



Neutral Citation Number: [2018] EWHC 3588 (Ch)

Case No: HC-2016-001872

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2018

**Before :**

**MR JUSTICE ZACAROLI**

**Between :**

- (1) BLUE POWER GROUP SARL
- (2) BLUE WAVE CO SA
- (3) BLUE MGMT LTD

**Claimants**

**- and -**

- (1) ENI NORGE AS
- (2) ENI SPA
- (3) ENIPROGETTI SPA (FORMERLY KNOWN AS TECNOMARE SPA)

**Defendants**

**Andrew Twigger QC and Jonathan Allcock** (instructed by **Stephenson Harwood LLP**) for the **Claimants**

**Helen Davies QC, Fionn Pilbrow and Richard Eschwege** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing date: 4 December 2018

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
MR JUSTICE ZACAROLI

**Mr Justice Zacaroli:**

1. This is an application by the defendants for an order requiring the claimants to disclose “full information” in respect of the source or sources of the defendants’ privileged documents that are or have been in the claimants’ possession or control. The application is made under the jurisdiction named after the decision of the House of Lords in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] ACC 133.
2. By the same application the defendants also sought orders for inspection, delivery up and/or deletion of copies of certain privileged documents. The parties have, however, reached agreement in principle in relation to these aspects of the application.

Background

3. The application is made in existing proceedings in which the claimants claim against the defendants for breach of contract, breach of confidence and breach of database rights.
4. The claimants are associated companies who conducted the business of research, development and engineering of technologies in the energy sector. The Defendants are an Italian oil multinational and two of its subsidiaries.
5. The proceedings arise out of a project relating to the potential transportation of compressed natural gas (“CNG”) from an oil and gas field in the Barents Sea, known as “Goliat”.
6. The first defendant is the operator and majority (65%) licence-holder for Goliat. The minority (35%) licence interest is held by the Norwegian oil company now called Equinor, but formerly known as “Statoil”.
7. In the first half of 2010 the claimants and defendants entered into a series of agreements, including an “Exclusive Framework Agreement” (“EFA”), relating to a potential project for exploiting the gas released at the Goliat field. The claimants have a particular specialism in CNG technologies, and the parties were considering and investigating the use of CNG technology in exploiting the natural gas at the Goliat field.
8. The claimants’ claims fall under three heads:
  - i) A claim for breaches of contractual obligations of exclusivity, relating to the first and second defendant’s engagement of third parties to carry out work at Goliat that the claimants say should have been awarded to them.
  - ii) A claim against the first defendant for breaches of obligations in the EFA to use its best endeavours to obtain Statoil’s consent to the CNG project and/or to promote the CNG option to Statoil, together with breaches of related obligations to keep the claimants informed about various matters.
  - iii) Claims for breach of obligations of confidence and/or database rights.

This application

9. The claimants provided standard disclosure in the action on 17 September 2018. Schedule B to the claimants' list of documents disclosed that they were in possession of a number of documents that were potentially covered by the *defendants'* legal professional privilege. These comprised:
  - i) two documents created by the defendant's solicitors for the purposes of the litigation (the "HSF Documents"); and
  - ii) 108 documents dating back a number of years containing or referring to internal legal advice from the defendant's in-house counsel in connection with the matters that were and/or now currently are in dispute or under negotiation between the parties (the "In-house Documents").
10. Subsequently, two further potentially privileged documents, falling within the category of In-house Documents, were identified.
11. Schedule B to the claimants' list of documents sets out when and how the claimants and their legal advisors first discovered the existence of the potentially privileged documents and the steps taken thereafter. In summary:
  - i) All document harvesting work was undertaken for the claimants by and/or under the supervision of a separate firm of solicitors, Wikborg Rein LLP ("WBR").
  - ii) It was first appreciated that the claimants had possession of potentially privileged documents of the defendants in the first half of 2017, when one such document was reviewed by junior counsel instructed by Stephenson Harwood LLP ("SH"), the claimants' solicitors instructed in relation to the proceedings. Upon discovering the possibility that the document was covered by the defendants' privilege, junior counsel ceased reviewing it and it was passed to WBR. WBR thereafter undertook a search of all harvested documents, for the purpose of isolating any other potentially privileged documents. This led to the discovery of the other In-house Documents (save for the two documents referred to above which were discovered later, upon reviewing various hard-copy documents omitted from the original searches).
  - iii) Importantly, WBR did not undertake any assessment as to whether the relevant documents were in fact, or remained, privileged. That is why the claimants refer to all of these documents as "potentially" privileged. One obvious way in which a document may have ceased to be privileged is if it was provided to the claimants by the defendants in circumstances where it was intended that it would not remain confidential, as against the claimants.
  - iv) The HSF Documents were discovered by an associate at SH, by chance when reading a document for purposes unconnected with disclosure. That document was labelled on its face as privileged, and it is common ground that it is covered by litigation privilege. No-one else from SH or the claimants has reviewed the documents. Following its discovery, WBR were asked to undertake a further search of all harvested documents, by reference to

keywords that would identify the defendants' solicitors. One further such document was discovered.

- v) None of the potentially privileged documents has been further seen or reviewed by SH or the claimants. WBR promised not to undertake any further review of potentially privileged documents of the defendants.
  - vi) All of the potentially privileged documents were copied by WBR into separate sub-folders on a USB stick which was provided to the defendants.
12. Following receipt of that USB stick and the further two documents referred to in paragraph 10 above, and having undertaken their own review, the defendants' solicitors have concluded that 78 of the In-house Documents are either privileged or (where, for example, there is a chain of emails only some of which are privileged) part-privileged.
13. The defendants complain at the conduct of the claimants and their solicitors in having delayed for up to 18 months, from first appreciating that they held potentially privileged documents of the defendants, before revealing that fact. The claimants deny any impropriety. It is not necessary to explore on this application whether the claimants ought to have revealed that they had these documents any earlier than they did. I note, however, that SH, having appreciated that they and/or the claimants held potentially privileged documents of the defendants, properly sought to identify and isolate from review all such documents. Moreover, the potentially privileged documents were disclosed by the claimants voluntarily.

Norwich Pharmacal: the legal test

14. The scope of the *Norwich Pharmacal* jurisdiction was described by the House of Lords in the case which gave the jurisdiction its name as follows ([1974] AC 133, 175, per Lord Reid):

“if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.”

15. There is no issue between the parties as to the conditions which have to be satisfied on an application under the *Norwich Pharmacal* jurisdiction. They were succinctly summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All E.R. 511 at [21] as follows:

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

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

(iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.”

16. It is common ground that, as confirmed by Flaux J in *Ramilos Trading v Buyanovsky* [2016] CLC 896 at [14], it is sufficient for the applicant to demonstrate a “good arguable case” of wrongdoing.
17. Further guidance on these conditions was given by the Supreme Court in *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55, [2012] 1 WLR 3333, at [15] to [16], per Lord Kerr of Tonaghmore JSC, from which the following points emerge:
  - i) It is not necessary that an applicant intends to bring legal proceedings against the wrongdoer; any form of redress (for example the bringing of disciplinary action or dismissal of an employee) will suffice; and
  - ii) The pre-condition of necessity does not require the remedy to be one of last resort, but the need to order disclosure will be found to exist only if it is a “necessary and proportionate response in all the circumstances”.
18. If these threshold conditions are met, then the court has a discretion whether to make an order. Lord Kerr in *Rugby Football Union* (above, at [17]) identified a non-exclusive list of factors, of which the following are of potential relevance in this case:
  - a) The strength of the possible cause of action;
  - b) The strong public interest in allowing an applicant to vindicate his legal rights;
  - c) Whether the making of the order will deter similar wrongdoing in the future;
  - d) Whether the information could be obtained from another source;
  - e) Whether the respondent to the application knew or ought to have known that it was facilitating arguable wrongdoing;
  - f) Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;
  - g) The degree of confidentiality in the information sought;
  - h) The privacy rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed; and
  - i) The rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed.
19. The defendants contend that the conditions necessary for a *Norwich Pharmacal* order are satisfied here, because:
  - i) There is at least a good arguable case that the potentially privileged documents, being confidential to the defendants, came into the claimants’ possession as a result of wrongdoing on the part of someone;
  - ii) The claimants, by receiving the documents, were mixed up in the wrongdoing so as to facilitate it;

- iii) The claimants are able or likely to be able to provide information to enable the ultimate wrongdoer to be sued; and
  - iv) The defendants have carried out their own internal enquiries, but the results are inconclusive, accordingly they need an order that the claimants provide “full information” as to the source or sources of the privileged documents in their possession.
20. Before addressing these points, I deal with the claimants’ contention that there is no jurisdiction to make an order in this case. They advance three arguments in support of this submission: (1) the relief must be sought by way of separate action, not by way of interim relief in existing proceedings; (2) there can be no need for an order here, since there are already proceedings on foot; and (3) an order cannot be made for the purpose of providing evidence for foreign proceedings.

*(1) Separate action required*

21. The claimants contend that there are two types of application for disclosure of the identity of wrongdoers. The first (which typically arises in intellectual property cases) is where a claimant has an existing claim against a defendant (e.g. for infringement of a trademark) but seeks an order as to who else was involved in the wrongdoing (as in, for example, *Sega Enterprises Ltd v Alca Electronics* [1982] FSR 516). In such a case, while relief is normally granted in final form at trial, interim relief may be granted if sufficient need can be made out. The present case is not of this first type. The second type of case is where the only relief sought against the defendant is disclosure and the essential logic is that without disclosure there cannot be an action against the ultimate wrongdoer. The claimants submit that there is no example of this second type of case where relief has been granted on an interlocutory basis within existing proceedings.
22. The defendants, however, point to cases where this has indeed been done. It is sufficient to refer to just one, a decision of Mann J in *Various Claimants v News Group Newspapers Ltd and another (No.2)* [2013] EWHC 2199 (Ch), [2014] Ch 400. This case concerned an application, within existing proceedings, for disclosure of information in the hands of a third party, the police. At [69], Mann J considered the procedural question as to whether an originating process was necessary, and continued:

“69. ...Whether this procedure can be adopted depends on the general case management power identified above: CPR r 3.1(2)(m). What I think it implicitly boils down to is an order which dispenses with the need for the Part 8 applications which would normally be required for a Norwich Pharmacal order and which substitutes a different regime. I do not consider that an originating process is a sine qua non of making an order. Of course it normally will be, because the respondent has to have formal notice of what is proposed, and there has to be some proceeding in which an order can formally be made, and there can be no such proceeding without some originating process. However, in the present case there are some proceedings in which the order can be made. Note 31.18.11 in *Civil Procedure 2013*, p 942 records: ‘A Norwich Pharmacal order may also be made during an existing action.’

70. No authority is given for that proposition, and no procedure is suggested, but it is implicit in that note in its context that if it is made during the course of an action then it could be made by ordinary application rather than by originating process. If that is right (and I think it is) then it removes the need always to have a form of originating process specifically targeted at the Norwich Pharmacal order. Where the respondent waives the need to have some originating process I do not think that the court has to insist on it.”

23. In the present case, to require the claim to be brought by separate originating process would be a triumph of form over substance. This is an unusual case, in that relief is sought by defendants against claimants (and not a third party) in existing proceedings. There is thus already an originating proceeding within which an order can formally be made, and the claimants have had full and proper notice of the application. The fact that the ‘defect’, if there is one, could be cured by the simple expedient of the defendants amending the defence to include a counterclaim demonstrates the technical nature of the objection. Accordingly, I reject the complaint that the claim is bad in law because it was not brought by separate originating process.

*(2) No need, because of the existing proceedings.*

24. The claimants make two points under this heading. The first is that there is no necessity for an order because there will already be a trial, when questions can be asked to elicit the information needed. The short answer to this, however, is that the alleged wrongdoing is not an issue in the existing proceedings, accordingly, no evidence will be led upon that issue, disclosure would not be directed at it, and there is no certainty that the person or persons who have evidence to give in relation to it will be witnesses at trial such that they could be cross-examined. Moreover, if (which the defendants allege) there is sufficient risk of further leaking of privileged information to the claimants, then the damage which the defendants seek to prevent would have already occurred.

25. The second point made by the claimants is that the defendants can avail themselves of the equitable principle (deriving from the decision in *Lord Ashburton v Pape* [1931] 2 Ch 469) that where privileged documents come into the hands of an opposing party, the party claiming the privilege can obtain an injunction to restrain disclosure of the documents, to prevent copies being made of them, to restrain any use of the information contained in the documents and for delivery up of the documents. There are two answers to this submission. The first is that no such claim could be brought here because the claimants, as the recipients of the allegedly privileged information, do not threaten to make any improper use of it and are content to deliver up, or delete, any copies of the relevant privileged materials. Secondly, even if the claimants were threatening to make use of the material, such an injunction would not meet the defendants’ concern: it would not identify the wrongdoer and so would not assist the defendants in seeking to prevent the further leaking of its privileged material.

*(3) No order can be made in aid of foreign proceedings*

26. The defendants accept that, following *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, [2014] QB 112 and *Ramilos Trading* (above), it is established that there is no jurisdiction to make a *Norwich Pharmacal*

order if the information is sought for use in foreign proceedings to which the Evidence (Proceedings in Other Jurisdictions) Act 1975 applies.

27. In *Ramilos Trading*, Flaux J (at [120]) held that it is not possible to bypass the statutory regime simply by asserting that the case was at such an early stage that it could not be said proceedings would be instituted abroad. That was because, if the claimant did not have enough information to institute proceedings abroad, then it could not be in a position to establish a good arguable case of wrongdoing for the purposes of obtaining *Norwich Pharmacal* relief.
28. The claimants rely on a paragraph in the witness statement of Mr Moir, the defendants' solicitor, in which he states that "[i]t is only when the source or sources of the leaks is or are identified that the Defendants will be in a position to identify the exact nature of the wrongdoing and to consider what steps they can or should take against such wrongdoers, including if necessary and appropriate any legal or disciplinary proceedings against the wrongdoer". The claimants point out that any legal proceedings would likely be in Italy, given that is where the second defendant is based.
29. The defendants, however, can justifiably point to purposes for which they need the information which do not involve foreign legal proceedings, and thus to which the 1975 Act would be irrelevant. These include (1) isolating the wrongdoer, once identified, from access to any confidential or privileged information, (2) dismissing the wrongdoer and (3) taking disciplinary proceedings against the wrongdoer. There is no requirement for the purposes of the *Norwich Pharmacal* jurisdiction that the applicant intends to bring an action against the wrongdoer. It is sufficient that the applicant wishes to obtain some redress, or even protect itself against further wrongdoing: see *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, per Lord Woolf CJ at [45]–[46], citing with approval the following passage from the speech of Templeman LJ in *British Steel Corp'n v Granada Television Ltd* [1981] AC 1096:

"In my judgment the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and a plaintiff may obtain an order for discovery provided he shows that he is genuinely seeking lawful redress of a wrong and cannot otherwise obtain redress. In the present case BSC state that they will not finally determine whether to take legal proceedings or whether to dismiss the employee or whether to obtain redress in some other lawful manner until they have considered the identity, status and excuses of the employee. The disclosure of the identity of the disloyal employee will by itself protect BSC and their innocent employees now and for the future and is essential if BSC are to redress the wrong."

30. Accordingly, I reject the claimants' argument that there is no jurisdiction to make a *Norwich Pharmacal* order in this case, merely because one of the possible forms of redress against the ultimate wrongdoer might involve legal action abroad. In practice, such action is unlikely as it would not be necessary in order for the defendants to



achieve their stated goal of preventing further wrongful disclosure of privileged information to the claimants. If the wrongdoer remains employed, then that goal can be achieved by internal, including disciplinary, measures. If not, then the defendants can proceed safe in the knowledge that no further leaks will occur (at least from that source).

31. I now turn to the conditions that need to be satisfied in order to obtain a *Norwich Pharmacal* order.

Good Arguable Case of wrongdoing

32. The claimants accept that there is a good arguable case of wrongdoing in the case of the HSF Documents, but they deny that the defendants have established even a good arguable case of wrongdoing in the case of the In-house Documents.

33. The principal foundation of the defendants' case that there has been wrongdoing is the very fact that the claimants are in possession of 80 of their privileged documents. In addition, they point to the following six matters:

- i) On 14 of the documents, there is an express statement that they are confidential and privileged. A redacted copy of one such privileged document has been exhibited to Mr Moir's witness statement.
- ii) In all but one case, the documents do not reveal how the claimants obtained them. In the case of emails, for example, there is no email in the chain which crosses the line from the defendants to the claimants.
- iii) The one exception is where confidential internal legal advice, circulated by email internally within the defendants, was emailed by a Mr Trilli (of the defendants) to a Mr Nettis (of the claimants). Other documents disclosed by the claimants reveal, however, that Mr Nettis – before sending the email on to someone else within his organisation for printing – deleted the names of some of the recipients internal to the defendants, including that of an in-house lawyer, and deleted the emails sending the chain on to him. The defendants contend that this is suspicious behaviour consistent with Mr Nettis having appreciated the fact that it was wrong for the email to have been sent to him.
- iv) In some cases, emails have been copied and pasted into word documents. Originally, the defendants thought that these documents were created after the claimants had ceased to trade, in 2016, but later analysis of the metadata establishes that the word documents were created in 2010 and 2011.
- v) Some of the privileged documents consist of PDFs. The defendants have exhibited a redacted copy of one such PDF in order to demonstrate that it was created in 2017, i.e. after the claimants ceased to trade. The significance of this is that the claimants' explanation (see further below at [34]-[36]) that there was a regular exchange of confidential information between the parties while they were in negotiations in connection with the Goliat project is not an answer in relation to documents created after the claimants ceased to trade in 2016.

- vi) In the case of one document – not itself a privileged document – it was faxed to the defendants in 2014 from a fax number which has been traced to an internet café a short walk from the defendants’ London offices.
34. The claimants’ response to the defendants’ principal case is that it was common practice for the claimants and defendants to share confidential information with each other in the course of their relationship concerning the Goliat field, so that there is nothing inherently suspicious in the fact that the claimants are in possession of the defendants’ confidential information.
35. Mr Morris, of SH, stated in his witness statement that:
- “the documents which the Defendants contend to be privileged were just a few of the many ‘ENI documents’ in the Claimants’ possession, following a close relationship between the parties over several years, during which a large amount of what would otherwise have been ‘internal’ documentation was shared by the Claimants with the Defendants, and by the Defendants with the Claimants...
- ...[t]hese exchanges involved passing USB sticks, hard copy documents and sending emails. As regards USB sticks, I am told by Mr Nettis that their use to pass documents between representatives of the Claimants and the Defendants was regular and widespread throughout the parties’ relationship and, in addition, that this was normal practice for the Defendants. Mr Nettis also informs me that USB sticks were often exchanged after meetings or dinners and would sometimes originate with one party, with documents on them, be provided to the other party, and then be returned containing additional documents. It is not now possible for the Claimants to be sure when, or by whom, particular USB sticks were provided and, for that reason, the Claimants have accepted that they cannot challenge (at least for the time being) a claim to privilege in respect of In-house Lawyer Documents on USB sticks...
- ...Mr Nettis has told me that he understood at the time that this was all part of the way in which the Defendants sought to negotiate with the Claimants. Mr Trilli would tell Mr Nettis that he could not concede a particular point because others within the Defendants’ organisation were against it, and Mr Trilli would then provide a document to demonstrate this, in the expectation that Mr Nettis would then back down on the point in question.”
36. So far as emails are concerned, the claimants have exhibited emails (in addition to the one attaching potentially privileged material referred to at para 33(iii) above) from Mr Trilli to Mr Nettis forwarding what would otherwise have been ‘internal’ documents of the defendants. In one case, although there is no evidence as to how the email chain was copied to the claimants, it was clearly done so within minutes of it being produced internally within the defendants, as can be seen from the timing on the respective emails within the claimants and defendants.
37. The defendants have adduced no evidence to contradict what is said in Mr Morris’ witness statement. In Mr Moir’s first statement, he explained the steps taken by the defendants to try to identify the source(s) of the In-house Documents but said “...they have not been able to identify with confidence the source or sources.” In his second

statement, having referred back to the steps taken as identified in his first statement, Mr Moir said:

“the Defendants can confirm that, in view of what has come to light since the Claimants’ disclosure, the Defendants’ human resources team intends to carry out a specific investigation into these issues, including a review as necessary of Mr Trilli’s emails. However, I am instructed that this process has to be carried out in accordance with Italian employment law and the Defendants’ internal procedures. This process cannot be short-cut and any discussions with Mr Trilli have to, and will, take place in the context of that process.”

38. He went on to point out that, in light of the fact that Mr Trilli was only involved in negotiations with the claimants for a part of the period covered by the dates of the In-house Documents, “Mr Trilli is not and cannot be a complete answer to the Defendants’ concerns.” According to Mr Moir, there are 47 employees or former employees identified as senders or recipients of one or more of the In-house Documents. The culprit could be any one of those, or even someone else altogether.
39. The defendants point to the fact that the claimants’ evidence does not expressly state that the defendants’ legal advice was routinely shared with the claimants, as part of the regular exchange of information at meetings. They also contend that receipt of documents containing such advice would be memorable, particularly where such documents stated that they contained information that was confidential and legally privileged.
40. The logical consequence of the claimants’ acceptance that the In-house Documents are potentially privileged is that it is at least arguable that the supply of the documents to the claimants was not authorised by the defendants. If it was authorised, then privilege – as against the claimants – would have been lost. Accordingly, it follows that it is at least arguable that there was wrongdoing of some kind in the supply of the documents to the claimants. That argument suffers, however, from a number of weaknesses, as described in the following paragraphs.
41. First, while the circumstance that the claimants found themselves in possession of the In-house Documents clearly requires an explanation (to avoid an inference of wrongdoing) the fact is that the explanation given by the claimants, that the disclosure of internal confidential information was commonplace, provides a compelling answer in the absence of anything to contradict it.
42. It is true that the claimants’ explanation is expressed at a high level of generality, but that is a consequence of the fact that the claimants have not had sight of those (or those parts) of the In-house Documents over which the defendants claim privilege, save for the heavily redacted versions of a few of them exhibited to Mr Moir’s witness statements.
43. Second, as the claimants contend (and this is not disputed by the defendants for the purposes of this application), there is no concept in Italian law precisely equivalent to legal professional privilege in the English law sense, and such professional duties of confidentiality as exist between lawyers and clients under Italian law do not, at least generally, apply to in-house lawyers. The defendants are forced to rely, therefore, on the ground that the information was confidential (the wrongdoing consisting of breach

- of confidence in passing the information to the claimants). The fact, however, that the claimants' receipt of the In-house Documents occurred against the background that Italian law did not recognise privilege in the information, lends credibility to the argument that their receipt would not have stood out as remarkable or suspicious.
44. So far as the specific points relied on by the defendants are concerned (see [33]) above, the first and second points do not add materially to the general proposition that the fact of the information being in the claimants' possession itself demonstrates an arguable case of wrongdoing.
  45. The force of the defendants' third point (concerning the email communication between Mr Trilli and Mr Nettis) is that Mr Nettis' behaviour in deleting certain of the recipients of the internal email of the defendants indicates awareness on his part of wrongdoing. If Mr Nettis perceived there was wrongdoing, then that provides some support for the argument that there was indeed wrongdoing. The problem with this submission, however, is that the defendants know beyond doubt who it was who provided the confidential document to the claimants: it was Mr Trilli, whose email to Mr Nettis was the means by which the information crossed the line between the claimants and the defendants. The *Norwich Pharmacal* jurisdiction is relied on by the defendants in order to compel disclosure of the identity of the person who wrongfully communicated confidential information to the claimants. It is clearly unnecessary in the case of this document. No information is needed from the claimants to establish what the defendants already know.
  46. The defendants also maintain that Mr Trilli cannot have been the person who provided most of the In-house Documents to the claimants, as he was only in a position to do so for a small period. At most, he can have been responsible for only a handful of the documents. This, however, misses the point that Mr Trilli, as the source of at least one of the alleged 'leaks', clearly has relevant evidence to give. If his evidence is that there was no wrongdoing in the case of the one document that he is known to have supplied, then that would seriously undermine the defendants' case that the mere fact the claimants are in possession of the defendants' confidential documents is evidence of wrongdoing. The strength of the defendants' case is considerably weakened by the failure to adduce evidence from the one person known to have transmitted at least one of the documents in question, notwithstanding that the failure to produce the evidence (yet) can be explained by the procedural hurdles of Italian employment law.
  47. In relation to the defendants' fourth point (the pasting of emails into word documents), the proposition that this is inherently suspicious behaviour is difficult to assess without sight of the content and context of the relevant documents. I do not accept that, put at a high level of generality, the mere fact of copying and pasting emails into a word document is sufficient evidence of suspicious behaviour to counterbalance the unanswered evidence from the claimants that the exchange of internal documents was commonplace.
  48. The defendants' fifth point relates to the creation of PDF documents. If it is correct that these documents were created after the claimants ceased trading, then the fact that there was a regular exchange of internal information during the period that the defendants and claimants were engaged together on the Goliat project would not provide an explanation in relation to them. The defendants rely on the metadata in the

document, which establishes that it was created in November 2017, long after these proceedings were commenced, and long after the claimants ceased trading.

49. At the hearing of the application, the claimants' counsel suggested that the explanation for this may well have been because the document was scanned by WBR in the course of collating documents for disclosure. In answer to the defendants' counsel's observation that the document had to have been scanned by someone on the defendants' side, because no hard copy version had been disclosed by the claimants, he explained that where WBR had found hard copy potentially privileged documents, they had scanned the document and then disclosed the scanned version (via the USB stick on which all such documents were contained) but had not disclosed, in addition, the hard copy version.
50. Subsequent to the hearing, I received a letter from SH which contained the following further details provided by WBR:
  - i) The file name shown on the document (WBR000000025) is a document reference automatically allocated to documents scanned on WBR's scanners;
  - ii) The scanner identified by the meta-data is the make and model used by WBR; and
  - iii) According to WBR's records, they were scanning documents on the 14 November 2017 (the date upon which the PDF was created) for the purpose of providing documents to the claimants' e-disclosure providers.
51. In addition, SH confirmed that hardcopy privileged documents were disclosed in scanned PDF format only.
52. I have also received a letter in response from HSF. While they are unable to take issue with points (ii) and (iii) in the SH letter, since those are within WBR's knowledge, they do take issue with point (i), stating that the references given to the documents on the USB stick provided by WBR were allocated by HSF as "WBR00000001" "WBR00000002". The original document name, however, was "A.zip\_0779\_001.pdf".
53. On the basis of this exchange of correspondence, and without assistance from an expert in analysing PDF meta-data, it is difficult to reach firm conclusions as to the origin of the document (or any of the other PDFs), save that it is inherently more likely that the explanation for the date (14 November 2017) of creation of the PDF is that it was on that date that WBR scanned the document for the purposes of e-disclosure.
54. The final point made by the defendants is that in one case an email chain was faxed from an internet café a short walk from the defendants' premises. This is said to be inherently suspicious behaviour. The defendants do not assert that this document was in fact privileged. The document was faxed in January 2014. It is very difficult to draw any conclusions from the fact that one (and only one) document was faxed in this way.

55. For the above reasons, while the logical consequence of the claimants' acceptance that the In-house Documents are potentially privileged is that their supply to the claimants potentially involved wrongdoing on the part of someone, that case, on the basis of the evidence before me, is very weak.

Need for an order

56. The claimants contend that there is no need for disclosure (in addition to the point that an action is already on foot in which disclosure can be given and witnesses called, which I have dealt with above) because there is no sufficient risk of any future leak of privileged legal advice.
57. This, however, misses the point. The "need" for an order refers only to the question whether the information is necessary in order for the Defendants to take action against the wrongdoer (see, for example, the formulation of the condition in *Ramilos Trading*, above, at [11]: "there must be a need for an order *to enable action to be brought against the ultimate wrongdoer*"). It does not require an investigation into whether it is necessary for the defendants to take such action, although that question is relevant to the exercise of discretion, which I deal with below.
58. The more pertinent question is whether an order is needed in circumstances where (1) the wrongdoer, if there was one, is someone who was (and may still be) within the defendants' own organisation and (2) the defendants have not completed internal enquiries.
59. It is impossible to reach a conclusion, on the facts of this case, in respect of this condition in isolation. Applying the test as formulated by Lord Kerr in the *Rugby Football Union* case (above), in determining whether an order is a "necessary and proportionate response in all the circumstances", it is necessary to balance, on the one hand, the defendants' ability to discover the identity of the wrongdoer(s) for themselves and, on the other hand, the claimants' ability to do it for them. It is also necessary to have regard to the extent of the burden which (on the basis of the particular order sought) would be imposed on the claimants. I deal with these points under the next two headings.

Facilitation of the wrongdoing, and ability to provide information

60. The third pre-condition for an order is that the claimants must be (1) mixed up in so as to have facilitated the wrongdoing, and (2) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.
61. The claimants accept that, assuming the other pre-conditions are established against them, they were, albeit innocently, sufficiently mixed up in the wrongdoing (because they received the documents) so as to have facilitated it. They deny, however, that they are able to provide information necessary to enable the ultimate wrongdoer to be pursued by the defendants.
62. If the evidence had demonstrated clearly that one, or perhaps a handful, of employees of the defendants had engaged in the clandestine leaking of confidential information to the claimants, then there would be force in the argument that the claimants – who

received that information – must be able to say who it was that gave it to them. Such behaviour would have been intrinsically memorable.

63. That is not this case, however. Instead, the unanswered evidence of the claimants is that the exchange of internal information was commonplace. Even assuming that this involved wrongful conduct on the part of one or more of the defendants' employees, it is difficult to see why it would have been memorable, or why it would be materially easier for the claimants to track down the wrongdoer(s) than it would be for the defendants.
64. So far as the HSF Documents are concerned, there is no direct evidence as to the circumstances in which they found their way to the claimants. The defendants are reluctant to reveal any details of the documents for fear of waiving privilege. The claimants suspect, from such information as has been revealed about them, that they were the kind of standard letter sent to custodians of documents or potential witnesses at the start of litigation, requiring them to preserve relevant documents. If so, any one of the recipients might have passed it to a representative of the claimants.
65. Mr Morris states that Mr Nettis does not recall ever having read any documents created by HSF or even knowing that they were in the claimants' possession. He certainly does not know how they came into the claimants' possession. In response to Mr Moir's complaint that the claimants appeared not to have spoken to four other individuals who assisted with the document harvest tasks, Mr Morris states that, between them, he and a senior associate have made enquiries of those people, and none of them has any recollection of seeing either of the two HSF Documents, and do not know who may have provided them to the claimants.
66. The defendants contend that the claimants have made enquiries only of those persons specifically identified by Mr Moir. Mr Morris, however, says that SH have asked "the key individuals responsible for giving instructions and assisting with document harvesting on behalf of the claimants in relation to these proceedings." If the HSF Documents had been provided to the claimants with the deliberate intention of leaking confidential information to provide the claimants with an advantage in the proceedings, then that would have made sense only if the leak was to the personnel within the claimants who actually have influence in relation to the proceedings. Accordingly, those are the key individuals to ask.
67. There is no evidence that the HSF Documents contained any confidential legal advice, and no evidence of any link between the supply of the HSF Documents and the supply of the In-house Documents. On the contrary, such evidence as there is suggests that the supply of the HSF Documents was an isolated incident, occurring some time later and under different circumstances from those prevailing when the In-house Documents were provided to the claimants.
68. Once the general proposition – that the receipt of the potentially privileged documents would have been intrinsically memorable – is discarded, then the ability of the claimants to provide relevant information is seriously hampered by the fact that they have not seen the relevant documents. Without seeing their content and the parties to the email chain, where relevant, it is impossible for the claimants to know who, within the defendants' organisation or otherwise, provided the documents to them.

69. As with the second condition, on the facts of this case it is difficult to provide an answer to the third condition in isolation. Although, in one sense, the claimants, as the recipients of the documents, must at one time have been able to identify who provided the documents to them, on the basis of the evidence adduced on this application it is far from clear that they are able to do so now. Moreover, so far as the order actually sought by the defendants is concerned, the claimants are likely to be no better placed than the defendants to identify, and provide “full information” in respect of, the wrongdoer(s), if he, she or they exist(s). I will address the extent to which the claimants might be able to provide some lesser form of assistance when considering the exercise of discretion.

### Discretion

70. The defendants seek an order in the following terms:

“[An officer of the Claimants / an individual on behalf of the Claimants] shall by [\*\*] 2018 swear and serve on the Defendants’ solicitors an affidavit giving full information in respect of the following matters, so far as is within the Claimants’ knowledge or is reasonably ascertainable:

- (a) The identity of the source and/or sources from whom the Claimants obtained possession of, and/or who otherwise provided the Claimants with access to, the Privileged Documents;
- (b) Save for the identity of the source and/or sources in paragraph 1(a) above, the identity of any other person and/or persons (including, but not limited to, any present or former employees of the Defendants, and/or any present or former employee and/or representative of the Claimants) who was involved in the provision to the Claimants of, and/or in giving the Claimants access to, the Privileged Documents;
- (c) The dates when, and circumstances in which, the Privileged Documents were provided to the Claimants.”

71. The proposed order is extremely broad. It would in practice require the claimants not only to make enquiries of all their current and former employees, but also to review much of their documentation going back to 2010 for the purposes of ascertaining whether it sheds light on who supplied the In-house Documents. To the extent that the documents are relevant to the issues in the existing litigation, then they will already have been disclosed (unless privileged), but it is possible that some such documents would be irrelevant to the issues in the proceedings, and therefore not identified for disclosure upon prior review.

72. Having regard to all the circumstances, I have concluded that it would not be appropriate to make such an order. The principal factors that have led me to that conclusion are as follows (most of which I have developed above in dealing with the conditions for making an order):

- i) The weakness of the case that there was any wrongdoing in the first place.



- ii) It is far from clear that the defendants cannot obtain the information from within their own organisation, particularly where they have not yet interviewed the one person (Mr Trilli) who it is known passed at least one confidential document to the claimants.
  - iii) As against that, the claimants are in no better position than the defendants to identify and provide full information in respect of the alleged wrongdoers.
  - iv) The identification by the claimants of those who supplied In-house Documents to them, if done before the defendants have completed their own internal enquiry, might risk exposing innocent people to disciplinary action.
  - v) As a result of (ii) and (iii) above, even if the defendants have technically established a “need” for an order so as to identify the wrongdoer(s), it is on an “only just” basis.
  - vi) The primary purpose of this application, as acknowledged by the defendants, is to prevent further disclosure to the claimants of the defendants’ privileged legal advice. The evidence demonstrates, however, that there is minimal if any risk of that happening. It is accepted that most of the In-house Documents were obtained by the claimants during the course of their involvement with the Goliat project. The evidence that any of the In-house Documents have been passed to the claimants since the cessation of their trading and the commencement of these proceedings is very thin. While the two HSF Documents, undoubtedly subject to litigation privilege, must have been passed to the claimants since the commencement of these proceedings, such evidence as there is suggests that these do not contain legal advice. More importantly, despite a further search conducted by WBR of all harvested documents (which extends beyond the date range of original searches, to include the period after the commencement of this litigation), no other such documents have been located.
  - vii) The order sought would place a burden on the claimants out of proportion to the strength of the claim that wrongdoing existed, the likely ability of the claimants to provide helpful information, and the risk of further disclosure of privileged information to them.
73. In reaching this conclusion, I have taken into account the fact that the request relates to confidential information which the claimants accept is privileged in the English law sense (the parties being in agreement that it is the English law of privilege that applies in the context of disclosure in this litigation, whatever may be the position under Italian law). Where one party to litigation discovers that it holds documents of the other that it is willing to assume are the subject of legal professional privilege, then the court will generally expect reasonable co-operation from that party. That co-operation would normally include ensuring that it has identified and delivered up (and/or deleted copies of) all such documents. That is likely to involve at least some explanation – to the extent it is aware – of how it acquired them, in order to justify its conclusion that it has identified and delivered up all such documents. This is relevant to the question whether the burden of responding to a *Norwich Pharnacal* would be reasonable in all the circumstances.

74. In this case, the claimants have explained the circumstances in which they found the potentially privileged documents and the searches they have undertaken. They have also provided a reasonable explanation as to how they came to acquire the In-house Documents. That explanation has been given at a high level of generality, but (as I have noted above) that is necessarily so in light of the fact that the claimants cannot see the documents themselves.
75. While they have not been able to offer an explanation for how they came to have the HSF Documents, the claimants have made inquiries of those principally involved with the litigation and document harvesting, and none of them know how the documents were provided to the claimants.
76. Accordingly, I do not regard the fact that the context of this *Norwich Pharmacal* application is the alleged leaking of documents that are, as a matter of English law, potentially privileged, outweighs the factors I have identified at [72] above.
77. I have also considered whether some lesser form of order is appropriate, which would impose a smaller burden on the claimants but might assist the defendants in their own ongoing investigations as to the source of the potential leak.
78. The claimants have already agreed to provide inspection of “family” documents relating to the In-house Documents (by which term, I understand them to mean documents such as attachments to an email where the email, but not the attachment, has been provided). They have also agreed to identify for the defendants where such family documents have already been disclosed. Further, the claimants have agreed to provide inspection of the USB stick on which the HSF Documents were located. These are matters which more likely fall within the remit of ongoing disclosure obligations in the action, as opposed to a *Norwich Pharmacal* order. They may, nevertheless, provide some assistance to the defendants in their investigations of potential wrongdoing.
79. The defendants contend that the claimants could do still more. They point out that the claimants’ evidence refers only to limited enquiries having been made: in particular, the people identified by Mr Morris as having been approached were only asked about the HSF Documents. Given the matters I have referred to above as relevant to the exercise of discretion, however, and given that further enquiries would involve both current and former employees (given the claimants ceased trading in 2016) going back some eight years, I exercise my discretion against making a *Norwich Pharmacal* order requiring the claimants to make such enquiries.
80. Beyond this, such further assistance as the claimants might be able to provide depends on the extent to which further details about the In-house Documents can be revealed to them. At present, the claimants are hampered from learning anything about the In-house Documents by reason of the existing undertakings given by SH and WBR.
81. The defendants contend that they have made it clear to the claimants that they are willing to allow WBR to take further steps (as set out in Mr Moir’s first witness statement) “reasonably necessary to enable the Claimants to comply with the order sought” or to “respond fully to the order sought”.

82. The claimants object that this suggestion relates to *complying with an order*, and has not enabled them to take any further steps in order to respond to the *application*. That is the reason, they say, why there has so far been no exploration of mechanisms by which WBR might be able to assist the claimants in this process. As I understand this objection, the claimants are not saying that they refuse point blank to provide any further assistance, even with WBR's help. It is rather that they have been unable to do so, to date, because the defendants appeared willing to relax the undertakings given by SH and WBR only in order to comply with an order granted.
83. The defendants contend that there is information that WBR could reveal to SH and the claimants without trespassing on privileged matters. For example, WBR could describe the USB stick on which the HSF Documents, and perhaps others, were originally found, to see if that jogs any memories as to when or where the documents were received.
84. In this respect, I consider that it would be premature to make any order under the *Norwich Pharmacal* jurisdiction requiring specific assistance to be given. It is unfortunate that steps were not taken earlier to resolve what appears to be a misunderstanding as to the defendants' intentions in suggesting relaxing the undertakings given by WBR (i.e. as to whether that was only to enable *compliance* with an order). The misunderstanding now having been resolved, however, it is to be hoped that the co-operation normally expected of parties to litigation (as I have indicated above) can be deployed if and to the extent that there is more that can be done with WBR's assistance.
85. Having regard, however, to (1) the factors relevant to the exercise of discretion (as set out above at [72]-[73]), (2) the lack of sufficient precision as to what further steps the defendants might ask the claimants and WBR to carry out and (3) the fact that – by definition, since they have not yet been asked – the claimants have not indicated a blanket refusal to carry out such steps, I do not consider it right at this stage to make an order under the *Norwich Pharmacal* jurisdiction to compel further co-operation.
86. Accordingly, I dismiss this application.