perry* was a declaration that the disclosure order in that case did not authorise sending information notices to persons who were outside of the jurisdiction.

55. Indeed, the respondent does not seek to persuade me otherwise. Mr Miskin began his submissions by saying that the precise ratio of *Perry* is that s.357 of POCA confers no authority to issue information notices on people outside the jurisdiction. He, rightly, does not contend that the reasoning in *Perry* renders a disclosure notice itself invalid solely by reason of the target being outside the jurisdiction.

56. However, he submits that it was implicit within *Perry* that any disclosure order must be tailored to the circumstances and not infringe territorial limits. He argues that the disclosure order in the present case was unauthorised and defective. This is because the true purpose was to obtain information solely from the respondent as the SFO could not properly serve an enforceable information notice on him or any other overseas person.

57. Mr Miskin has, in his submissions, placed considerable reliance on the assertion that the only purpose of the application for the disclosure order was to obtain information from the respondent who was overseas. I accept that such would have been impermissible. Had that been the case I would have no hesitation in accepting that Supperstone J was misled and that the application before him was an abuse of the disclosure order procedure. However, there is in my view no evidential basis for this assertion. Rather it is supposition arising from the fact that the SFO had already sought production orders some years previously in relation to the respondent's bank accounts through which the money used for the purchase of the property flowed and in relation to the conveyancing solicitors used by the respondent to purchase it. I accept the submissions of the SFO in this regard that the existence of the production orders does not indicate that all domestic sources had been exhausted. The application for the disclosure order made clear that organisations and people, other than the respondent, were likely recipients of information notices. Mr Sutcliffe made clear to Supperstone J during the hearing that the SFO were interested in possible funds other than 8 Tasker Lodge as well as those used to purchase it. The order itself was addressed to Mr Faerman "or any person served with a notice under this order". Indeed I am told that since the making of the order the SFO has served and obtained information pursuant to a number of disclosure notices on persons within the jurisdiction, all of which has assisted in the provenance of funds used to purchase the property.

58. I find no support for the respondent's submissions in the fact that the respondent was the only named person in the Disclosure Order. As I have already indicated there were others to whom the SFO envisaged that they would be sending notices under the Order. I recognise that the Practice Direction indicates that an application for a disclosure order should normally name as respondents those persons on whom the appropriate officer intends to serve notices. However, I accept that the absence of such names in the present case does not mean that the only intended person for information notices was Mr Faerman. As was said in *NCA v Simkus and others*

[2016] EWHC 255 (Admin; [2016] 1 W.L.R 3481 at [66], a case in which Edis J conducted a thorough review of an application for disclosure orders, at the stage of applying for a disclosure order it may not be known how many notices would be given under it or to whom. There may be persons identified in a disclosure order application on whom no proceedings are ever served. I accept that current general practice is not to include proposed recipients of notices. S.357(3)(b) of POCA however states that the target of the investigation must be named. Mr Faerman was therefore named in this order.

59. Mr Miskin further submits that the inability of the SFO to serve an information notice on Mr Faerman outside of the jurisdiction had a material effect on their ability to satisfy s.358(3) of the Act. He submits that in reality the SFO wanted information from Mr Faerman. It was only this that was likely to be of substantial value to the investigation for the purposes of which the order was sought. If the judge knew, by reason of the judgment in *Perry*, that Mr Faerman could not be served with any notice under the proposed order he would not have found that the requirements for making an order were satisfied.

60. I accept, as does Mr Sutcliffe, that the judge should have been told about the judgment in *Perry* at the application. It was plainly material that the respondent was outside the jurisdiction (already known to the judge) and that this had an impact on the use of the order sought. I am not, however, persuaded that had he been told of *Perry* it was unlikely that the order would have been made. There were good grounds for the application and, for the reasons I have set out above, others within the jurisdiction who were likely to have relevant information of substantial value.

61. I turn to Mr Miskin's submission that the disclosure order made is flawed in that it should not have contained the penal notice. The only named respondent is Mr Faerman. He was outside of the jurisdiction and therefore not in peril of committing any offences. This of itself renders the document bad on its face and unlawful.

62. It is right that in paragraph 90 of *Perry* Lord Phillips said that the disclosure order in that case, addressed to all those named in it, included "inappropriately", a penal notice. As observed above, the order in that case included the names of Mr Perry and members of his family as well as "any other individual or entity associated with the named respondents". In that regard it is not dissimilar to the Disclosure Order made in the present case. It is clear, however, from the relief granted that this did not render the entire disclosure order invalid. Notwithstanding that the penal notice was inappropriate, the relief granted was a declaration that the disclosure order made did not authorise sending information notices to persons who are outside the jurisdiction. If the effect of the penal notice was to render the disclosure order itself invalid it is in my view inconceivable that the Supreme Court would not have said so.

63. It follows that I am not persuaded that the presence of the penal notice renders the disclosure order itself invalid.

64. In conclusion I am unpersuaded for the reasons above that the Disclosure Order made by Supperstone J and amended by Martin Spencer J is invalid. The judge in my view was entitled to make it. Whilst the judgment of the Supreme Court in *Perry* should have been brought to his attention, I am unpersuaded that such would have resulted in a refusal of the application. The judge may have underlined that no information notice

could or should be served on Mr Faerman whilst he remained outside the UK but the order would still properly have been made.

The serving of the redacted Disclosure Order

65. Mr Miskin is highly critical of the service in July 2019 of an information notice and redacted Disclosure Order on Mr Faerman's solicitors. [See paragraphs 13-16 above]. I consider that criticism justified.

66. The judgment in *Perry* makes absolutely clear that an information notice under cover of a disclosure order made pursuant to s.357 POCA cannot be issued against those outside the jurisdiction. There is no doubt that Mr Faerman was, at the time of the notice, in Brazil and known by the SFO to be so.

67. I do not accept Mr Sutcliffe's submission that by redacting the penal notice on the disclosure order the SFO complied with the decision in *Perry.* There is nothing in the judgment itself which suggests an information notice can be issued against those outside the jurisdiction so long as the penal notice is removed. The judgment makes clear that the power to issue an information notice comes solely and exclusively from the authority provided in s.357. Its very purpose is to be supported by the criminal sanction within s.359(1). As paragraph 94 of the judgment makes clear, an information notice is mandatory. In those circumstances it is difficult to see how an unenforceable information notice could properly be served under a redacted disclosure order.

68. I can see nothing in either of the authorities cited by Mr Sutcliffe which assists him in this regard. Both *KBR* and *Jiminez* dealt with different provisions (complex/serious fraud investigations and tax notices respectively) and the court in each case distinguished *Perry* in robust terms.

69. The court in *KBR* was concerned with information notices issued pursuant to s.2(3) of the Criminal Justice Act 1987. The court found that, unlike s.357 POCA, this section had some extraterritorial application outside the jurisdiction where there was a sufficient connection between the company and the jurisdiction. The court recognised that in *Perry* a "sufficient connection" test was beyond the proper limits of the statutory construction of s.357. As the information notice in *KBR* could properly be issued against someone outside of the jurisdiction it could properly be served on an employee within it.

70. *Jiminez* concerned the issuing of tax notices by HMRC under schedule 36 of the Finance Act 2008 to a UK national living in Dubai. The penalties for non-compliance were civil rather than criminal. The court found that, unlike *Perry* and the regime under s.357-359 of POCA, the effect of the notice was not to impose on a foreign based recipient obligations re-enforced by a criminal sanction if not complied with. It did not therefore offend international law. In his judgment Leggatt LJ did not accept that sending a notice by post to a person in a foreign state requiring him to provide information that is reasonably required for the purpose of checking his tax position in the UK violates the principle of state sovereignty. It was not objectionable that the notice was expressed as a command rather than a mere request for information.

71. The court in each case therefore concluded that, unlike ss.357-359 POCA, the provisions in question did or could have extraterritorial effect. Relevant information notices could therefore be issued in relation to those overseas, within the relevant statutory framework, with the applicable consequences which flow from non-compliance. I can find nothing in either case which provides authority for the use of information notices with a redacted penal notice. The judgment of Leggatt LJ in *Jiminez* cannot assist in this regard. Unlike ss. 357 and 359 of POCA, in that case there was no violation of international law because there was no criminal sanction. The notice could therefore be sent in the form he discussed.

72. It follows that in my judgment the SFO had no power to issue an information notice against Mr Faerman whilst he was in Brazil and none should have been served upon his solicitors. The inclusion of the redacted Disclosure Order cannot remedy the situation. The service of these documents on Mr Faerman's solicitors within the jurisdiction is also no answer to *Perry*. As I have already observed, paragraph 94 of the judgment states that the power to issue an information notice "can only be exercised in respect of persons who are within the jurisdiction". The notice was not being issued in relation to his solicitors. They were not being required to provide the information sought. It was directed to Mr Faerman. He was in Brazil. It should not have been issued.

73. Mr Sutcliffe submits that if the documents sent were incapable of forming an information notice for the purposes of s.357 then they were merely a non- statutory request for the voluntary provision of information. I do not accept that these were intended as such. The covering letter was couched in mandatory terms, telling the respondent that he was obliged to provide the information sought. The documents had the veneer of enforceability whilst having no capacity for enforcement. They risked misunderstanding, confusion, and the purporting of a power that did not exist. Whilst not on the basis of instructions, I consider Mr Sutcliffe's initial explanation of the form of these documents in his oral submissions to be the most likely – that had a request for the voluntary provision of information been made in a letter it would not have had the same force.

74. I can therefore understand the concern of the respondent's solicitors upon receipt of the letter and documents in July. They were right to take objection to it on the basis that no information notice could be issued under the Disclosure Order against Mr Faerman whilst he was in Brazil. It is regrettable that the documents were sent by the SFO. Fortunately, the respondent's solicitors were alive to the issue and challenged the documentation. No information was provided in consequence of it. In those circumstances I cannot see that the respondent has been prejudiced in any way.

75. The SFO upon request withdrew the notice. They replaced it with the letter they should always have sent asking for the voluntary production of information. That they were entitled to do. As *Perry* stated, no authority is required under English law for a person to request information from another person anywhere in the world.

76. For this reason, I agree with Mr Sutcliffe that in many respects the efficacy of the information notice and redacted penal notice is "somewhat moot". I agree that the remedy for the wrongful service of the information notice would have been a declaration that the Disclosure Order did not authorise the information notice to be

served on the respondent's solicitors. All that reliance on *Perry* would have achieved – the dismissal of the disclosure notice - has already therefore occurred.

Material non-disclosure

77. As I have already indicated Mr Sutcliffe concedes that he should have disclosed the Supreme Court judgment in *Perry* to Supperstone J when he made the application for the Disclosure Order. It is accepted by the respondent that this was an oversight and that there is no aspect of bad faith.

78. In oral submissions Mr Miskin made clear that in his application to discharge the Order he relied less on the materiality of the failure to disclose than on his argument that there was no jurisdiction for the judge to have made the order in the first place.

79. There is nonetheless a general duty in civil proceedings on a party applying for a without notice order to make full and frank disclosure of all material facts. As the court in *Brinks Mat v Elcombe [1988] 1 WLR 1350* made clear the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made proper inquiry. If material non-disclosure is established the court should be astute to ensure that the applicant who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived from that breach of duty. It is not however for every omission that the injunction would be automatically discharged. The court has a discretion to continue the order.

80. The Court of Appeal (Civil Division) in *Jennings v Crown Prosecution Service (Practice Note) [2006] 1 WLR 182* looked at the duty in relation to restraint proceedings in a criminal context. At paragraph 64 Longmore LJ said:

> *"The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified."*

81. As Edis J said in *Simkus* in the context of public agencies pursuing the proceeds of crime (whether under criminal or civil procedures) the court is concerned to fulfil the public interest in recovering the proceeds whilst also being alert that its jurisdiction is not used to impose arbitrary or unfair action by the state. The public interest in making restraining orders in appropriate cases is likely to weigh more heavily than the need to enforce high standards in those who make the application. He cited with approval *Director of the Assets Recovery Agency v Keane [2007] EWHC 112* which stated that the court's powers in the event of a failure in the duty to disclose is "designed to serve the interests of justice where no other tool for doing so exists and requires a broad, merits based evaluation of all the circumstances."

82. Applying such an approach in the present case I do not consider that the order should be discharged for the following reasons:

i) For reasons set out above I accept that had the judgment in *Perry* been disclosed the application would nonetheless have been granted. The result would have been a clarification that no information notice could be served on Mr Faerman outside the jurisdiction. It would not have undermined the merits of the application for and decision to grant the order sought.

ii) The SFO did not act in bad faith.

iii) There has been no prejudice to Mr Faerman.

iv) There is a clear and compelling public interest in maintaining the disclosure order. The respondent does not challenge the merits of the SFO's suspicion concerning the legality of the funds used to purchase the property.

Conclusion

83. For the reasons set out above I do not consider the Disclosure Order to be invalid. Although it should now be clear to the SFO, I underline that it does not authorise the issuing of any information notice to those who are outside the jurisdiction.

84. I find there was material non-disclosure to Supperstone J at the time the application was made. For the reasons set out above I do not consider that such warrants discharge of the Order which will remain.

85. The application to discharge the order is accordingly dismissed.

Costs

86. By reason of my findings at paragraphs 65-74 above I make no order for costs.